



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 140 OF 2015**

**AMAKA DEVELOPMENT LTD.....PLAINTIFF**

**-VERSUS-**

**COUNTY GOVERNMENT OF TAITA TAVETA.....DEFENDANT**

**JUDGMENT**

*(Plaintiff being owner of land; defendant allowing diversion of a public drain pipe into the plaintiff's land in 1999 for purposes of road rehabilitation; the drain pipe being a health hazard and defendant not removing or dealing with it despite numerous requests from the plaintiff; plaintiff filing suit in 2015 for compensation; whether such suit caught up by 3 year limitation period; the nuisance being a continuing nuisance; thus the de die in diem rule applicable; damages however recoverable for the 3 year period to the filing of suit; clear in this case that defendant is in breach of its statutory duty to maintain drains in a hygienic state; plaintiff suffering closure of its premises owing to the public health risk; plaintiff awarded damages for loss suffered; defendant given 12 months to restore the environment and pay costs of the suit).*

**A. INTRODUCTION AND PLEADINGS**

1. This suit was commenced through a plaint which was filed on 23 June 2015. The plaintiff is the registered proprietor of the land parcel LR No. 1956/504 situated within Voi town. It is pleaded that the property is developed with two godowns, ten stalls, a business premises occupied by a tenant operating a restaurant (Augustine George Resort), and a residential premise. The plaintiff avers that in the year 1999, the predecessor of the defendant, Voi Municipal Council, embarked on rehabilitation of some roads within Voi town centre. This included the one abutting the suit property. The plaintiff avers that the route of the storm water drainage was diverted from the road reserve into its parcel of land. The plaintiff pleads that when causing the said diversion, the Municipal Council gave assurance that an Environmental Impact Assessment had been carried out and that there would be no environmental harm to adjoining parcels of land, and further, that this was not permanent and would be relocated to run along the road reserve. The plaintiff contends that upon completion of the rehabilitation works, the Municipal Council abandoned the drainage, and that effluent now spills into the suit land, making the environment unbearable and forcing the tenants occupying the godowns and stalls to vacate. The plaintiff pleads that his complaints to the Municipal Council that the drainage be relocated has never been attended to. When the County Government took over, he also complained but he was ignored. He avers that he complained to the National Environment Management Authority (NEMA) through a letter dated 15 October 2014, and that on 5 May 2015, NEMA called upon the defendant's Chief Officer, Water & Irrigation to take remedial measures to re-route the drainage so as to pass within an approved sanitary lane. The plaintiff pleads that instead, the defendant closed the Augustine George Resort and left things as they are. The plaintiff pleads that she has suffered huge financial losses, because since January 2010, no tenant has occupied the premises, and that occupancy of Augustine George Resort cannot be allowed even by the defendant itself on health grounds. She claims that the tenants were paying Kshs. 560,000/= per month, being Kshs. 12,000/= per stall (x10), Kshs. 220,000/= for the godowns (x2). She alleges that prior to its closure, Augustine George Resort was paying monthly rent of Kshs. 50,000/=. She seeks Kshs. 36,960,000/= as loss of rent from January 2010 to the date of filing suit. She contends that the diverting of the drainage and failing to maintain and keep it in a healthy hygienic state is an infringement of the plaintiff's right to a clean and healthy environment. In the suit, the plaintiff seeks the following prayers :-

*(a) A declaration that the defendant's action, or as may be that of its predecessor, Voi Municipal Council, in diverting the route of the subject storm water drainage from the road reserve into the plaintiff's parcel of land No. 1956/504, is illegal, unlawful, an affront to sanctity of ownership.*

*(b) A declaration that the defendant's action in neglecting and failing to maintain and keep the subject storm water drainage in a healthy and hygienic state is an infringement and violation of the plaintiff's entitlement to clean and healthy environment as given by Section 3 of the Environment Management and Coordination Act, No. 8 of 1999.*

*(c) An order compelling the defendant to take remedial measures to drain the subject storm water drainage and re-route it to pass within the approved sanitary land along the road reserve.*

*(d) Kshs. 36,960,000/- being loss of income from the godowns and from the stalls.*

