



REPUBLIC OF KENYA



**Njogu & 5 others v Sino Hydro Corporation Ltd & another (Land Case 92 of 2023) [2024] KEELC 6536 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6536 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
LAND CASE 92 OF 2023  
YM ANGIMA, J  
OCTOBER 3, 2024**

**BETWEEN**

**DAVID GACHOKI NJOGU ..... 1<sup>ST</sup> PLAINTIFF  
MARGARET WAIRIMU RUGIRI (SUIING AS THE LEGAL REPRESENTATIVE  
OF ZAKARIA RUGIRI JOSHUA) ..... 2<sup>ND</sup> PLAINTIFF  
WASHINGTON GATHUA MUGUNDIA ..... 3<sup>RD</sup> PLAINTIFF  
MWANGI MUGUNDIA ..... 4<sup>TH</sup> PLAINTIFF  
ALICE WANGUI WANJIRU ..... 5<sup>TH</sup> PLAINTIFF  
DAVID MWANGI GICHAGA ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**SINO HYDRO CORPORATION LTD ..... 1<sup>ST</sup> DEFENDANT  
CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT  
AGENCY ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. Plaintiffs' Claim**

1. By a plaint dated 01.02.2021, amended on 26.03.2023 and further amended on 08.02.2022 the 1<sup>st</sup> to the 6<sup>th</sup> Plaintiffs sued the Defendants seeking the following reliefs:
  - a. A declaration that they are entitled as against the Defendants to exclusive use and possession of L.R. Nyandarua/Ol'Kalou Central/3403, 454, 6472, 5496, 5495, 5648 and 3321.
  - b. A permanent injunction be issued restraining the Defendants by themselves/and their servants, officers, employees, agents and/or person acting through or under them from in



any manner interfering with the Plaintiffs' exclusive use and possession of L.R. Nyandarua/Ol'Kalou Central/3403, 454, 6472, 5496, 5495, 5648 and 3321.

- c. Exemplary and/or general damages for trespass.
  - d. The costs of the suit plus interest at court rates.
  - e. Any other relief that the court may deem fit and just to grant.
2. The Plaintiffs pleaded that they were the legitimate owners of Title Nos. Nyandarua/Ol'Kalou Central 3403, 6472, 5495 5496, 5648 and 3321 and 454 and as such they were entitled to exclusive use and enjoyment of all the proprietary rights arising from such ownership. It was pleaded that sometime in January, 2021 the 1<sup>st</sup> Defendant acting on the instructions of the 2<sup>nd</sup> Defendant commenced construction of a sewer line through their said properties (the suit properties) without their consent and without undertaking any process of legal acquisition of the suit properties.
  3. The Plaintiffs pleaded that the Defendants said conduct of constructing a public sewer line on private property was without lawful justification and excuse since is amounted to unlawful interference with their proprietary rights over the suit properties. It was the Plaintiffs' case that despite issuance of a demand and notice of intention to sue, the Defendants had failed to make good their claim hence the suit.

#### **B. 1st Defendant's Response**

4. The 1<sup>st</sup> Defendant filed a statement of defence dated 03.02.2021 denying liability for the Plaintiffs' claim. It denied that the Plaintiffs were the owners of the suit properties and put them to strict proof thereof. It pleaded that the Ol'Kalou town sewerage system was being constructed on riparian reserve and not on the Plaintiffs' land. It was contended that it was the Plaintiffs who had encroached on the riparian reserve.
5. It was the 1<sup>st</sup> Defendant's further defence that it undertook construction of the sewerage system as an agent of the 2<sup>nd</sup> Defendant which was the principal. It was pleaded that prior to commencement of works, the 2<sup>nd</sup> Defendant had consulted all stakeholders to be affected by the project and that the Plaintiffs had personally participated in the consultative process.
6. The 1<sup>st</sup> Defendant also pleaded that it had been wrongly sued since it was merely acting as an agent of a disclosed principal hence it could not be personally held liable in such capacity. It denied that any demand or notice of intention to sue was issued. As a result, it prayed for dismissal of the Plaintiffs' suit with costs.

#### **C. 2nd Defendant's Response**

7. The 2<sup>nd</sup> Defendant filed a statement of defence dated 05.05.2021 and amended on 10.03.2022. It denied liability for the Plaintiffs' claim in toto. Like the 1<sup>st</sup> Defendant, it pleaded that the sewer line was being constructed on a riparian reserve and not on the Plaintiffs' properties. It was contended that it was the Plaintiffs who had encroached upon the riparian reserve.
8. It was pleaded that the sewerage system was laid strictly on the riparian reserve as identified and confirmed by the Water Resources Authority (WRA) hence the Plaintiffs' claim was untenable and illegitimate. The 2<sup>nd</sup> Defendant denied that a demand and notice of intention to sue was issued and put the Plaintiffs to strict proof thereof. As a result, the 2<sup>nd</sup> Defendant prayed for dismissal of the Plaintiffs' suit with costs.



