



Kithome v Janton Investment & another (Environment & Land Case 5 of 2020) [2023] KEELC 451 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEELC 451 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE 5 OF 2020
CK YANO, J
FEBRUARY 1, 2023**

BETWEEN

JULIUS NYAGAH KITHOME PLAINTIFF

AND

JANTON INVESTMENT 1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by a plaint dated June 22, 2020 and amended on the 23rd of October 2020. The plaintiff pleaded that the 1st defendant through a contract granted by the 2nd defendant is in the process of rehabilitating the stadium at Kathwana Primary School.
2. The plaintiff averred that the 1st defendant is using contaminated soil excavated from a hospital site and thereby polluting the environment and also pausing danger to the pupils of Kathwana primary school.
3. The plaintiff contends that the soil excavated from the hospital dumping site contained needles, bottles and other medical waste and therefore hazardous to the soil, water and the health to the playground users and the community at large.
4. The plaintiff stated that despite being directed by NEMA to remove the said contaminated soil and arrange on cleaning of the stadium, the 1st defendant has paid no attention to the directive and have continued with the work illegally. The plaintiff stated that the 1st and 2nd defendants failed to conduct the prerequisite environmental impact assessment as required by the law.
5. The plaintiff further stated that he is apprehensive that the 1st defendant will proceed to bury the contaminated soil with a layer of clean soil to avert justice.
6. The plaintiff has enumerated particulars of breach as follows:



- a) The 1st defendant willfully using the contaminated soil excavated from a hospital dumping site in total disregard of the health and environmental issues being raised by the community.
 - b) The 1st and 2nd defendant willfully failed to conduct the prerequisite Environmental Impact Assessment as required by the law.
 - c) Despite demands being duly made and notice of intention to sue being given, the defendants have refused, failed and/or neglected to rectify the breach.
7. The plaintiff prayed for judgement against the 1st and 2nd defendants jointly and severally for the following orders:
- a. An order compelling the 1st defendant to remove the contaminated soil and cleaning of the stadium to avoid the polluting of the soil and the water and also from risking the lives of the pupils in the school.
 - b. A permanent injunction restraining the 1st Defendant from using the contaminated material in upgrading or rehabilitating the said stadium.
 - c. A mandatory injunction ordering the 1st and 2nd defendants directing them to conduct the Environment Impact Assessment before the commencement of any work in the school.
 - d. General damages.
 - e. Costs with interest at court rates.
8. At the hearing, the plaintiff testified as PW1 and did not call any witness and stated that he lives in Kathwana where he carries on business. He adopted his witness statement dated October 23, 2020 as his evidence-in-chief. The plaintiff also produced the documents filed on October 26, 2020 as P Exhibits 1 and 2 respectively. These documents are the demand letter dated May 3, 2020 and photographs. The plaintiff was also cross-examined and re-examined.
9. In his statement, the plaintiff stated that sometime at the end of January, 2020, he noted that the 1st Defendant was using material excavated from a hospital dumping site to upgrade and rehabilitate the stadium at Kathwana Primary School. That the soil excavated from the hospital site contained needles, bottles and other medical waste hazardous to the health of pupils at Kathwana Primary School and its environs.
10. The plaintiff stated that he raised the issue with the relevant authorities to have the 1st defendant remove the contaminated materials but nothing was forthcoming from that. That upon inspection conducted by NEMA on February 4, 2020, it was confirmed that the 1st defendant had used contaminated soil sourced from a medical facility without due diligence on the safety of the soil, and that the work on the stadium was done without the prerequisite Environmental Impact Assessment contrary to section 58 of the *Environmental Management and Coordination Act*.
11. The plaintiff stated that the 1st defendant was directed to immediately organize for removal of the contaminated soil and clean up the stadium for any hazardous waste to avoid land and water pollution as well as eliminate the impending risk of harm to the playground users, but the 1st defendant paid no attention to the directives and concerns by NEMA and the plaintiff and is still continuing with the work of rehabilitation of the stadium in total disregard of the environmental pollution and thereby risking the lives of the pupils and the community at large.
12. When cross-examined by Mr Mbiyu, learned counsel for the 1st defendant, the plaintiff confirmed that he was among those who attended a meeting at Kathwana stadium, the subject matter of this suit on



