



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 424 OF 2014

LINCOLN KIVUTI KARINGI.....1ST PLAINTIFF

LINA NJURA MUTURI..... 2ND PLAINTIFF

VERSUS

MICHAEL NJUGUNA MAKINDU.....DEFENDANT

JUDGMENT

This suit was commenced by way of a plaint dated 31st March, 2014 filed in court on 4th April 2014. The Plaintiffs sought the following reliefs against the defendant;

- a) A declaration that the Defendant is not entitled to keep soil deposit on his premises in such a manner as to exert any kind of force and/or pressure on the Plaintiffs' perimeter wall or to avail opportunity for thieves to leap into the Plaintiffs' property to carry out their unlawful activities.
- b) An order for the immediate evacuation of the soil deposit on the Defendant's land.
- c) A permanent injunction restraining the Defendant from continuing to maintain and keep the soil deposit on his premises so as to be a nuisance to the Plaintiffs.
- d) Special damages of Kshs. 2,287,402.64.
- e) General damages.
- f) Costs of the suit.
- g) Interest on (d), (e) and (f) at court rates.
- h) Any other relief the court deems fit to grant.

The Plaintiffs' case:

The Plaintiffs averred that they were the registered proprietors of all that parcel of land known as L.R No. 14225/213 (hereinafter referred to as "the suit property") while the Defendant was the registered proprietor of all that parcel of land known as L.R No. 14225/87 which adjoins the suit property (hereinafter referred to as "the adjoining property"). The Plaintiffs purchased the suit property in 2006. The suit property had a masonry perimeter wall. In 2010, the Defendant caused to be deposited on the adjoining property a layer of clay soil covered with another layer of red loam soil with the effect that the level of the adjoining property rose by about 2 metres. This resulted in force and pressure being exerted on the masonry wall that separated the suit property from the adjoining property. The soil deposited on the adjoining property also made it easy for thieves to access the suit property and steal from the Plaintiffs' tenants.

Due to persistent force and pressure that was being exerted on the said perimeter wall, the wall weakened with time and cracks started to develop on the same. On the night of 13th December, 2013, a significant portion of the said wall collapsed causing the Plaintiffs to suffer loss and damage the particulars of which were pleaded as follows;

- 1) Professional fees for investigation into the stability of the perimeter wall - Kshs. 382,800/-.
- 2) Costs incurred in erecting a temporary corrugated iron sheet (*mabati*) wall - Kshs. 20,000/-.

- 3) Quotation for architectural drawings for re-erecting the wall - Kshs. 185,600/-.
- 4) Quotation for fees for submission of architectural drawings to the Nairobi City County for re-erecting the wall - Kshs. 33,520/-.
- 5) Quotation for engineering drawings for re-erecting the wall -Kshs. 174,800/-.
- 6) Quotation for fees for submission of engineering drawings to Nairobi City County for re-erecting the wall - Kshs. 600/-.
- 7) Quotation for the cost of reconstruction of the collapsed wall (average) - Kshs. 1,490,082.64/-.

Total - Kshs. 2,287,402.64/-

The Plaintiffs averred that the said wall collapsed as a result of the Defendant's negligence the particulars of which were pleaded as follows;

- 1) The Defendant failed to take any or sufficient precautions against causing or permitting pressure to be exerted on the Plaintiffs' wall.
- 2) The Defendant failed to take any precautions to prevent thieves from using the raised level of the adjoining property as a passage to commit acts of theft on the suit property and/or failed to take all proper and reasonable steps to ensure that no undue inconvenience was caused to the Plaintiffs.
- 3) The Defendant failed to observe due care by not applying for and/or securing authorization from several statutory bodies tasked with oversight jurisdiction over the matters complained of like the National Environment Management Authority and the Nairobi City County which would have required the carrying out of an Environmental Impact Assessment that could have identified the nuisance complained of in advance and thus prevented it.
- 4) The Defendant failed and/or refused to pay any or sufficient heed to the numerous complaints by the Plaintiffs about the possible collapse of the wall which came to pass and the use by thieves of the raised level of the adjoining property as a means to gain access to the suit property to commit acts of theft.

The Plaintiffs averred that due to the foregoing matters, their investment on the suit property had been seriously hampered and interfered with causing them to suffer damage.

