REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 139 OF 2017

PHOEBE WANGUI GAKUI..PLAINTIFF

-VERSUS-

LUCY WAMBUI..................................1ST DEFENDANT/RESPONDENT

WESTERN EXPRESS COACH.........2ND DEFENDANT/RESPONDENT

NAIROBI CITY COUNTY.................3RD DEFENDANT/RESPONDENT

JUDGMENT

INTRODUCTION

1. The Plaintiff filed and/or lodged before this Honorable Court a Plaint dated 6th of February 2017 and in respect of which the Plaintiff sought the following Reliefs;

i. Permanent Injunction against the 1st and 2nd Defendants from using the premises known as House Number 136/56, Joseph Kangethe Estate for commercial purposes;

ii. Permanent Injunction against the 1st and 2nd Defendants from being or causing a nuisance from the use of the premises known as House Number 136/56, Joseph Kangethe Estate for commercial purposes.

iii. General damages by the Defendants for the nuisance caused and breach of their obligations.

iv. Costs of the suit together with Interest rates for such period and at such rate this Honorable Court may deem fit to order.

v. Any such further relief the Honorable Court may deem fit and appropriate.

2. Following the filing and service of the court process herein, namely the Plaint and summons to enter appearance, the Defendants herein proceeded to and entered appearance and thereafter filed their statements of Defence. For clarity, the 1st and 2nd Defendants entered appearance and filed their statement of Defence on the 16th of June 2017.

3. On the other hand, the 3rd Defendant entered appearance on the 13th of March 2017 and thereafter filed statement of Defence on the 22nd of March 2018.

4. It is also important to note that contemporaneous with the filing of the Plaint herein, the Plaintiff also mounted a Notice of Motion Application whereby same sought for temporary Relief, in the nature of temporary injunction, to restrain the 1st and 2nd Defendants from continuing with and/or perpetuating the offensive activities that constituted the nuisance, which was complained of.

5. It is also common ground that upon the filing of the said Application, same was placed before the Honorable Court, who proceeded to and indeed granted orders of interim injunction, to avert the perpetuation of the nuisance. For clarity, the said orders issued on the 28th of February 2018, were thereafter confirmed to subsist until the hearing and determination of the suit.

EVIDENCE BY THE PARTIES

6. In ordinary circumstances, one would have expected that the subject matter would have been listed for pre-trial directions and thereafter set down for hearing in the normal manner, whereby the parties would tender and adduce evidence, which would be subject to cross-examination where appropriate.

7. On the other hand, the parties herein could very well proceed to invite the Honorable Court that same would wish to have the witness statements and the requisite bundles of documents, adopted as evidence and in which case the Honorable Court would proceed to make suitable orders, adopting the witness statements and the bundle of documents as the evidence and Exhibits, by and/or on behalf of the parties.

8. However, in respect of the subject matter, what transpired is quite different. Suffice it to say, that on the 18 th of march 2019, the Plaintiff's Counsel who intimated to the Court that the matter was for pre-trial conference abandoned the standpoint and participated in a discourse culminating into the Court making the following orders;

> "Court: Parties are to file and exchange written submissions on whether damages are payable and the quantum thereof within 21 days\. Highlighting of submissions on 27th May 2019."

9. Other than the foregoing directions, the parties herein again participated in the proceeding of 27th April 2021, culminating into the orders which were coached as hereunder;

> "Court: Plaintiff to file and serve submissions on the issue of damages and costs within 7 days. The Defendants will file and serve their submissions within 7 days of service by the Plaintiff. Plaintiff to serve the 1st and 2nd Defendants. Highlighting of submissions on 25th of May 2021."

10. Though the submissions were to be highlighted on the 25th of May 2021, the intended highlighting of the submissions on the twin issues of damages and costs, did not materialize and the matter was thereafter set down for highlighting on the 18th of October 2021.

11. I must state that on the 18th of October 2021, the subject matter was placed before me and having perused the previous proceedings and directions, which were issued by my predecessor and thus a Court of coordinate jurisdiction, I was bound by the directions hitherto made.

12. Nevertheless, it is also worthy to point out that this Court did raise the issue with the parties' Advocates as to whether same were contented with the position as herein before enumerated and whether submissions per se, would suffice, to enable the Honorable Court to render a suitable and compliant judgment.