- April 16, 2020. When shown the minutes of the said meeting, PW1 confirmed that the same stated that sampling of ten different points in the field, no traces of medical waste disposal was noticeable and that members concluded that the contractor proceeds to carry on with the process of adding red soil and manure upto the level that had been recommended by the Public Health Office. The plaintiff confirmed that he was part of that team, though he did not agree with the decision reached. He stated that he raised an objection but the same is not captured in the said minutes. The plaintiff confirmed that he filed this case on October 26, 2020 after the said meeting of April 16, 2020 and that in his witness statement and pleadings, he did not disclose the minutes which had concluded the issue about the medical waste.
13. The plaintiff further confirmed that nobody, including him, had suffered from the alleged medical waste. He confirmed that the said meeting was attended by other stakeholders, including the chairperson, vice chairperson and secretary of Kathwana market and that all refused to record any statement. PW1 stated that after the meeting of April 16, 2020, he did not take any expert to verify whether there was any medical waste, adding that the rehabilitation work was completed and the stadium is in use.
 14. When cross-examined by Mr Saluny, learned counsel for the 2nd defendant, the plaintiff reiterated that he attended the meeting of April 16, 2020 where the samples that were taken confirmed that no medical waste was found in the soil and that the stadium was in use. The plaintiff stated that he is a politician and that the stadium has been used for political meetings and he has not heard anyone who has suffered from any medical waste. The plaintiff further stated that he is aware that the swearing in of the Governor of Tharaka Nithi and his deputy was done in that stadium and nobody had complained.
 15. The plaintiff stated that he did not go to NEMA to find out if they were satisfied with the findings. The plaintiff further contended that he is a parent at Kathwana Primary and Secondary schools and knew the former principals and head teacher of those schools and confirmed that those former head teachers were present in the meeting of April 16, 2020 together with the representative of NEMA.
 16. The plaintiff stated that he has sued the 1st defendant because they were given the contract by the 2nd defendant and that the soil containing medical waste was taken and both defendants are to blame and asked the court to order for the removal of the contaminated soil.
 17. The plaintiff stated that the Public Health and NEMA confirmed that there was no contaminated soil and that he went to the public Health who informed him that they gave out their recommendation and were satisfied but he did not go to NEMA.
 18. The plaintiff was re-examined by Ms Otieno and stated that he was never given the minutes in the 2nd defendant's documents and that he has never been called to any other meeting and therefore could not put in an objection and has never gone back to NEMA. He stated that he has not seen any report made by NEMA confirming that the recommendation had been complied with.
 19. It was the plaintiff's testimony that the recommendations by NEMA have never been complied with.

The 1st Defendant's Case

20. The 1st defendant filed its statement of defence dated 15th February 2022 wherein it averred that the rehabilitation of the stadium was undertaken in strict compliance with the clear guidelines of the law.
21. The 1st defendant stated that a thorough Environmental Impact Assessment was carried out and the same was found suitable and that the County NEMA Director and Public Health Department have found out the same to be suitable soil for the pupils' playground and that the same has been in use for several months and no single casualty has been reported.



22. The 1st defendant prayed for the dismissal of the plaintiff's suit with costs.
23. At the hearing, Joel Mwangi Mwaura testified on behalf of the 1st defendant as DW1. He testified that he is the site manager of the 2nd defendant and adopted his witness statement dated February 15, 2022 and also relied on his replying affidavit filed in court on February 15, 2022 as his evidence-in-chief. He was cross-examined and re-examined.
24. The evidence of DW1 was that sometime in January, 2020, the 1st defendant was contracted by the 2nd defendant to upgrade and rehabilitate the stadium of Kathwana Primary School and that upon this, the 1st defendant undertook the required legal procedures and processes for the project.
25. DW1 stated that in the course of the construction, some harmful materials were found in the excavated soil. That the NEMA County Director and the Public Health Officer gave recommendations for the removal of the same by the contractor. He stated that the contractor followed the guidelines and recommendations and after removing the harmful contaminated soil and waste material compacted the ground and the same was approved by the County Director, NEMA and the Public Health Officer. DW1 stated that the playground has been in use for several months and no single casualty has been reported.
26. DW1 was cross-examined by Mr Saluny advocate for the 2nd defendant and Ms Otieno advocate for the plaintiff and re-examined by Mr Mbiyu advocate for the 1st defendant. He stated that the contractor was required to do the work to the required standard and that in the event of any defect, the contractor was required to remedy the situation.
27. DW1 confirmed that he was the one undertaking the work and denied that there were medical waste found. He further stated that following some recommendation from the Public Health to remove any hazardous material from the site, they did some sampling and never found any hazardous material.
28. DW1 stated that he was aware of a complaint dated February 6, 2020 by NEMA alleging that the soil used had medical waste, but that when sampling was done, no hazardous material was found, and the Public Health Officer gave them the green light to go on with the project.