*(e) Kshs. 610,000/= per month from the date of institution of this suit until the relocation of the subject storm water drainage, or the hearing and final determination of this suit, whichever comes first.*

*(f) Any or further order this Honourable Court may deem fit and just to grant.*

*(g) Costs of the suit.*

*(h) Interest on (d) (e) and (h) at Court rate.*

2. The defendant filed defence which basically denied all the claims of the plaintiff. In particular, it denied that Voi Municipal Council was in charge of storm water drainage in Voi Municipality. It pleaded that the sewerage holes, storm water drainage, pits and the entire drainage system within and around Voi Township were under the domain, maintenance and control of TAVEVO Water and Sewerage Company Limited. It denied being notified of any of the breaches complained of. It also refuted the particulars of damage pleaded by the plaintiff. It contended that the suit is time barred following the provisions of the Limitation of Actions Act, CAP 22, Laws of Kenya.

## B. EVIDENCE OF THE PARTIES

3. PW-1 was Dominic Lenjo a director of the plaintiff company. He adopted a statement that he had recorded as his evidence in chief. In it, he more or less reiterated what I have set out above as pleaded in the plaint. He mentioned that it was in 1999, after the El-Nino rains, that the Voi Municipal Council decided to rehabilitate the roads within Voi Town. When working on the road abutting the suit land, the Council diverted the storm water drainage into the suit property, on the premise that they would relocate it back after completing the works on the road. This has not however been done to date. As a result of the abandonment, the drainage blocked and putrefied, and started emitting an unbearable stench. With continuing drainage, it spilt over in January 2010 and spilt its effluent into the suit property which forced all tenants to leave. They tried to persuade the Municipal Council to address the situation in vain and the County Government also ignored them. He reiterated the issue of the NEMA letter and the damages pleaded in the plaint. He produced various exhibits to support his case, including the title document, a survey report, some Public Health notices from the defendant, and the NEMA letter.

4. PW-2 was Rashid Harun Shake, a registered valuer in private practice. He produced a valuation report that he conducted for the suit premises. He had been instructed to establish the loss of economic activity caused by the open sewer line. He noted the developments on the plot as comprising of a hotel, two warehouses, and 10 single rooms which had been let out as stalls. He inspected the premises on 15 May 2015 and prepared his report on 20 May 2015. Cross-examined, he acknowledged that he was never shown any rent records. He estimated the rent based on the neighbourhood though he did not identify any property used for comparative purposes. When he made the report, there was zero occupation of the premises as the tenants had moved out. He stated that the only structure within the width of the storm water drain was the hotel. He only captured in his report the premises on the plot affected and left out those not affected. There was a residential section which was not affected. He elaborated that this is actually a sewer line and not a storm drain and the end of the line is a collection site, but since it was open, it can also collect storm water.

5. PW-3 was Bartholomew Mwanyungu, a Licenced Land Surveyor. He did a topographical survey and concluded that the drain passes through the suit property.

6. The defendant called Gabriel Katuta, an administrator with the defendant. He also had a witness statement which he adopted. In it he stated that Augustine George Coffee House was built way after the Plot No. 1956/504 was registered. He stated that the building plan for the Coffee House was not approved, and that its construction could not have been approved, in view of the poor drainage that the plaintiff is complaining about. He also added that the plaintiff is not the owner of the plot where the Coffee House is located as the same is in the name of Edward Lenjo Musamuli. He stated that even assuming that the building was approved, rehabilitation of the road took place in the year 1999, and there is no way it could have taken the plaintiff 17 years to raise issue with the drainage of the area where the plot is located. In his oral evidence in court, he testified that he is well aware of the dispute herein. He elaborated that in the year 1999 he was the Town Clerk of Taveta Town Council. After devolution, he was absorbed into the County Government as the Town Administrator. He testified that the storm water drain was a National Government Project which came about under the El Nino Disaster Management Project and the consultant employed was Uniconsult. The contractor was Victory Construction. The role of the Municipal Council was to remove illegal structures so as to provide a conducive environment for the contractor. He was of the view that the plaintiff ought to have sued the National Government. He also stated that there were sittings and minutes pointing out the challenges and that the plaintiff ought to have raised issue at that time and the same would have been taken care of. He added that there were other issues which were raised and resolved. He was aware of the plaintiff's complaint because they in fact complained directly to him.

7. He testified that the building plans of the plaintiff were not approved and have not been approved to date. He recalled that the plaintiff was given a notice by the Public Health Department to abate the mess and they complied. Their business was closed because of the problem but they were later given licence to operate. He stated that the storm water drain came before the plaintiff's building and that it is the plaintiff who developed his building (which was not approved) on top of the storm water drain, such that the storm water drain now passes below the building. He referred to some letters written by the plaintiff in the year 2010 and 2011 seeking approval for his architectural drawings, and letters written in 2015 asking for permission to reopen the hotel that had been closed due to public health concerns.

8. Cross-examined, he testified that the town had a plan first made in 1973 with plots in the area earmarked for storage facilities (godowns) as they are near the Railway. He stated that the restaurant was closed but it is open at the moment yet no go-ahead has been given for reopening. He was referred to a letter dated 7 April 2015 from the Public Health Department directing the defendant to reroute the drain to lie within sanitary lanes and not through private plots. His response was that this is a project on its own and requires budgetary allocation. They however placed covers. He denied that the drainage is on private property and his view was that the Public Health Department was wrong. He stated that the County Surveyor was consulted and found that the storm water drain is in the right place. He was of opinion that the plaintiff's problem is of his own making as he built on the storm water drain without getting building approval.

9. With the above evidence, the defendant closed its case.

10. I directed counsel to file written submissions and I have taken note of the submissions filed by Mr. B.O Odongo, learned counsel for the plaintiff and Mr. Kibara, learned counsel for the defendant. I have considered all their submissions.

### C. ANALYSIS AND DECISION.

11. There is a threshold issue that has been raised by Mr. Kibara, that this suit is time barred and ought to be struck out. It was submitted that the plaintiff is seeking damages on the tort of nuisance where the cause of action arose in the year 1999. I was pointed at Section 4 (2) of the Limitation of Actions Act, which provides for a three year limitation period, and the affirmation thereof in the case of *Jones M. Musau & Another vs Kenya Hospital Association & Another (2017) eKLR*. This was an action for medical negligence over a surgery that went awry and the complications thereof led to the death of the patient in the year 2008. A suit for compensation was filed in the year 2013. This suit was struck out by the High Court for being filed outside the 3 year limitation period prescribed for torts in Section 4 (2) of the Limitation of Actions Act. This decision was affirmed on appeal to the Court of Appeal.

12. Mr. Odongo did not address me on this issue of limitation. The question that I need to ask myself is whether this is a claim for the tort of nuisance that arose in the year 1999 and whether the suit itself is time barred. I have looked at the prayers sought in the plaint. Prayers (a) and (b) are declaratory orders. Prayer (c) is seeking a compelling order to re-route the drain. Prayer (d) is for damages for loss of income which is calculated from the year 2010. Prayer (e) is damages from the date of institution of the suit. The gist why these orders are sought is an action that took place in the year 1999 which, if I am to believe the plaintiff, and I will get to that in a moment, led to a storm water drain being passed through the plaintiff's land. That storm water drain is still there to date. In my opinion, if the plaintiff's position on the case is to be approved by this court, this would be a case of a continuing breach, rather than a one off action that took place on a particular day and stopped without continuing. The cause of action continues so long as the breach persists. This is well explained in *Clerk & Lindsell on Torts, Sweet & Maxwell, 18<sup>th</sup> Edition*, at page 1697 paragraph 32-20 which provides as follows :-

*“Continuing Injury: If the act complained of creates a continuing source of injury, and is of such a nature as to render the doer of it responsible for the continuance, then in cases in which damage is not of the essence of the action, as in trespass, a fresh cause of action arises de die in diem, and in cases in which damage is of the essence of the action, as a nuisance, a fresh cause of action arises as often as fresh damage accrues. Whenever one person wrongfully puts something upon the land of another, he is not only liable to pay damages for the trespass in placing the thing there, but he is further under an obligation to remove it, and is guilty of a continuing trespass as long as he neglects to do so.”*

13. It will therefore be misplaced to say that we can only count time for three years from 1999. I am not therefore persuaded with the argument that this suit is time barred and I will delve into the merits of it.