#### **D. Trial of the Action**

9. At the hearing hereof, the Plaintiffs called 7 witnesses in support of their claim one of whom was a government surveyor stationed at Nyandarua North Sub-County. The gist of their case was that the Defendants had constructed the Ol'Kalou town sewerage system through the suit properties without their consent and without compensating them for violation of their property rights. They denied that the sewer system was on a riparian reserve. They disputed the existence of a river or other water body close to the suit properties.
10. The 2<sup>nd</sup> Defendant called 2 witnesses at the trial and closed its case. The 1<sup>st</sup> witness (DW1) was an assistant engineer who supervised the construction of the sewerage project. It was his evidence that the sewerage line was confined to the riparian reserve as mapped by WRA. It was also his evidence that only the owners outside the riparian reserve were compensated and that the Plaintiffs were not among them.
11. The second witness (DW2) was the regional technical manager of WRA. He testified that WRA identified and pegged the riparian reserve for the sewer line upon request from the County Government of Nyandarua. A report dated 24.02.2021 in that regard was produced in evidence. He further testified that WRA was guided by the physical features on the ground only and did not make reference to survey maps and the Registry Index Map (RIM).

#### **E. Directions on Submissions**

12. Upon conclusion of the trial the parties were granted 21 days each to file and exchange their respective submissions on the suit. The record shows that the Plaintiffs filed submissions dated 04.07.2024 whereas the 2<sup>nd</sup> Defendant's submissions were dated 19.07.2024. The 1<sup>st</sup> Defendant, however, did not file any submissions in the matter.

#### **F. Issues for Determination**

13. It is evident from the record that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination as provided for under Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues from any of the following:
  - a. The allegations contained in the pleadings or answers to interrogatories.
  - b. The allegations contained in statements sworn by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
14. The court has considered the pleadings, evidence and documents on record. The court is of the opinion that the following are the key issues which arise for determination herein:
  - a. Whether the Plaintiffs are the owners of the suit properties.
  - b. Whether the sewerage system was constructed entirely on riparian land or on the suit properties.
  - c. If the answer to (b) is in the affirmative, whether the Plaintiffs have any legitimate cause of action.
  - d. Whether the Plaintiffs have proved their claim against the Defendants.
  - e. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
  - f. Who shall bear costs of the suit.



## G. Analysis and Determination

- a. Whether the Plaintiffs are the owners of the suit properties
15. The court has considered the material on record on this issue. Although the Defendants denied the Plaintiffs' ownership of the suit properties, the court is satisfied on the basis of the material on record that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs have a legal interest in the properties they profess to own whereas the 2<sup>nd</sup> Defendant has a beneficial interest in parcel 454. The court is satisfied that there is adequate documentary evidence such as copies of title deeds and letter of grant of representation. In any event, there was no evidence of adverse claims by third parties against the suit properties.
- b. Whether the sewerage system was constructed entirely on riparian land
16. The court has considered the material and submissions on record. The Plaintiffs contention was that the sewerage line was constructed through the suit properties without their consent which constituted a violation of their property rights. They denied that their properties fell within a riparian reserve or that they had encroached upon a riparian reserve. In fact, they denied that their properties were close to any river, stream, swamp, or other water body (whether permanent or seasonal).
  17. The 2<sup>nd</sup> Defendant on its part contended that the sewerage system was laid entirely within the riparian reserve and did not affect the suit properties. It was contended that, if anything, the Plaintiffs were the ones who had encroached on the riparian reserve hence they had no legitimate grievances against the Defendants. The 2<sup>nd</sup> Defendant called the regional technical manager (DW2) who produced a report which marked and identified the riparian reserve where the sewer line was constructed.
  18. It is noteworthy that DW2 stated that in determining the riparian reserve one needs only to be guided by the physical features on the ground and that it is not necessary to make reference to survey maps or the RIM. The only maps which were employed in this case were topo-sheets which were basically aerial maps showing the topography of the area. He stated that although he couldn't identify the name of the stream there was evidence of a watercourse having existed even though its course was not well defined in some areas due to human activity.
  19. Under Regulation 2 of the Water Resources Management Regulations, 2007 (the Regulations) riparian land is defined to mean "the land in respect of which management obligations are imposed on the owner due to its proximity to a water body." The regulations do not alter or transfer ownership of any portion of riparian land from the owner to either WRA or the public at large. The regulations simply impose restrictions on its use. Thus, where a water body passes through private land the riparian land adjoining the water body does not necessarily become public land as defined in Article 62 of *the Constitution* of Kenya.
  20. DW2 further informed the court that the riparian land was determined as stipulated under Regulation 116(2), (3) and (4) of the Regulations which stipulates as follows:
    2. Unless otherwise determined by a Water Resources Inspector, the riparian land on each side of a watercourse shall be defined as a minimum of six metres or equal to the full width of the watercourse up to a maximum of thirty metres on either side of the bank.
    3. The width of the watercourse shall be equal to the distance between the top edges of its banks.
    4. The riparian land shall be measured from the top edge of the bank of the watercourse and this shall also apply to seasonal and perennial watercourses.