The Defendant's case:

The Defendant filed a defence on 28th May, 2014 in which he denied the Plaintiffs' claim in its entirety. The Defendant averred that the adjoining property was located on the lower side of the suit property and in view of the slope, storm water and raw sewage from the suit property would be directed to the adjoining property thereby rendering the property unfit for any use hence the need for reclamation. The Defendant admitted that in 2010 in an effort to reclaim the adjoining property, he deposited red soil that was excavated from the construction site of the Northern Bypass road thereon. The Defendant denied that the said red soil caused the level of the adjoining property to rise by 2 metres and that the same exerted pressure on the masonry perimeter wall causing it to collapse. The Defendant denied that the Plaintiffs had suffered any loss.

The Defendant averred that the Plaintiffs' perimeter wall was poorly erected without the necessary support pillars and the same had cracks all round. The Defendant averred that the Plaintiffs were trying to repair the said wall as at the time of its collapse. The Defendant denied that the Plaintiffs' perimeter wall collapsed as a result of his negligence.

The evidence tendered at the trial by the Plaintiffs:

At the trial, the 1st Plaintiff gave evidence on his own behalf and on behalf of the 2nd Plaintiff after which they called two witnesses. The 1st Plaintiff (PW1) adopted his witness statement dated 31st March, 2014 as part of his evidence in chief. In his oral testimony, 1st Plaintiff stated as follows: They bought the suit property in 2006. The property was developed with residential houses and had a 2-metre high perimeter wall. The Defendant owned the adjoining property. In 2010, the Defendant piled soil on the adjoining property. They complained to the Defendant about the said soil through their caretaker. The Defendant levelled or spread the said soil to a height of about 1.8 metres. They told the Defendant that the said soil would affect the wall. In 2013 when the said wall began to bend, the Plaintiffs engaged a consultant engineer to study the impact of the said soil on the said wall and to advise them on what to do. The said engineer concluded in his report that the soil on the adjoining property had put pressure on the perimeter wall and that if the situation remained constant, the said soil would lead to its collapse. He paid to the said consultant engineer Kshs. 382,800/- for the report. The wall collapsed three months later. They reported the matter to the police and asked their advocates to write to the Defendant a demand letter. Initially, 15 metres of the 30 metre perimeter wall collapsed. There was a further collapse leaving only about 5 metres of the original wall standing.

PW1 stated further that he had not reconstructed the wall because the soil complained of was still on the adjoining property and that the reconstruction of the wall should be done by the Defendant who caused its collapse. PW1 produced the following as exhibits in support of the Plaintiffs' claim for special damages in the sum of Kshs. 2,287,402.64; Quotations from three contractors (with the average being Kshs. 1,500,000); Invoice and receipt for putting up a temporary iron sheet fence (Kshs. 20,000); Acknowledgement of payment from Prof. Sixtus Kinyua (Ksh. 382,800); Quotation for redesigning of the wall (Kshs. 185,600/-); Quotation for structural engineering design and supervision of construction of the damaged wall by Prof. Eng. Sixtus Kinyua(Kshs. 174,800/-) and three Invoices from the City Council of Nairobi (Kshs. 30,000/-, Kshs. 3520/- and Kshs. 600/- respectively). PW1 produced the following further documents as exhibits: a report by Prof.

Sixtus Kinyua Mwea dated September, 2013, a police abstract dated 27th January, 2014, a demand letter dated 10th July, 2013, photographs of the collapsed wall and a certificate of title for the suit property. PW1 urged the court to grant the reliefs sought by the Plaintiffs in the plaint.

The Plaintiffs' second witness was Prof. Sixtus Kinyua (PW2). He stated as follows: He was a registered engineer. He prepared a report on the instructions of the Plaintiffs. He produced the report as PExh.10. He charged Kshs. 382,000/- for the report. He visited the suit property in July 2013 in relation to the report. He noted that the disputed wall had horizontal and vertical cracks and there was soil backfill on the other side of the wall. The wall was 2 metres high while the backfill was 1.2 metres high. He stated that soil introduced horizontal forces which should have been contained by the length of the wall. He stated that if there was no counter force, the wall could begin to crack slowly and could eventually collapse. He stated that since the wall on the suit property was a masonry wall, it could not resist the force. He stated that before the wall collapsed, he had recommended that the soil backfill on the adjoining property be removed and proper drawings be made for the restoration of the wall. He stated that on 9th January, 2014, he wrote to the Plaintiffs giving a quotation for engineering design and supervision of the construction of a new wall.