14. There is the other threshold issue raised by Mr. Kibara, that this suit should be dismissed because the plaintiff is not the owner of the disputed land. I don't see where this came from because the copy of title that was produced shows that the suit property was transferred to the plaintiff on 27 May 2010. There is therefore nothing for me to go into a deep analysis because the title is here and this is what it shows. It speaks for itself. The plaintiff is the registered proprietor of the suit property.

15. The complaint of the plaintiff is that in the year 1999, the defendant undertook a project to improve roads within Voi Town. To do so, it diverted the storm drain into the plaintiff's plot. This, the plaintiff avers, was a temporary measure to allow for the road to be made, and it was his expectation that once the road is done, the storm drain would be diverted back to the usual channel on the road reserve. This has not however been done to date. The approach taken by the defendant in its pleadings was that sewage holes, storm water drainage, pits and the entire drainage system in Voi, are under Tavevo Water and Sewerage Company Limited. This however was not the angle taken when presenting evidence. The path that the defendant now took was that the actions of 1999 were actions of the National Government. It was said that in the year 1999, the National Government undertook to rehabilitate roads destroyed by the El Nino rains and the defendant therefore sought to be excused from the actions taken. I am not persuaded. It may be that indeed the road rehabilitation works were being done by the Government under the El Nino Emergency Project under the Office of the President. However, the duty to maintain storm drains remained the duty of the Local Government, in this instance the Voi Municipal Council, under the Local Government Act (now repealed). The Local Government Act (repealed) in Section 168 to 176 indeed provided for this. Section 168 provided that *“Every municipal council, town council and urban council, may establish and maintain sewerage and drainage works within or without its area.”* Under Section 169, the local authority could enter land for purposes of carrying out drainage and sewerage works. It could carry such sewers, drains and pipes through public road or open space without paying compensation and into private land after giving 30 days notice and providing compensation for damage done. The local authority could from time to time alter, enlarge, divert and discontinue such sewers, drains or pipes.

16. It follows that under the pre-2010 Constitution regime, sewers and drains were under local authorities. Indeed, it has not been claimed by the defendant that the drains in issue are supposed to be maintained by the National Government. After County Governments came into being, storm water management and water and sanitation services became devolved functions. This is contained in the Fourth Schedule of the Constitution titled Distribution of Functions Between the National Government and the County Governments. Part 2 thereof provides for the county functions and Section 11 provides for County public works and services, including (a) storm water management systems in built-up areas; and (b) water and sanitation services. It was therefore always the duty of the defendant and its predecessor to ensure the maintenance of drains and sewers within its area of jurisdiction including Voi Town. That was never the responsibility of the National Government. If the National Government undertook rehabilitation of roads and diverted some drains, then upon completion of the road, it was the duty of the predecessor of the defendant, and now the defendant, to ensure that corrective measures are undertaken. The attempts to pass the buck to the National Government are a hopeless attempt at evading responsibility. In fact, Mr. Katuta himself acknowledged that this is their function but tried to escape by claiming that the correction has not been budgeted for. There is therefore no question that in so far as the responsibility to maintain these public drains and sewers is concerned, that falls squarely at the door step of the defendant.

17. The other ground that the defendant has used to try and shirk liability is to claim that the plaintiff developed on a storm drain and that his

building was not approved. To me, it is irrelevant which came first and whether the building of the plaintiff was approved or not. What we are dealing with here is a situation where there is a public storm drain passing through a person's private land. The design of the public storm drain was never presented to me. I have nothing to doubt the assertion of the plaintiff that the diversion to his land was only meant to be temporary. It is therefore the responsibility of the defendant to ensure that the public drain is taken back into the proper public sanitary channels. And this has nothing to do with approval or non-approval of building plans. It is the duty of the defendant to maintain and ensure that its drains, sewers and pipes are not a hazard to public health and to the environment. The plaintiff is simply telling the defendant to conduct its public duty and conduct it properly.