21. The results of the determination of the riparian land were contained at page 3 of WRA's report dated 24.02.2021. It was stated that the stream in close proximity to the suit properties was a tributary of Ol'Kalou river which was a seasonal stream. The court finds no fault with the technical findings of the report on the identification of the extent of the riparian land. The court agrees that the sewer line was constructed within riparian land. However, the critical issue which requires to be determined is who has proprietary rights over such riparian land.
- c. If the answer to (b) is in the affirmative, whether the Plaintiffs have any legitimate cause of action
22. Although the 2<sup>nd</sup> Defendant took the view that riparian land is public land and that the concerned land owners should not be compensated for its use the court is of a different view. There is nothing in the Water Act of 2016 or the Regulations which suggests an alteration or transfer of a land owner's rights on the basis of the land's proximity to a water body or watercourse. On the contrary, Regulation 116(1) of the Regulations expressly states as follows:
- “Riparian land” as defined in Part 1 of these rules shall not imply change of ownership but imposes management controls on land use for water resource quality as defined in these Rules.”
23. Part A of the 6<sup>th</sup> Schedule of the Regulations provides a list of proscribed activities on riparian land. These include:
- a. Tillage or cultivation.
- b. Clearing of indigenous trees or vegetation.
- c. Building of permanent structures.
- d. Disposal of any form of waste within riparian land.
- e. Excavation of soils or development of quarries.
- f. Planting exotic species that may have adverse effects to water resources.
- g. Any other activity that in the opinion of the authority and other relevant stakeholders may degrade a water resource.
24. The 2<sup>nd</sup> Defendant cited the case of the Seventh Day Adventist Church (East Africa) t/a Solace Lifestyle and Wellness Resort -vs- Mario Rashid and 16 Others [2022] eKLR and suggested that the Constitution of Kenya classified riparian land as public land under Article 62 thereof. Article 62(1) provides as follows:
- “Public land is:-
- a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- b. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- c. land transferred to the State by way of sale, reversion or surrender;
- d. land in respect of which no individual or community ownership can be established by any legal process;



- e. land in respect of which no heir can be identified by any legal process;
- f. all minerals and mineral oils as defined by law;
- g. government forests other than forests to which Article 63 (2)(d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- h. all roads and thoroughfares provided for by an Act of Parliament;
- i. all rivers, lakes and other water bodies as defined by an Act of Parliament;
- j. the territorial sea, the exclusive economic zone and the sea bed;
- k. the continental shelf;
- l. all land between the high and low water marks;
- m. any land not classified as private or community land under this Constitution; and
- n. any other land declared to be public land by an Act of Parliament—
  - i. in force at the effective date; or
  - ii. enacted after the effective date.

25. The 2<sup>nd</sup> Defendant further submitted that the inclusion of rivers, lakes and other water bodies implied that riparian land was part of public land as contemplated in Article 62(1) of *the Constitution*. As indicated before, riparian land is land in respect of which management obligations are imposed on the owner due to its proximity to a watercourse or water body. The court does not, therefore, agree with the 2<sup>nd</sup> Defendant's submission that a land owner's proximity to a water body necessarily results into loss of his land, or part thereof, to the public. If the framers of *the Constitution* had intended that riparian land should be public land, they would have expressly included it as such in Article 62(1) of *the Constitution*.

26. The court is thus satisfied that the Plaintiffs have a legitimate cause of action against the 2<sup>nd</sup> Defendant because their respective parcels of land were well defined in government survey records as reflected in the RIM. They did not lose any portion of their parcels on account of their proximity to a watercourse. The law simply imposed upon them certain restrictions in the manner in which they would utilize and enjoy their properties.