The 2nd Defendant's Case

29. The 2nd defendant filed a statement of defence dated July 8, 2020 which was amended on November 17, 2020 in which it denied the plaintiff's claim. It is the 2nd defendant's case that no contaminated or hazardous soil was used by the 1st defendant to rehabilitate the stadium at Kathwana Primary School and that NEMA did not issue any adverse directive regarding the project. The 2nd defendant denied that the 1st defendant buried contaminated soil with a layer of clean soil as alleged by the plaintiff and reiterated that NEMA approved the project. The 2nd defendant urged the court to dismiss the plaintiff's suit with costs.
30. Aggrey Karani, the 2nd defendant's Chief Officer for Education, Youth, Sports, Culture and Tourism testified as DW2. He adopted his statement dated May 7, 2021 as his evidence-in-chief and was cross-examined and re-examined. He confirmed being with the plaintiff in the meeting held on April 16, 2020 which he said he chaired as the representative of the users of the project. DW2 produced the said minutes as D exhibit 1, letter dated 22nd April, 2020 as D. exhibit 2, E 1A Project Report as D Exhibit 3 and contract dated March 5, 2018 as D exhibit 4.
31. DW2 testified that sometime in March, 2018, the 2nd defendant contracted the 1st defendant to carry out the rehabilitation of the stadium at Kathwana Primary School and that the Project was carried out and completed. That at the tail end of the project, there was a complaint by the plaintiff regarding the



quality of soil used in rehabilitating the said stadium. He stated that the said complaint was taken up by the Public Health Department which after an inquiry made some recommendations.

32. DW2 stated that in the meeting of April 16, 2020, the plaintiff's complaint was comprehensively discussed and after the meeting, all those who were in attendance, including the plaintiff, visited the stadium to ascertain whether all the recommendations made by the Public Health Department had been implemented. He stated that they carried out soil sampling in ten different points and found no traces of medical waste disposals. DW2 further stated that the Public Health Department carried out an independent inspection on both the stadium and the primary school compound on April 21, 2020 and confirmed that the recommendations made were fully adhered to during the rehabilitation project and that among others, no signs of soil contamination was found upon re-inspection. DW2 stated that there were no traces of any medical waste on the said stadium and/or school field, adding that the 1st defendant adhered to the recommendations in the Environmental Impact assessment Project Report before completing the project and handing over the site to the 2nd defendant. His evidence was that the rehabilitation of the stadium was done in adherence to the environmental safety requirements and that any defects in the project were remedied. DW2 stated that there was no contaminated soil to be cleaned as at October 26, 2020 and as users of the project were satisfied, and was surprised that the plaintiff had filed this suit against the defendants. That the stadium has been in use since completion and no one has complained of suffering from any medical waste.

Submissions

33. Upon the close of the case, the parties through their respective advocates requested for time to file their written submissions. The plaintiff filed his submissions on October 11, 2022 through the firm of Otieno & Co Advocates while the 1st defendant filed theirs on October 31, 2022 through the firm of Mbiyu Kamau & Company Advocates. The 2nd defendant did not file any submissions.

