



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 308 OF 2012

KAIGOKEM & PARTNERS LIMITED.....1ST PLAINTIFF

JENIFFER NKUENE RIRIA.....2ND PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL.....1ST DEFENDANT

NAIROBI CITY WATER & SEWERAGE CO.....2ND DEFENDANT

S.S MEHTA & SONS LIMITED.....3RD DEFENDANT

JUDGMENT

1. The 1st plaintiff **KAIGO KEM & PARTNERS LIMITED** and the 2nd plaintiff **JENIFFER NKUENE RIRIA** (collectively referred to as plaintiffs) have filed this case against the defendants, **CITY COUNCIL OF NAIROBI** (hereinafter called the council), **NAIROBI CITY WATER AND SEWERAGE COMPANY** (hereinafter called Nairobi Water and Sewerage) and **S.S. MEHTA & SONS LIMITED** (hereinafter called MEHTA).

2. The plaintiffs seeks judgment against all the defendants jointly and severally for Ksh 2,801,823.00 for cost of construction of sewer line, Ksh 330,000 for cost of maintenance of that sewer line and further charges up to date of judgment, for Ksh 489,428.72 being charges levied by Nairobi Water & Sewerage as sewerage charges, an order that Nairobi Water & Sewerage do take control and management of the sewer line, for general damage, and for an injunction restraining Nairobi Water and sewerage from interfering with the manholes and sewer line.

3. The plaintiff on or about 2006 requested the council to construct a sewer line to serve properly L.R. No. Dagoretti/Riruta/5121 (the subject property). The plaintiffs' evidence is that the council declined. The plaintiffs engaged 3 consultants to undertake that construction that is an engineer, a quality surveyor and a contractor. The plaintiffs' evidence is that the total cost of that construction was Ksh 1,951,823.00. That was the total cost of construction and of professional fees. The plaintiffs' prayer for reimbursement of that amount is because, as pleaded by the plaintiffs, the sewer line has been used by the general public.

4. Further, the plaintiffs seek for MEHTA to compensate them for damage caused to the manhole and for the blockage to the sewer line which occurred when MEHTA, had been contracted to construct Naivasha Road.

ANALYSIS

5. I have considered the parties pleadings, evidence, documents and submissions and having done so, I am of the view that only one issue arises, and that one issue will determine the plaintiffs' case at bar. The issue is:

“Did the plaintiffs follow the conditions of approval of construction of sewer line, if so are the plaintiffs entitled to judgement as sought.”

Although the 2nd plaintiff stated in her written statement that the subject property is registered in the name of the 1st plaintiff, I was only able to see in the plaintiff's documents a title of the subject property which shows it is registered in the 2nd plaintiff. In whose name the subject property is registered, whether the 1st or 2nd plaintiff, is not in issue because none of parties gave evidence to contradict the same. It was not enough for the defendants to plead and deny ownership of that property, it was necessary for evidence to be adduced to support that denial. There was no such evidence adduced at trial.

6. There are two letters written by the council, one dated 8th May 2006 and another dated 26th August 2005. Those two letters say exactly the same thing. They were letters giving the plaintiff authority to construct the sewer line. Because the contents of those letters are crucial to the determination of the issue identified here above, I will reproduce the letter of 8th May 2006 as hereinunder:

“8 May 2006

Gathugu Civil Engineers Ltd

P.O. Box 68180

NAIROBI

Attn. Eng.D.R. Wanjie

Reg. No. A1262

RE: PROPOSED 225MM 0.835.7 METRE SOCKET & SPIGOT CONCRETE PIPE SEWER EXTENSION AND CONNECTION TO SERVE PLOT LR. DAG/RIRUTA –KIKUYU ROAD

We are in receipt of your letter dated 3rd May 2006, Four blue prints and a copy of the payment receipt no. HQ-0029190 of 15/12/2006 in the sum of kshs 7000/- (Kenya Shillings Seven thousand only) made to Nairobi City Water and Sewerage Company.

We are pleased to inform you that the proposed sewer extension/diversion has been approved under our reference PDS No. 1959 subject to the following conditions:

- 1. That the approval of the drawings does not relieve the developer or the designer of the full responsibility of errors of the design which may be discovered subsequently.*
- 2. That the designer and the developer shall be responsible for sewer way leave acquired or to be acquired whether or not shown on the drawings at the time of approval.*
- 3. That any damage and loss in revenue to existing services (e.g sewer, water, telephone lines, power lines etc) to be made good solely at the expense of the developer/designer.*
- 4. That your contractor shall be required to:*
 - a. Have all stages of the construction works inspected and approved by the Inspection Team (IT) from the sewerage section of Technical Department.*
 - b. Have the inspection sheet signed by the Inspection Team and after completion of the works, submit the signed inspection sheet to the said section.*
- 5. That permit to cut open any public roads must be obtained from the City Engineer and all his conditions for such openings must be complied with.*

Failure to comply with these requirements would result in the constructed sewer being illegally connected to our sewerage systems and will not be adopted by Nairobi City Water & Sewerage Company.

Please arrange to collect two copies of the approved drawings and an inspection sheet from our sewerage section offices.

ENG. J P KIMANI

TECHNICAL DIRECTOR”

7. Noteworthy is that if the plaintiffs were to fail to comply with the conditions set out in the above letter, the result was that the constructed sewer line will be illegal and the Nairobi Water & Sewerage would not adapt it. The plaintiffs in their claim seek, amongst other orders for the reimbursement of the construction of the sewer line and for an order that the council and the Nairobi Water and sewerage do take control and management of the sewer line.

8. Geoffrey Gateri Kamau (Kamau) is an engineer employed by Nairobi Water and sewerage stated that his employer approved the construction of the sewer line by the plaintiffs but that it was a condition of the approval that a supervisory team of engineers, surveyors and inspectors of work, of Nairobi water and sewerage, to be present at the construction. He said:

“when that happens there is an inspection sheet signed everyday.”

9. Kamau said that his employer was not involved in the construction of the sewer line by the plaintiffs, as required. Kamau further stated:

“Ordinarily we act as consultants- we check materials, workmanship. What we approve we confirm during construction is adhered toplaintiff did not adhere. Since this was [so]....we [had] basis had no basis to adopt the sewer line.”

10. Kamau further stated that Nairobi Water & Sewerage was in the process of constructing sewer lines, in the area of the subject property, and that that work is on going. That the project is on going to overhaul the sewer line in that area. That once the Nairobi water & sewerage build the sewer network it is the responsibility of the land owners to be connected.

11. In respect to the plaintiff’s sewer line Kamau said that they had noted that there was overflow of effluent due to its design.

12. When the 2nd plaintiff was questioned on whether there was compliance, on the plaintiff’s part, with the conditions of approval to construct the sewer line, the 2nd plaintiff pointed out that the plaintiffs paid for the inspection by Nairobi Water & Sewerage. The 2nd plaintiff referred to a cheque dated 24th February 2006 for Ksh 20,000/= paid to Provincial Public Works Officer. Further the 2nd plaintiff stated that there was approval and commission of the sewer line by Nairobi Water and Sewerage. Also that the plaintiffs’ sewer line had been used by other people.

13. The defence of Nairobi Water & Sewerage in respect to its overseeing of the construction of the sewer line is as follows:

“The 2nd defendant in response to paragraphs 15 and 16 of the re-amended plaint states that:

- a. The 2nd defendant was not consulted and neither did it participate in the construction of the sewerline and therefore could not be held responsible for its maintenance or appropriateness at any one time.*
- b. The allegations about health risk to public are disputed and the 2nd defendant stated that there are competent authorities to deal with such and whose mandate the plaintiffs never invoked thereby making the allegations hollow.*
- c. Any allegations of negligence or breach of duty on the part of the 2nd defendant are denied and the plaintiff put to proof.*

7. In the contrary and without deviation from what has been stated in this defence, the 2nd defendant states that the sewer line constructed along Naivasha Road, is inappropriate for the following reasons:

- a. The sewer line is constructed within the road and not on the reserve as required.*
- b. The recommended construction standards were not observed during the constructions and implementation of the whole project appertaining to the sewer line.*

Consequently the claims by the plaintiffs are unfounded and in any event self inflicted by poor implementation of the project for which the 2nd defendant cannot be held liable.”

14. Kamau by his evidence stated as follows:

“further even after completion of the works, there has to be joint inspection and defects liability period when the contractor is required to make good any defects. After that the sewer line is supposed to be adopted by the Nairobi Water & Sewerage Co. Ltd. The plaintiff never followed that process and the sewer line was never adopted by my employer.

I have also visited the area and I observed the following regarding the sewer line in issue;

- a. The sewer line is extremely close to the road contrary to laid down stipulations.*
- b. The sewer line did not comply with gradient requirement and was therefore likely to fail.*

finally I wish to state that the 2nd defendant was not involved in the construction of the sewer line neither did it give any approvals at the various stages as required and therefore the sewer line is illegally connected to the system of the 2nd defendants main sewer line.

15. It is clear from the evidence adduced in this case, that the plaintiffs did not follow or fulfil two conditions of approval for construction of the sewer line, that is the plaintiffs did not prove, at all, that the construction work was inspected and approved by inspection team from the council’s or Nairobi Water & Sewerage technical department and further the plaintiffs did not provide the inspection sheet signed by that inspection team.

16. The evidence of whether or not there was supervision by the technical team ought, in my view, to have been proved by the contractor. That responsibility was provided in the contract between the plaintiffs and the contractor Benju. This is what the clause of the contract provided:

“LIASON WITH STATUTORY BODIES

The contractor shall be solely responsible for the engagement of statutory or Local Authority bodies for any liason required and shall be wholly responsible for any charges, permits, etc, required, and no claims for extras on this account shall be entertained.”

17. In response to the issue identified above I respond that there was no evidence presented by the plaintiffs that there was continuous supervision by the technical team or that inspection sheet were signed. It follows that having failed to prove that condition of the approval of construction the sewer line constructed by the plaintiffs was and is illegal and it cannot be adopted by the 1st and 2nd defendants. If the sewer line was illegal it follows that this court cannot order the plaintiffs to reimburse the costs of its repairs and nor can the court order Mehta to compensate the plaintiff for damage, if any that occurred. No order can flow from an illegality. On this I would also add that there was no sufficient evidence adduced to prove the damage alleged to have been done by Mehta. The plaintiffs ought to have called the evidence of the party who allegedly repaired such damages.

18. In the end the plaintiffs’ case fail. Having failed and because there is no reason shown why this court should not order for the costs to follow the event the suit will be dismissed with costs.

19. It is necessary to state that the 1st defendant, despite being served, did not call any evidence and did not participate in the trial. It follows that the 1st defendant’s defence remains mere allegation not proved.

CONCLUSION

20. The plaintiffs’ case for the reasons set out above is dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 4th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **4th** day of **May, 2020**.

MARY KASANGO

JUDGE