13. In response to the enquiries by this Honorable Court, the Counsel for the Plaintiff, as well as Counsel for 3rd Defendant responded by stating that same had filed their respective submissions and were keen to adopt the written submissions filed.. Consequently, the Honorable Court was bound to retire and render a judgment.

SUBMISSIONS BY THE PARTIES

Plaintiff's Submissions

14. The Plaintiff filed her written submissions on the 10th of May 2021 and in respect of which she adverted to the twin issues of Damages and costs.

15. According to the Plaintiff, the offensive actions and/or activities by and/or on behalf of the Defendants, were responsible for causation of nuisance and that the nuisance which included noise pollution, emission of toxic fumes, air and dust pollution, were being caused with the connivance of the 3rd Defendant herein.

16. The Plaintiff further submitted that the suit premises, which are situate along Joseph Kangethe Road, in Woodley Area, were exclusively meant for Residential. But however, the 1st and 2nd Defendants have converted a House situate within the said road into a garage and car wash, which actions have not only breached the City County Zoning regulations, but have subjected the Plaintiff to pain, anxiety and mental torture.

17. The Plaintiff further submitted that as a result of the toxic fumes, emitted by the 1st and 2nd Defendants' numerous buses, and the dust caused by the buses as same maneuver access into the premises occupied by the 1st and 2nd Defendants', have resulted into air and noise pollution.

18. It was the Plaintiff's further submission that had the 3rd Defendant been proactive and alert in the performance and/or execution of her mandate, the nuisance complained of would not have arisen.

19. As a result of the foregoing, the Plaintiff has therefore sought for payment of General Damages and craves that such damages be decreed against the Defendants jointly and/or severally.

20. In support of the foregoing submissions, the Plaintiff has referred the Honorable Court to the decision in the case of **Rylands vs Fletcher [1868] LR HL 330.** Besides she has also referred the Court to the decision in the case of **M.C. Metha vs Union of India [1987] 1 SCC 395.**

21. In a nutshell, it is the Plaintiff's submission that the action of the 1st and 2nd Defendants, which culminated into the nuisance, should attract compensation and that the Court should apply the Principle of Strict Liability and thereafter apply the same principle in assessing and awarding damages.

<u>1st and 2nd Defendants' Submissions</u>

22. The 1st and 2nd Defendants' herein did not file any submissions on the twin issues of Damages and costs.

<u>3rd Defendant's Submissions</u>

23. The 3rd Defendant herein filed her written submissions, which are curiously dated the 2nd of May 2019, but which speak to the issue of costs as the only issue pending for determination by the Court.

24. According to the 3rd Defendant, the offensive activities, which culminated to and/or were responsible for the nuisance complained of, were caused by the 1st and 2nd Defendants. In this regard, the 3rd Defendant contended that cost should only be borne by the said 1st and 2nd Defendants.

25. It was the 3rd Defendant's further submission that upon the filing of the subject suit and in particular, the issuance of the interlocutory injunctive orders, officers from the 3rd Defendant's Enforcement department proceeded to and enforced the orders of the Court which led to the abatement of the nuisance.

26. On the other hand, the 3rd Defendant further submitted that on her part, she even filed proceedings in respect of the subject matter, whereby same sought eviction orders, meant to evict the 1st and 2nd Defendants from the premises, which was the source of the nuisance.

27. Even though the proceedings seeking eviction were dismissed by this Honorable Court in terms of the Ruling rendered on the 6th of December 2018, the 3rd Defendant contends that the filing of the said eviction Application was a show of good faith and the intentment of the 3rd Defendant to address the offensive nuisance.

28. In short, the 3rd Defendant pleaded with the Court that costs should only be borne by the 1st and 2nd Defendants.

29. Suffice it to say, that the 3rd Defendant did not make any submissions on the issue of Damages and whether same are payable to and/or in favor of the Plaintiff or at all.

<u>ISSUES FOR DETERMINATION</u>

30. Having examined the pleadings filed by and/or on behalf of the parties, and having evaluated the submissions filed by and/or on behalf of the Plaintiff and 3rd Defendant respectively, I am compelled to itemize two issues for determination, namely;

> i. Whether the Plaintiff has laid a basis and/or foundation for payment of General Damages and if so, the quantum thereof.
>
> ii. Whether costs are payable and if so, who should bear the costs of the suit.