The Plaintiff's Submissions

34. In his submissions, the plaintiff raised three issues for determination namely, whether the prerequisite Environmental Impact Assessment (EIA) pursuant to section 58 of the *Environmental Management and Coordination Act* was conducted; whether the red soil deposited on the pitch/stadium had medical disposal, and whether the plaintiff is entitled to the reliefs sought.
35. Regarding the first issue, the plaintiff submitted that the 1st defendant did not at any given time produce any evidence to support its case that they followed all the required steps before embarking on the project. It was further submitted that the 1st defendant did not produce the licence as evidence to prove that all the laid down steps were followed. It is the plaintiff's submissions that in the absence of the project report and licence to carry out the project as required by law, it is clear beyond peradventure that the said Environmental Impact Assessment (EIA) was not carried, hence the anomalies that arose during the pendency of the project. It was submitted that the required procedure was not followed to the letter. Counsel for the plaintiff cited the provisions of section 58 of the *Environmental Management and Coordination Act*.
36. Regarding the second issue, the plaintiff submitted that the red soil which had been deposited on the pitch/stadium contained medical disposals, and referred to the letter dated February 6, 2020 from NEMA to the Chief Officer Education, Vocational Training, Sports, Youth, Culture and Tourism, Tharaka Nithi County Government. It is submitted that those directives would not have been issued at all if there were no medical waste or deposits which was hazardous waste harmful to the environment. The plaintiff Referred to a letter dated November 8, 2018 from the County Government of Tharaka Nithi, Department of Education, Youth, Sports, Culture and Tourism to the 1st defendant and



submitted that he has demonstrated that indeed the soil used by the 1st defendant contained some contaminated medical waste and or material.

37. The plaintiff submitted that he is entitled to the reliefs sought and urged the court to enter judgment in his favour as per the amended plaint.

The 1st Defendants' Submissions

38. It is the 1st defendant's submissions that the evidence adduced by the plaintiff and the defendants was that the work of upgrading or rehabilitation of the stadium subject of this suit was completed and not ongoing to require an injunction as prayed for in prayers (b) and (c) of the plaint. It was submitted that to compel the defendants to act as prayed in paragraph (b) and (c) of the plaint, the court would be acting in vain. Counsel for the 1st defendant submitted that it is trite law that courts do not issue orders in vain as that would amount to wastage of precious time of court and putting the court in an awkward position. Counsel for the 1st defendant relied on the case of *Efurieth Irima Mugo v Peter Njiru Mugeki* Elca No 16 of 2020 (ELCA E5/2020).
39. The 1st defendant submitted that as admitted by the plaintiff and other parties, no one has suffered any injuries to warrant issuance of orders or assessment of general damages and that to do so would be enriching the plaintiff unfairly and without any justification. The 1st defendant further submitted that the plaintiff filed this suit long after the meeting of April 16, 2020 without disclosing to the court the minutes of that meeting in which he did not indicate that he did not concur with. That the plaintiff ought to have made full disclosure. The 1st defendant relied on Civil Case No 43 of 2019 – Milimani, *Esther Nugari Gachomo vs Equity Bank Ltd* and submitted that the parties who would be entitled to costs are the defendants as against the plaintiff.
40. The 1st defendant submitted that the plaintiff failed to call witnesses in support of his case, among them stakeholders who attended the meeting of April 16, 2020 to buttress his case. It was submitted that the case was filed as an afterthought and that one can only read malice. It is the 1st defendant's submission that the suit as filed by the plaintiff is unmeritorious, is wanting and/or unjustifiable hence should be dismissed with costs to the 1st defendant.

Analysis And Determination

41. The court has carefully considered the pleadings, the evidence on record and the submissions made as well as the authorities relied on. I have also considered the applicable laws. The issues falling for determination, in my view, are:
- i. Whether an Environmental Impact Assessment (EIA) pursuant to section 58 of the *Environment Management and Coordination Act* was conducted for the subject project.
 - ii. Whether there was proof of the use of contaminated material in the upgrading or rehabilitation of the stadium at Kathwana Primary School.
 - iii. Whether the plaintiff is entitled to the reliefs sought.
42. Regarding the first and second issues, the plaintiff submitted that no Environmental Impact Assessment (EIA) was carried out before the commencement of the project hence the anomalies that arose during the pendency of the project.
43. It is clear therefore that the plaintiff is challenging the Environmental Impact Assessment (EIA) process for the project.



44. Part VI of the *Environmental Management and Coordination Act* provides for the Environmental Impact Assessment before the commencement of any project. Section 58 of the said *Act* provides as follows:

“58(1)Notwithstanding any approval, permit or license granted under this Act or any other written law in force in Kenya, any person, being a proponent of a project, shall, before financing, commencing, proceeding with, carrying out, executing or conducting or causing to be financed, commenced, proceeded with, carried out, executed or conducted by another person any undertaking specified in the second schedule to this Act, submit a project report to the Authority in the prescribed form, giving the prescribed information and which shall be accompanied by the prescribed fee.

(2) The proponent of a project shall undertake or cause to be undertaken at his own expense an Environmental Impact Assessment study and prepare a report thereof where the authority, being satisfied, after studying the project submitted under subsection (1), that the intended project may or is likely to have or will have a significant impact on the environment, so directs.

(3) The Environmental Impact Assessment study report prepared under this subsection shall be submitted to the Authority in the prescribed form, giving the prescribed information and shall be accompanied by the prescribed fee.”

45. The court has reviewed the evidence adduced in this case. Among the documents produced by DW2 as D. Exhibit 3 is an Environmental Impact Assessment (EIA) project report for the proposed remedial upgrading works for Kathwana stadium whose proponent was the 2nd defendant herein. In addition, it is clear from the evidence on record, and in particular the minutes of a meeting held on April 16, 2020 (D. Exhibit 1) that the issues raised by the plaintiff in this case were comprehensively discussed. It is also clear that after the said meeting, all the attendees, including the plaintiff, visited the stadium to ascertain whether all the recommendations made by the Department of Public Health had been implemented. From the evidence on record, soil sampling in ten (10) different points were carried out and no traces of medical waste disposals were found. In this case, the plaintiff failed to show that he disagreed with the findings of the stakeholders in which he was part of. Moreover, the plaintiff never produced any evidence to support his assertion that the soil that was used in the rehabilitation of the stadium were contaminated and/or that it polluted the environment.

46. In this case, the defendants have shown that an Environmental Impact Assessment (EIA) was carried out. The Environmental Impact Assessment (EIA) report was produced as an exhibit. And in undertaking due diligence, all the stakeholders, including the plaintiff, were present when sampling was done in ten (10) areas of the stadium in which no traces of medical waste was found, and confirmed by the Public Health Officer and NEMA. No objection was raised by the plaintiff in regard to the minutes produced and the plaintiff did not adduce any contrary expert report indicating that the findings of the committee/stakeholders who visited the site were not correct. Section 107 and 108 of the *Evidence Act* provide that he who alleges must prove. In this case, the plaintiff has failed to adduce any sufficient evidence in support of his claim.

47. Moreover, no person, including the plaintiff herein challenged the grant of the Environmental Impact Assessment (EIA) license as provided for under section 129 of the *Environmental Management and Coordination Act*. The project is said to have been long completed and already in use and this suit was only filed on June 22, 2020. In my view, the plaintiff is guilty of laches and has brought this case as an afterthought when the project was already completed and in use. Further, no evidence of any case of



anyone who has suffered from the use of the stadium has been tendered by the plaintiff. The defendants have also shown that there were elaborate mitigation measures put in place, including continuous monitoring process to ensure that the environment was not damaged and that users of the stadium are not exposed to any hazardous material. The claim by the plaintiff is too generalized and lacked the necessary scientific backing to afford it credence.

48. The next issue to consider is whether the plaintiff is entitled to the reliefs sought. I am aware of the prayers that the plaintiff asked for. These include an order for the removal of contaminated soil and cleaning the stadium, injunction and general damages. From the material on record and the evidence adduced, it is the finding of this court that the plaintiff's claim is based on speculative and unfounded allegations which have not been proved. Moreover, it is clear from the evidence on record that the rehabilitation of the stadium has been completed and is already in use. Indeed, it was already in use even as at the time the suit was filed. Therefore, granting the orders of injunction would be acting in vain. I do agree with the defendants submissions that courts do not issue orders in vain. In addition, from the evidence on record and as admitted by the plaintiff, no one has suffered or is likely to suffer any injuries to warrant issuance of orders of damages. I am therefore not persuaded that the plaintiff is entitled to any of the reliefs sought.
49. In the final analysis, the upshot of the foregoing is that the plaintiff's suit lacks merit and is dismissed.
50. On costs, I have noted that the plaintiff's concern was simply to protect the environment and the users of the stadium in question. In the circumstances, I order that parties bear their own costs.
51. Orders accordingly.

DATED SIGNED AND DELIVERED at Chuka this 1st day of February, 2023 in the presence of:

C/A: Martha

Ms. Otieno for plaintiff

No appearance for 1st defendant

No appearance for 2nd and 3rd defendants

C. K. YANO,

JUDGE.