27. The 2<sup>nd</sup> Defendant had no legal right to enter and undertake construction works thereon without their consent. The Defendants' actions therefore amounted to trespass and an invasion of the Plaintiff's property rights. The mere fact that the Plaintiffs were involved in public participation forum could not be construed to mean that they had consented to the Defendants' entry and construction on the suit properties. The mere act of signing an attendance list in a public participation exercise cannot take the place of a formal consent.

d. Whether the Plaintiffs have proved their claim against the Defendants

28. The court is satisfied on the basis of the evidence on record that the Plaintiffs have proved their claim against the 2<sup>nd</sup> Defendant on a balance of probabilities. The court has found that although the sewer line was constructed on part of riparian land, the same was not public land within the meaning of Article 62(1) of *the Constitution* of Kenya. As riparian owners, the Plaintiffs' rights of user and



enjoyment of the suit properties were only restricted in the manner provided for in the Regulations but such restrictions did not convert their land into public land. The Defendants' actions thus constituted trespass to land which is actionable per se.

e. Whether the Plaintiffs are entitled to the reliefs sought in the suit

29. The court has already found and held that the Plaintiffs are the owners of the suit properties and that they have a legitimate cause of action against the Defendants. The court has also found that they have proved their claim against the Defendants to the required legal standard. The court is thus of the view that the Plaintiffs are entitled to some of the reliefs sought in the suit as more particularly specified hereafter.
30. The court is of the opinion that the Plaintiffs are entitled to a declaration that they are entitled to exclusive use and possession of their respective parcels of land. However, they are not entitled to a restraining injunction against the Defendants because the acts complained of have already taken place. The evidence on record shows that the construction of the sewer line commenced in 2021 and was completed in 2023. There is no indication that the Defendants intend to construct an additional sewer line or to undertake any other works over the suit properties.
31. The court is further of the view that the Plaintiffs are entitled to general damages for trespass to land. However, the general damages of Kshs.1,000,000/= sought by each of the Plaintiffs is quite excessive bearing in mind the size of their respective parcels and the portion of land utilized for the sewer line. The court is of the view that a sum of Kshs.200,000/= for each of the Plaintiffs would be sufficient to compensate them for violation of their property rights.
32. In view of the award of compensation, the court is not inclined to grant a mandatory injunction for removal of the sewer line passing through the Plaintiffs' riparian land. The court is further of the opinion that such an injunction shall cause a serious disruption to the sanitation services enjoyed by the residents of Ol'Kalou. As a result, the court is not inclined to grant this equitable remedy due to its far-reaching consequences in the circumstances of this suit.
33. The court is not inclined to award any exemplary damages in this suit because there was no evidence of any oppressive, arbitrary or malicious conduct on the part of the Defendants. There was no evidence to suggest that the 2<sup>nd</sup> Defendant's conduct was calculated to earn it profit at the expense of the Plaintiffs. The Defendants were probably mistaken that they did not require any consent or permission from the riparian land owners.

f. Who shall bear costs of the suit

34. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Plaintiffs shall be awarded costs of the suit to be borne by the 2<sup>nd</sup> Defendant only. The 1<sup>st</sup> Defendant shall not be awarded any costs since it did not participate at the hearing.

## H. Conclusion and Disposal Orders

35. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved their respective claims against the 2<sup>nd</sup> Defendant on a balance of probabilities. However, since the 1<sup>st</sup> Defendant was an agent of a disclosed principal it shall not be held personally liable for its actions but



the 2<sup>nd</sup> Defendant shall shoulder legal liability. As a consequence, the court makes the following orders for disposal of the suit:

- a. A declaration be and is hereby made that the Plaintiffs are entitled as against the Defendants to exclusive use and possession of Title Nos. Nyandarua/Ol'Kalou Central/3403, 454, 6472, 5496, 5495, 5648 and 3321.
- b. The 1<sup>st</sup> to 6<sup>th</sup> Plaintiffs are each awarded general damages of Kshs.200,000/= for trespass to land as against the 2<sup>nd</sup> Defendant only.
- c. The Plaintiffs are hereby awarded costs of the suit to be borne by the 2<sup>nd</sup> Defendant only.
- d. The Plaintiffs' claim against the 1<sup>st</sup> Defendant is hereby dismissed with no order as to costs.
- e. For the avoidance of doubt, any relief sought in the further amended plaint which has not been expressly granted is deemed to have been denied.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 3<sup>RD</sup> DAY OF OCTOBER, 2024 AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Nderitu Komu for the Plaintiffs

N/A for the 1<sup>st</sup> Defendant

Ms. Caren Lagat for the 2<sup>nd</sup> Defendant

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