<u>ANALYSIS AND DETERMINATION</u>

<u>Issue Number One</u>

<u>Whether the Plaintiff has laid a basis and/or foundation for payment of general damages and if so, the quantum thereof.</u>

31. The starting point in respect of this matter is an affirmation that each and every citizen is entitled to the rights to clean and healthy environment, free and devoid of pollution in its many perspectives, be it air, noise, sound and/or environmental pollution.

32. In support of the foregoing affirmation, I can do no better than to reproduce the provisions of **Articles 42 and 70 of the Constitution, 2010**, which provides as hereunder;

> **"<u>Environment.</u>**
>
> 42. Every person has the right to a clean and healthy environment, which includes the right—
>
> (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
>
> (b) to have obligations relating to the environment fulfilled under Article 70.

Enforcement of environmental rights.

70. (1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate—

(a) to prevent, stop or discontinue any act or omission that is harmful to the environment; (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or

(c) to provide compensation for any victim of a violation of the right to a clean and healthy environment. (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury."

33. I must also state and underline that in the same vein, I am also a strong proponent of the **Rio De Janeiro Agreement on the Environment and Sustainable Development, 1992,** which espoused the three environmental principles, namely;

i. Precautionary principle

ii. Prevention Principle

iii. Polluter Pays Principle

33. In respect of the foregoing position, I would therefore be on the forefront in enforcing the Right to clean and healthy environment, with a view to ensuring the attainment of sustainable usage and sustainable development, in favor of the current as well as the future generations.

34. To underscore the jurisdiction of the Court to intervene and ensure the realization of the right to clean and healthy environment, it is important to take note of the provisions of **Section 13(3) of the Environment and Land Court Act, 2011**, which provides as hereunder;

"(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution."

35. Having underlined the foregoing position and particularly the affirmation to the protection of the Right to clean and healthy environment, the question that however requires determination in respect of the instant matter is whether Damages for violation to the right of clean and healthy environment, can be made and/or awarded in the absence of any Evidence tendered and/or adduced before the Court.

36. In this regard, I must underline that evidence plays a critical role and thus provides the Court with an evidential basis, upon which the applicable law is thereafter anchored and/or predicated. Consequently, in the absence of evidence, in its infinite forms, the Honorable Court would be incapacitated to apply the relevant law, with a view to reaching a just and fair determination.

37. It is also important to note that law cannot be applied in vacuum and that every litigant who beseeches the Court to grant a favorable order, must as of necessity, place before the Court, credible and sufficient material, upon which the law is thereafter applied.

38. In respect of the subject matter, I am afraid that the person upon whom the burden to place the material before the Court and thereafter prove her case on a balance of probabilities, has adduced and/or tendered no Evidence at all.

39. In the premises, the question thus remains, whether the submissions which were crafted and filed on behalf of the Plaintiff herein, can take the place of evidence and thus found a basis for an award of Damages in favor of the Plaintiff.

40. In my humble view, submissions, which have been variously described as the marketing language of the lawyers, cannot usurp the place of Evidence in its conventional nature or at all.

41. In support of the foregoing position, I take guidance from the Decision in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** where the Court observed as hereunder;

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

42. On the other hand, the position that no award can be made on the basis of submissions, but albeit in the absence of evidence was further underlined by the Court of Appeal in the case of **Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997** whereby the Court stated as hereunder;

> "…no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the **Civil Procedure Rules** [now Order 18 rule 2 of the **Civil Procedure Rules**]."

The same Court in **Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998** found the practice of making awards on the basis of the submissions rather than the evidence deplorable."

43. It is clear in respect of the subject matter that the Plaintiff, who was chargeable with the burden of proof abdicated her role and thereby threw caution to the wind. In this regard, the legal consequence of such kind of conduct, must be met with a pronouncement that no Damages can arise and/or ensue.

44. In any event, it is not open for the Honorable Court to anticipate, speculate and/or otherwise imagine, that because the premises where the nuisance was emanating from, fell within a residential area, and because the presence of the numerous buses, would no doubt cause noise and air pollution, the Honorable Court should thus proceed on an hypothesis and assumption, that nuisance thus accrued. Such a situation is not fathomable in our jurisprudence.