18. I am saddened by the very defensive approach taken by the defendant in this case. Here is a person who is pointing out to the defendant the health hazard that its storm drain is causing, and instead of taking corrective action, as it should, the defendant is now blaming the plaintiff. The plaintiff did not make the diversion of the storm drain into his land. That was done under instruction from the defendant and/or his predecessor. I have already pointed out that there is no design of the storm drain that has been shown to me which demonstrates that the public storm drain was designed to pass through the plaintiff's land. You cannot therefore blame the plaintiff for developing his land. The issue of approvals is completely separate. So what if the plaintiff's buildings were not approved? Does it change the fact that there is a public health hazard caused by the public storm/sewer drain? It doesn't. Does it change the fact that the defendant has a responsibility of maintaining this public drain and ensuring that it is not a hazard to the public including the plaintiff? It doesn't. It is time that public servants undertaking public duties especially those touching on environmental management and public health took their work seriously. This is not what I saw in this case. I saw a public servant in the person of DW-1 who did not appear to care about the deleterious effects that the storm/sewer drain in question is posing to the public. Mind you, this is the Town Manager. His performance in court was pitiful. If such an approach is what the Town Manager takes, that an open drain/sewer can remain unattended to for years on end, yet businesses are being closed because of the health hazard that it is causing, then I wonder whether the County Government of Voi is serious in undertaking its duty to maintain a clean and healthy environment, as it is duty bound to do so. I am sure this County Government will be quick to collect rates and other taxes from businesses. But have they provided a conducive environment for these businesses to operate? And what taxes do they expect if businesses are closed because of health hazards created by inaction of the same County Government? Have they considered the damage to the economy that job losses bring when businesses close. Article 42 of the Constitution provides that every person is entitled to a clean and healthy environment. The wording there is "every person." That includes even the person whose face you may not like or whose actions and activities you still question. It is an affront to Article 42 for the defendant to refuse to take corrective measures despite the numerous pleas of the plaintiff. And no, budgetary constraints cannot be taken as an excuse. The plaintiff was raising issues from the year 2010. He filed this suit in the year 2015. Does it take 5, 10 years, to budget for correction of a public health hazard?

19. May I remind the defendant of the provisions of Section 116 of the County Government Act on the principles of public service delivery. It provides as follows :-

*116. Principles of public services delivery in the county*

*(1) A county government and its agencies shall have an obligation to deliver services within its designated area of jurisdiction.*

*(2) A county shall deliver services while observing the principles of equity, efficiency, accessibility, non-discrimination, transparency, accountability, sharing of data and information, and subsidiarity.*

20. I am not convinced and I am not impressed by the defendant. People deserve, nay, have a right to live in an environment that is clean and tidy. It is the responsibility of the defendant to ensure that the environment around its town is clean and healthy to every person who is in the town. Making flimsy excuses and dodging responsibility is a no, no. It in fact appears that not just the plaintiff has been concerned about the inaction taken by the defendant. I have seen a letter from the Department of Health Services of the defendant dated 20 January 2015, giving notice to the Voi Town Administrator to take remedial works and clean and unblock the public storm drains (including the one under Augustine George Resort) and do any other works necessary to promote hygiene. It appears that this letter was ignored by the Town Administrator. Another notice was issued to the Town Administrator on 26 February 2015, giving a notice to abate nuisance. Again, it appears that this notice was ignored. NEMA issued an improvement order on 5 May 2015, asking the County Chief Officer of Water and Irrigation, to take measures to improve the poor effluent management within Voi Town. Specifically, that order identified that the storm water drainage passes through private owners' plots flowing downstream into the open environment and that this stagnant waste water poses a health risk to humans and causes environmental pollution. Nothing appears to have been done leading to closures of the restaurant business of the plaintiff.

21. We are dealing with a very unfortunate case of a Town Administrator and County Government that does not appear to take seriously its duties to provide and maintain a clean and healthy environment. The plaintiff is perfectly entitled to complain about the manner in which the defendant is acting. The plaintiff is entitled under Article 42 of the Constitution to a clean and healthy environment and under Article 70 to enforce that right.

22. This may not be a constitutional petition, and it doesn't have to be for a person to assert a right under the constitution. The plaintiff is perfectly entitled to demand a clean and healthy environment and the defendant has a duty to provide it. I think the plaintiff has made out a case for the issuance of the declarations in prayers (a) and (b) of the suit and issuance of the order in prayer (c) thereof. In addition, this court has the power to issue an environmental restoration order under Section 111 of the Environmental Management & Coordination Act (EMCA). It provides as follows :-

*111. Issue of environmental restoration order by a court*

*(1) Without prejudice to the powers of the Authority under this Act, a court of competent jurisdiction may, in proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment.*

*(2) For the avoidance of doubt, it shall not be necessary for a plaintiff under this under this section to show that he has a right or*

*interest in the property, environment or land alleged to have been or likely to be harmed.*

23. Thus apart from issuing the declarations in prayers a,b, and the order in prayer c, this court also issues an environmental restoration order, compelling the defendant to take measures to remove the drain pipe from the plaintiff's land and create public drain pipes that are safe and hygienic and which do not pose a risk to the environment and to public health.

24. Let me now turn to the issue of damages. Is there a case made out for damages?

25. I will start with Section 170 of the Local Government Act, which was drawn as follows :-

*170 (1) All sewers, drains, pipes, ventilating shafts or other conveniences for the disposal of sewage or drainage, constructed by or which are under the control of a municipal council, town council or urban council, shall be vested in such local authority, and such local authority, its officers and servants, shall at all times have a right of access to private property for the purpose of inspection, maintenance, alteration or repairs of such sewers, drains, pipes, ventilating shafts or other conveniences vested in it, and may do all things necessary to uncover and expose such sewers, drains, pipes, shafts or other conveniences for the purpose of inspection, alteration or repair.*

*(2) A local authority which exercises any of the powers conferred by this section shall, in its discretion, either repair all damage done or caused thereby or pay compensation for any such damage not so repaired, the amount of any such compensation being determined, in default of agreement, by arbitration (emphasis mine).*

26. It will be seen from the above that under the former regime there was actually a right to compensation for damage caused by drains or works undertaken in a person's land. I am not aware of an equivalent in the current County Government Act. But under common law, a person who suffers injury is entitled to compensation. There is also the general polluter pays principle under environmental law. The plaintiff has certainly suffered loss and damage because of the acts of omission and/or commission of the defendant. I am of the view that he is entitled to compensation by way of damages. The plaintiff did not plead any general damages, and Mr. Odongo did not, in his submissions, make a claim for these. I would readily have awarded general damages if the same were pleaded.

27. What the plaintiff pleaded and has asked for are more or less in the nature of special damages which must not only be pleaded but must also be specifically proved. It will be recalled that I held that the tort herein is continuing thus not caught up by limitation. However, there will have to be limitation on the claim of damages, for these can only be claimed for those within 3 years to the filing of the case rule. The rule is that where an action arises *de die in diem* (from day to day) the plaintiff can recover for such portions of the tort as lie within the time allotted by statute although the first commission of the tort occurred outside the six year or three year limitation period as the case may be for contracts and tort. I can only therefore entertain damages from 26 June 2012. The plaintiff asked for damages in form of loss of rent being Kshs. 12,000/= per month for each stall (x10); Kshs. 220,000/= per month for each godown (x2) and Kshs. 50,000/= for the restaurant. The plaintiff produced an expert who assessed the rent payable. The defendant did not bring any evidence to challenge the assessment of the plaintiff. I have no reason to doubt this assessment. I will award the plaintiff the amount of Kshs. 610,000/= per month (Kshs. 7,320,000/= per annum) from 26 June 2012 to the date of this judgment in total Kshs.68,320,000/=. Interest will start to accrue from the date of filing suit till payment. The defendant is given 12 months to take corrective action and ensure that the nuisance is removed. If it does not, then it will be liable to pay the plaintiff the same sum of Kshs. 610,000/= per month from the date of this judgment till it has abided by its obligations. For the avoidance of doubt, if it proceeds to undertake repairs within 12 months, this money (that accrues after judgment) will not be claimed. If it doesn't, this money will be claimed and will continue being claimed until the repairs are undertaken.

28. The only other issue left is costs. Costs will follow the event. The defendant to pay the costs of this suit.

29. Judgment accordingly.

**DATED AND DELIVERED THIS 4TH DAY OF NOVEMBER 2021.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**