The Plaintiffs' next witness was Kennedy Mugendi (PW3). PW3 adopted his witness statement dated 4th April, 2014 and stated further as follows:

He was employed as a caretaker by the 1st Plaintiff between 2004 and 2010. The Defendant owned the adjoining property which was separated from the suit property by a wall. In 2010, a Chinese contractor which was building the Northern Bypass road poured soil on the adjoining property and placed it against the wall leaving no space between the soil and the wall. The Defendant was not involved in the exercise. The 1st Plaintiff asked him to complain to the Defendant about the soil that was placed against the wall. He denied that any sewage or storm water used to collect along the wall. He stated that the sewage from the suit property was collected in a septic tank. He stated that he was not aware that the wall in question had collapsed. He stated that it was still standing when his employment with the 1st Plaintiff ended.

The evidence tendered by the defendant:

The Defendant (DW1) gave evidence and did not call any other witness. The Defendant adopted fully his witness statement dated 2nd February, 2015 as his evidence in chief. In his said statement, the Defendant stated as follows: He was the proprietor of the adjoining property which was located on the lower side of the suit property. The Plaintiffs purchased the suit property in 2006. It had a perimeter wall around it. The wall had multiple cracks because of poor workmanship and lack of supporting structures. There was a slope from the Plaintiffs' property to the adjoining property. The Plaintiffs took advantage of the slope and directed all storm water and raw sewage from the suit property to the adjoining property making it unusable. In 2010, he decided to reclaim the adjoining property by filling it with soil from the Northern Bypass construction site. He wanted to make it suitable for the construction of a commercial centre comprising of shops, petrol station, restaurant and vehicle service bay. He stated that the said reclamation made it impossible for the Plaintiffs to channel storm water and raw sewage into the adjoining property. He stated further that with no escape from the suit property, the raw sewage and storm water accumulated at the lowest level of the perimeter wall thus weakening it. He denied that his reclamation of the adjoining property caused cracks and subsequent collapse of the Plaintiffs' wall.

On re-examination, he stated that part of the Plaintiffs' wall that was facing the Northern Bypass and which was a non-boundary wall had also collapsed and as such, the soil that was deposited on the adjoining property was not the cause of the collapse of the boundary wall. The Defendant stated that he had sold the adjoining property to a third party who had put up a new boundary wall and as such there was no need to restore the collapsed wall.

The Plaintiffs' submissions:

After the close of evidence, the parties made closing submissions in writing. The Plaintiffs filed their submissions on 1st December, 2020 in which they framed the following issues for determination by the court on which they submitted on;

1. Whether the harm suffered by the Plaintiffs, namely, cracking and subsequent collapse of the Plaintiffs' perimeter wall was as a direct result of the soil that the Defendant had deposited against the said wall.
2. Whether the Defendant in his actions showed intentional, negligent or reckless interference with the Plaintiffs' use and enjoyment of their parcel of land.
3. Whether the Plaintiffs are entitled to the orders sought.

On the first issue, the Plaintiffs submitted that their wall was intact until the Defendant brought additional soil on his land thus changing the topography resulting in the new soil deposit exerting force and pressure on the masonry perimeter wall that separated the adjoining property and the suit property. The Plaintiffs relied on Mohazo EPZ Ltd. v New Wide Garments EPZ Limited & another [2020] eKLR and submitted that where a party engages in actions that are likely to endanger other peoples premises, such party is liable for any resulting damage.

The Plaintiffs relied on Rylands v Fletcher [1868] UKHL 1 and submitted that they had established that the Defendant had committed acts that amounted to nuisance. The Plaintiffs submitted that the Defendant ought not to have kept the said soil on his land in such manner as to occasion cracking and subsequent collapse of the Plaintiffs' perimeter wall.

On the second issue, the Plaintiffs relied on Donoghue v Stevenson [1932] AC 562 and submitted that the Defendant had been negligent. The Plaintiffs submitted that the Defendant owed the Plaintiffs a duty of care not to interfere with their enjoyment of the suit property. The Plaintiffs submitted that the Defendant breached this duty by depositing a layer of soil on the adjoining property that exerted pressure on the wall causing it to collapse. The Plaintiffs submitted that the said collapse occasioned loss and damage to the Plaintiffs.

On the third issue, the Plaintiffs submitted that they were entitled to the orders sought since they had proved that harm was occasioned to them by the Defendant.

The Defendant's submission:

The Defendant filed his submissions on 10th December, 2020. The Defendant submitted that the report that was prepared and produced in evidence by PW2 could not form a basis for the Plaintiffs' claim. The Defendant submitted that the Plaintiffs had sent a demand letter to him before the said report by PW2 in which they had raised issues that were of concern to them. The Defendant submitted that the said report was manufactured by the Plaintiffs to hoodwink the Court.

The Defendant submitted further that damages were not specifically pleaded and proved as required by the law. The Defendant argued that in the case of the Kshs. 382,000/- that was said to have been paid to PW2, no evidence of payment either in cash or by cheque was produced in court. With regard to Kshs. 1, 500,000/- that was claimed as the average cost for repairing the collapsed wall, the Defendant argued that none of the quotations was produced as exhibit. The Defendant submitted that the documents produced in support of the Plaintiffs' claim were of no evidential value.

The Defendant submitted that the Plaintiffs had failed to prove that their wall collapsed as a result of the Defendant's negligence. The Defendant submitted further that the Plaintiffs did not also prove the damages claimed. The Defendant urged the court to dismiss the Plaintiffs' suit.

Issues for determination.

From the pleadings, the following in my view are the issues arising for determination in this suit;

1. Whether the Plaintiffs' boundary wall between the suit property and the adjoining property collapsed as a result of the Defendant's negligence.
2. Whether the Plaintiffs suffered loss and damage as a result of the said collapse of their wall.
3. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.

Whether the Plaintiffs' boundary wall between the suit property and the adjoining property collapsed as a result of the Defendant's negligence.

Section 109 of the Evidence Act, Chapter 80 Laws of Kenya provides as follows:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

In the text, Commercial Environmental Law & Liability (Thomson Sweet & Maxwell), the authors have outlined the ingredients of negligence at paragraph C1.2 as follows;

- a) The existence of a legal 'duty of care' owed to the Plaintiff by the defendant;**
- b) Breach of that duty of care;**
- c) Damage to the Plaintiff which results from that breach; and**
- d) Foreseeability on the part of the defendant that such conduct would have inflicted upon the plaintiff the particular type of damage which he now complains of.**

In Donoghue v Stevenson (supra) Lord Atkin stated as follows:

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbour. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

It is not disputed that the Plaintiffs' boundary wall between the suit property and the adjoining property collapsed on the night of 13th December, 2013. What is in dispute is whether the collapse of the said wall was caused by the negligence of the Defendant. The burden was upon the Plaintiffs to prove the negligence pleaded against the Defendant. From the evidence on record, I am satisfied that the Plaintiffs have demonstrated that the said boundary wall collapsed as a result of the soil that the Defendant brought onto the adjoining property and heaped against the wall. From the evidence on record, the Plaintiffs were concerned about the effect of the said soil before the wall collapsed. The Plaintiffs had noted unusual cracks on the wall and suspected that the same was being caused by the pressure from the soil on the adjoining property that was leaning on it. The Plaintiffs engaged PW2, a consultant engineer to have a look at the wall and advise on what was causing the said cracks. PW2 visited the suit property and the adjoining property on 6th July, 2013. In his report dated September, 2013, PW2 stated that when he inspected the wall, the same had suffered distress that was manifested by cracks. PW2 stated that on examination of the ground,

he observed that there was a level difference of 1.2 metres between the side of the wall facing the suit property and the side facing the adjoining property. PW2 stated that the wall was 2 metres in height and that the owner of the adjoining property had filled up the property with soil up to a height of 1.2 metres. In his findings, PW2 stated that the wall could not withstand the forces from the said soil on the adjoining property that was being exerted on it and that the wall was at risk of failure. PW2 recommended that the soil that had been deposited on the adjoining property be removed to relieve pressure that it was exerting on the boundary wall so as to avert its collapse after which the wall could be repaired. PW2 produced his report in evidence as PExh. 10.

On 10th July, 2013 after PW2 had visited the suit property, the Plaintiffs through their advocates wrote to the Defendant pointing out among other things that the soil that the Defendant had deposited on the adjoining property was exerting pressure on the boundary wall and was causing damage to the wall. In the letter, the Plaintiffs demanded that the Defendant removes the said soil that was exerting pressure on the said wall. In a letter dated 17th July, 2013 in response to that demand, the Defendant through his advocates on record contended that as the owner of the adjoining property, he had a right to use the same in whatever manner he deemed fit. The Defendant admitted that he had deposited soil on the adjoining property. The Defendant claimed that the said soil was for landscaping and denied that it had caused any damage to the boundary wall. The Defendant did not take any action and the wall collapsed 4 months later. The Defendant claimed in his defence and evidence that the Plaintiffs' boundary wall was weak due to poor construction and that the same collapsed as a result of exposure to storm water and leaking sewage. The Defendant did not place any convincing evidence before the court in support of his claims. I am satisfied that the Plaintiffs have proved on a balance of probabilities that their boundary wall collapsed as a result of the soil that was deposited by the Defendant against the said wall on the side of the adjoining property.

I am in agreement with the Plaintiffs that the Defendant owed a duty of care to the Plaintiffs to ensure that the soil that he deposited on the adjoining property did not cause damage to the Plaintiffs' wall. I am satisfied that the Defendant breached that duty as a result of which the Plaintiffs suffered damage. The Plaintiffs have proved negligence on the part of the Defendant. I am of the view that the Defendant should have taken action as soon as it was pointed out to him that the said soil was exerting pressure on the said wall. His failure to take any remedial action was itself negligent. I am of the view that the fact that the wall may have been weak due to poor workmanship in its construction, does not absolve the Defendant from his acts of negligence.

In Mohazo EPZ Ltd. v New Wide Garments EPZ Limited & another (supra) which concerned a claim similar to the one before this court, the court stated as follows:

“From the evidence adduced, it is clear that notwithstanding the alleged shortcomings of the wall what actually caused the collapse of the wall was the fact that the 1st Defendant loaded rolls of fabrics on a wall which was a non-loading wall and which was not meant to carry any load apart from its own weight. Whereas, going by the report of Saload Adjuster (K) Ltd, had the structure been reinforced it would have to some extent ameliorated the occurrence of the incident, it is clear that had the 1st Defendant not loaded its rolls onto the wall the same would not have collapsed.”

From the evidence of PW2, the wall in question was not a retaining wall. It was a masonry perimeter wall. It could not therefore withstand the pressure exerted by the soil. Even if poor workmanship had been established, the materiality of the pressure that was exerted on a wall that was not designed to withstand such pressure cannot be ignored. In view of the foregoing I find that the soil on the adjoining property caused the said masonry perimeter wall to collapse and that the said collapse was as a result of the Defendant's negligence.

Whether the Plaintiffs suffered loss and damage as a result of the said collapse of their wall.

The Plaintiffs' wall was constructed at a cost. When the Plaintiffs purchased the suit property, the wall was in place and was part of the property which they acquired for value. When the wall collapsed, the Plaintiffs lost the use and the value thereof. I am satisfied therefore that the collapse of the Plaintiffs' wall resulted in loss and damage to them.

Whether the Plaintiffs are entitled to the reliefs sought in the plaint.

I have set out earlier in this judgment the reliefs sought by the Plaintiffs against the Defendant. The Defendant led evidence that was not controverted by the Plaintiffs that he had sold the adjoining property to a third party who had taken possession thereof and had constructed a new boundary wall. The Defendant produced a photograph of the new wall in evidence. The Defendant no longer has control over the adjoining property. Prayers (a), (b) and (c) of the plaint cannot therefore be granted against the Defendant. Since the new owner of the adjoining property was not joined as a party to the suit, these reliefs have been overtaken by events.

With regard to special damages, the Plaintiffs claimed Kshs. 2,287,402.64. The claim comprised of various items one of which was Kshs. 382,000/- that was said to have been paid to PW2 for investigating and advising the Plaintiffs on the effect of the soil on the adjoining property on the boundary wall. I find the fees exorbitant and its payment not proved satisfactorily. The Plaintiffs did not tender any evidence showing that PW2 issued an invoice for the said amount and that they settled the same. There was also no official receipt issued for the payment by PW2. The letter dated 16th September, 2013 purporting to acknowledge receipt of the said payment is not sufficient evidence of payment. I have no doubt that PW2 rendered services to the Plaintiffs. I am not persuaded however that the cost of those services were Kshs. 382,800/-. The Plaintiffs also claimed Kshs. 20,000/- for the temporary fence that they put up when the perimeter wall collapsed. This claim was proved. The remaining special damages claim concerned the cost of restoring the boundary wall. Having looked at the wall that has been put up by the new owner of the adjoining property, I am in agreement with the Defendant that construction of a new boundary wall would not be necessary. The Defendant was only liable to restore the perimeter wall on the boundary between the suit property and the adjoining property. A new boundary wall has been put up. The Plaintiffs did not convince me that there is need for another wall. I will therefore not award the Plaintiffs the cost of constructing a new boundary wall. The last claim by the Plaintiffs was for general damages. General damages is compensatory. The Plaintiffs did not tender any evidence showing that they incurred any loss or damage over and above what they claimed as special damages. I will therefore award the Plaintiffs only nominal damages for nuisance.

Conclusion:

In conclusion, I hereby enter judgment for the Plaintiffs against the Defendant as follows;

1. Kshs. 20,000/- being special damages together with interest at court rates from the date of filing suit until payment in full.
2. Kshs. 50,000/- as general damages together with interest at court rates from the date hereof until payment in full.
3. Costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF JULY 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiff

N/A for the Defendant

Ms. C.Nyokabi-Court Assistant