45. In support of the foregoing position, I find support in the Decision in the case of **Kibos Distillers Ltd & 4 others vs Benson Ambuti Adega & 3 others [2020]** where the Court stated;

> "In the instant matter, there is no scientific empirical evidence on record to prove point pollution and its causal link to the activities of the three appellants. No sampling technique to prove river pollution was tendered in evidence. Above all, the alleged deleterious effect of the vinasse to the environment was not scientifically proven and no expert report on the effect of vinasse to the environment was produced in evidence.
>
> Further, it is an incorrect deduction and conclusion of fact to make a finding that the fact that the respondents had raised their complaints over raw effluent discharge into the environment by the three appellants' years before filing the petition was proof of environmental degradation. Proof that a complaint had been raised years before is not proof of environmental degradation. Pollution is primarily proved by empirical, technical and scientific evidence and not by lay man opinion testimony or depositions. In the context of the statements by the learned judge as stated above, I find that the judge erred in deducing and arriving at conclusions of fact that the three appellants were responsible for river pollution without any scientific, empirical and sampling evidence to prove point pollution and the causal link to the three appellants."

46. Taking the cue from the foregoing observation, I am afraid that in the absence of credible or any evidence at all, by the Plaintiff herein and given the perfunctory manner in which the proceedings herein were conducted, the Plaintiff is entitled to no Damages.

Issue Number Two

Whether costs are payable and if so, who should bear the costs of the suit.

47. Before venturing to address the incidence of costs and whether same is payable in respect of the subject matter and by whom, it is necessary to take cognizance of the provisions of the **Fourth Schedule of the Constitution, 2010.**

48. Pursuant to and in line with the said provisions of the Fourth Schedule of the Constitution 2010, as read together with provisions of the **Physical and Land Use Act,** 2019, the mandate to carry out physical planning and designate land use, which will include change of user, where appropriate, was placed at the doorstep of the County Governments, in this case the 3rd Defendant.

49. Pursuant to and in line with the aforesaid position, it was incumbent upon the 3rd Defendant herein to ensure that the zonal regulations as pertains to nature of buildings and the land use, was duly observed and complied with by all.

50. However, in respect of the subject matter, the Nuisance that has been complained of arose as a result of the failure by the 3rd Defendant to enforce the provisions of the Physical Planning Act,[now repealed and replaced] by the Physical and Land Use Act 2019. In this regard, it was the abdication of statutory duty that precipitated the nuisance complained of.

51. Owing to the foregoing, even though the nuisance was not perpetrated by the 3rd Defendant, same condoned and/or connived in the perpetuation of the nuisance, by its dereliction of duty.

52. As a result of that dereliction of duty, the Plaintiff was constrained to and indeed approached this Honorable Court and it is worthy to note that the 3rd Defendant only sprung into action, after the Court issued orders of temporary injunction and not otherwise.

53. In the premises, I find and hold that both the 3rd Defendant, as well as the 1st and 2nd Defendants herein, were culpable for the causation of the nuisance, which precipitated the filing of the instant suit.

54. In my humble view, the Defendants herein are jointly and severally liable to pay the costs of the subject Proceedings.

55. In support of the foregoing position, I take guidance from the Decision in the case of **Farah Awad Gullet vs CMC Motors Group Ltd [2018]** where the Court stated as hereunder;

“In James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005), the Court held inter alia, that:

“Notwithstanding the provisions of section 27, above costs is generally a matter within the discretion of the Court. The Court did not, however, explain why it denied the appellant his costs before the trial Court. In absence of any explanation in that regard we think that the learned Judge of the Superior Court erred in denying the appellant the costs of the suit before the trial Court”.

Where there is sufficient reason why a trial Court awarded costs, then the appellate Court will not interfere with that award as was the case in S.K. Njuguna & another versus John Kiarie Waweru & another [2009] eKLR (Civil Appeal No. 219 of 2008) where the Court stated that:

“We reiterate that the issue of costs is in the discretion of the Court and in this appeal, we are satisfied that there were justifiable reasons why the appellants herein were ordered to pay the costs although the Election Petition against them was dismissed.”

FINAL DISPOSITION

56. Having addressed the twin issues that the parties agreed on in the course of the Proceedings which I have alluded to herein before, I reach the conclusion as follows;

i. No damages are due and/or awardable to the Plaintiff.

ii. +The Plaintiff is however awarded costs of the suit and same shall be borne by the Defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant