

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO 6 OF 2020

JOSIAH ONYANCHA.....PLAINTIFF/APPLICANT

VERSUS

ANNAH KWAMBOKA OMBOGA.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. The Plaintiff filed suit against the Defendant claiming that the Defendant had trespassed onto the Plaintiff's land parcel number NYARIBARI/CHACHE/B/B/BOBURIA/6546 and dug it up with the intention of laying some pipes. He also claimed that the Defendant has been discharging effluent, rain water and noxious substances onto the Plaintiff's land thus denying him the right to a clean and healthy environment. He prayed for general damages for trespass, mental torture and embarrassment, exemplary damages and aggravated damages together with costs of the suit.

2. Contemporaneously with the suit, the Plaintiff filed a Notice of Motion dated 29th October 2020, which was subsequently amended on 12th December 2020 seeking an injunction to restrain the Defendant from trespassing on his land or allowing effluent, rain water, noxious substances to escape from her premises to the Plaintiff's parcel of land.

3. The Defendant filed Grounds of Opposition dated 9th December, 2020 in which he stated that the Applicant was guilty of laches. He also claimed that the application was misconceived, lacked merit and was bad in law. However, the Defendant has not yet filed any defence.

4. When the matter came up for the hearing of the application on 10th December 2020, the court directed that the Public Health Officer, Kisii County to visit Land Parcel No. NYARIBARI/CHACHE/B/B/BOBURIA/6924 for purposes of establishing if effluent is being discharged onto the said parcel of land and if so, by who, and file his report in court within 30 days.

5. Pursuant to the said court order, the Public Health Officer visited the suit property and filed his report dated 13th April, 2021 indicating that there was no effluent being discharged on the Plaintiff's land. He however observed that owing to the gradient of the Defendant's land which was on the upper part while the Plaintiff's land was on the lower side, it was inevitable for rain and storm water to flow from the Defendant's land onto the Plaintiff's land. He also observed that the Defendant had put some mitigation measures in place by constructing an underground tank to harvest the rainwater from his roof and demolished part of his floor so that he could lay pipes to channel the rain water into the public drainage system. He took photographs of the site which were filed alongside the report.

6. The court directed that the parties file their submissions on the report. The Plaintiff opted not to file any submissions as his counsel indicated that she was in agreement with the findings of the Public Health Officer. On the other hand, learned counsel for the Plaintiff filed his submissions dated 20th April 2021, in which he contended that there had been an earlier report dated 10th June, 2020 which stated that there was effluent flowing into the Plaintiff's compound and that the Defendant had been advised to construct a closed drainage with a water trap seal to direct water into the existing septic tank.

7. He faults the report for failing to demonstrate the methodology used to determine the gradient of the Defendant's land and introducing a disputed portion of land which is not the subject of this suit. He states that the Defendant has been engaging in acts of trespass on the Plaintiff's land since 2005 and the Public Health Officer seems to be justifying or excusing the Defendant's actions. He has referred the court to the case of **Rylands v Fletcher (1868)UKHL1** for the proposition that a person who for his own purposes brings or keeps on his land anything that is likely to do mischief, if it escapes is prima facie answerable for all the damage which is the natural consequence of its escape.

ISSUES, ANALYSIS AND DETERMINATION

8. The main issue for determination is whether the Defendant has been discharging effluent onto the Plaintiff's Land Parcel No. NYARIBARI/CHACHE/B/B/BOBURIA/6924 and whether the Defendant ought to be restrained from doing so.

9. The Public Health Officer's report dated 13th April, 2021 clearly states that as at the time of inspection on 25th March 2021, there was no effluent being discharged onto the Plaintiff's parcel of land. The Public Health Officer has indicated that owing to the gradient of the land between the Plaintiff's parcel and the Defendant's parcel of land, it is inevitable for rain water to flow from the Defendant's land to the Plaintiff's land. He has detailed the steps that the Defendant has taken to mitigate the flow of rain and storm water from her parcel to the Plaintiff's parcel of land.

10. I note that the Plaintiff's complaint dates back to 2005 and although he acknowledges that the Defendant has blocked one of her windows and laid some pipes to redirect the rain and storm water to the main drainage system, he still insists that the Defendant is discharging effluent onto his land. This is not borne out by the pictures accompanying the report. The issue of trespass constitutes the Plaintiff's main complaint in the plaint and the same can only be determined after a full hearing of the case. On the material placed before the court, I am unable to make any conclusive finding in that regard. I therefore direct that the report of the Public Health Officer shall form part of the court record and either party may call the maker of the said report to shed more light on its contents. In the meantime the case shall be set down for hearing so that the court can determine all the issues in dispute.

DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE