



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 7 OF 2015**

**JAMES KIMANI MAINA.....PLAINTIFF**

**VERSUS**

**ATHI WATER SERVICES BOARD.....DEFENDANT**

**BIRDI CIVIL ENGINEERS LIMITED.....THIRD PARTY**

**JUDGMENT**

**INTRODUCTION**

1. By a Plaint dated 24<sup>th</sup> December 2014 and filed on 14<sup>th</sup> January 2015, the Plaintiff sought the following reliefs against the Defendant:-

- 1. Kshs 7092,496/= being the subject matter of this Suit together with Interest at Court Rates from 1<sup>st</sup> October 2011 until Payment in Full Together With Interest at Court Rates (sic).**
- 2. Costs of this Suit Together with Interest at Court Rates (sic).**
- 3. Such Further and/or other Relief and/or Reliefs as this Honourable court may deem fit and just to grant in the Circumstances of this Case (sic).**

2. On 18<sup>th</sup> February 2015, the Plaintiff's advocates sought and obtained interlocutory judgment for the sum of Kshs 7,092,496.90 against the Defendant herein for having refused, failed and/or neglected to enter appearance even after having been served with Summons to Enter Appearance. The said Advocates extracted a Decree in the sum of Kshs 10,392,353.95 which was inclusive of interest for 1213 days from 1<sup>st</sup> October 2011. They also sought to have their costs in the sum of Kshs 256,967.50 approved by the Deputy Registrar of the Environment and Land Court Milimani Law Courts.

3. On 17<sup>th</sup> April 2015, the Defendant filed a Notice of Motion application seeking orders for a stay of execution pending the hearing and determination of its said application, the setting aside of the interlocutory judgment that had been entered against it, leave to file its Defence out of time and leave to issue a Third Party Notice to Messrs Birdi Civil Engineers Limited.

4. On 17<sup>th</sup> April 2015, Onyancha J (as he then was) granted it an interim stay of execution on condition that it deposited the sum of Kshs 7,092,497/= into court before 4<sup>th</sup> May 2015, which it did. On 28<sup>th</sup> May 2015, its advocates filed a Consent letter of even date in which they had agreed with the Plaintiff's advocates to transfer the said sum to an interest earning account in the joint names of both advocates. The said amount was to be held as such pending further orders of the court.

5. Its advocates filed a Notice of Appointment of Advocates dated 5<sup>th</sup> May 2015 on even date. They subsequently filed the Statement of Defence dated 21<sup>st</sup> July 2016 on the same date. The Plaintiff's Reply to the Defence was dated and filed on 8<sup>th</sup> August 2015.

6. The Defendant's advocates also issued Birdi Civil Engineers Limited, the Third Party herein a Third Party Notice dated 22<sup>nd</sup> July 2015. The same was filed in court on 25<sup>th</sup> July 2015. The said Third Party's advocates filed a Notice of Appearance dated 23<sup>rd</sup> August 2016 on 25<sup>th</sup> August 2016. They did not, however, participate in the proceedings herein.

7 The Defendant filed a List of Witnesses and Bundle of Documents dated 6<sup>th</sup> October 2017 on the same date. It also filed a Request for Judgment against the Third Party on 19<sup>th</sup> June 2018. The same was dated 15<sup>th</sup> June 2018. There was no minute in the court file to show

whether or not the said interlocutory judgment was entered against the Third Party herein.

8. The Plaintiff filed a fresh Witness Statement cross-referencing the List and Bundle of Documents on 9<sup>th</sup> May 2018. It also filed a List of Agreed Issues dated 14<sup>th</sup> May 2018 on 16<sup>th</sup> May 2018. The Defendant also filed a fresh Witness Statement cross-referencing the documents it wished to rely upon on 22<sup>nd</sup> May 2018. These new Witness Statements were filed pursuant to the court's directions of 19<sup>th</sup> April 2018. Notably, the Defendant did not file any Statement of Agreed Issues.

9. The Plaintiff's case was supported by the evidence of two (2) witnesses who included him while the Defendant called one (1) witness in support of its case. They all adopted their respective Witness Statements as their evidence-in-chief. After the close of their respective cases, the Plaintiff filed Written Submissions dated 21<sup>st</sup> January 2019 on 24<sup>th</sup> January 2019 while the Defendant filed its Written Submissions dated 20<sup>th</sup> May 2019 on 22<sup>nd</sup> May 2019.

10. Parties highlighted their respective Written Submissionson 11<sup>th</sup> June 2019. The Judgment herein is therefore based on the said Written Submissions, which they relied upon in their entirety.

### **THE PLAINTIFF'S CASE**

11. The Plaintiff's case was that following the construction of a sewer line by the Defendant in Dagoretti/ Kangemi area, the Defendant damaged his property and the terrain in Land Reference Number Dagoretti/ Kangemi/69 which were now Land Parcels Numbers Dagoretti/Kangemi/1621, 1622 and 1623 (hereinafter referred to as the subject properties")which were along the Nairobi River. As a result of the interference by the Defendant, he suffered loss and damage to his land and property thereon, crops, trees and water tank all totalling to Kshs 7,092,496.90. The computation was made up as follows:-

<b>1. Removal of boulders from the land and depositing them along the river.....</b>	<b>Kshs 13,000/=</b>
<b>2. Repairing and restoring water irrigation scheme which was on the land and was damaged by the Defendant.....</b>	<b>Kshs 29,100/=</b>
<b>3. Restoring red soil on the land to restore it to the same condition in which it was prior to the Defendant's interference with the land.....</b>	<b>Kshs 26,000/=</b>
<b>4. Loss of income from the land by failure to Sell tomatoes for three (3) years at the rate of 372,000/= per year after the land and irrigationSystem was interfered with by the Defendant.....</b>	<b>Kshs 372,000/=</b>
<b>5. Loss of income from the land by failure to sell vegetables for 3 years after (sic) at the rate of 560,000/= per year after the land and irrigation System was interfered with by the Defendant.....</b>	<b>Kshs 1,681,800/=</b>
<b>6. Fencing off the land with 57 metres of chain link and barbed wired with cedar posts and labour costs.....</b>	<b>Kshs 31,720/=</b>
<b>7. Damage to the elevated tank.....</b>	<b>Kshs 31,720/=</b>
<b>8. Land Surveyor's fees.....</b>	<b>Kshs 30,000/=</b>
<b>9. Add loss of napier grass for 3 years.....</b>	<b>Kshs 63,000/=</b>
<b>10. Add Land Valuers fees for valuing the damaged property thereon.....</b>	<b>Kshs 49,424/=</b>
<b>Add value of damaged land.....</b>	<b><u>Kshs 5,000,000/=</u></b>
<b>Grand total.....</b>	<b><u>Kshs 7,092,496.90</u></b>

12. His evidence was that he made several demands to the Defendant to restore his land to its original position that it was before the interference but that it had refused, failed and/or neglected to do so as at the time of trial despite having given him an assurance that it would compensate him for the land and repair the damage that was occasioned thereon compelling him to engage the services of a Land Valuer and Land Surveyor.

13. He therefore asked this court to grant him the prayers he had sought in his Plaintiff.

### **THE DEFENDANT'S CASE**

14. The Defendant's case was that it entered into a Contract (hereinafter referred to as "the Contract") with the Third Party in which the Standard Technical Specifications clearly set out the scope of works to be carried out by the Third Party and its obligations under the said Contract. It pointed out that upon receiving the claim from the Plaintiff, it agreed to compensate him for the damage to his trees and farm crops in line with the Government rates of compensation from the Ministry of Forestry and Agriculture.

15. The reinstatement of the site, including removal of boulders and flattening the area, fencing of the land, beacon reinstatement, compensation of the damaged masonry tank foundation after the cause was ascertained were to be addressed by the Third Party. It was its contention that he was not genuine in bringing the instant claim because the issues fell squarely within the ambit of the Third Party's obligations under the said Contract.

16. It was also emphatic that it was its obligation to establish the real extent of the riparian land and acquire any land (if any) outside the riparian land as defined in the Water Act, 2002.

17. It therefore urged this court to dismiss the Plaintiff's claim against it with costs because it was fatally and irredeemably defective and had failed to disclose any cause of action against it.

## **LEGAL ANALYSIS**

18. The Plaintiff listed the following as the issues for determination by this court:-

**1. Did the Defendant contact the Residents of Dagoretti/ Kangemi Area in Nairobi in writing whose land frontaged Nairobi River including the Plaintiff informing them that she wished to construct a sewer line along Nairobi River running from Dagoretti/ Kangemi/Lavington assuring them that she would compensate them for any loss of property occasioned by the construction of the sewer line and she required their co-operation during the construction to achieve the desired objective?**

**2. Following that understanding, did the Defendant construct the said sewer line and caused a lot of damage to the Plaintiff's land in the course of the construction of the said sewer line, which the Defendant renegade (sic), then refuse to restore the said land and/or replant the land to the position in which it was, damage the property and the crops thereon and cause loss and damage to the crops on the Plaintiff's land?**

**3. Despite the Defendant's promise to restore the land back to what it was prior to the Defendant's entry onto the land, did the Defendant renegade (sic), then refuse to restore the said land and/or replant the land to the position in which it was, damage the property and the crops thereon and caused loss and damage to the crops on the Plaintiff's land?**

**4. Was the Plaintiff entitled to interest at court rates on his claim for the said sum of Kshs 7,092,496.90 from 1<sup>st</sup> October 2011 as per the default judgment that was entered in his favour on 25<sup>th</sup> February 2015 which as that date amounted to Kshs 3,299,857.05?**

**5. Having admitted liability to the Plaintiff but then filed "Third Party" proceedings against "M/S Birdi Engineering Limited" (sic) who had failed and/or neglected to file Defence to the Third Party Proceedings", did the Defendant have any or any defence or at all to the Plaintiff's claim of Kshs 7,092,496.90 plus costs and interest at court rates?**

**6. Who would pay the costs of the suit?**

19. After carefully perusing the aforesaid issues, it appeared to this court that the only issues that had been placed before it were:-

**1. Whether or not the Plaintiff suffered loss and damage to his subject properties;**

**2. If so, who was to blame for the said damage;**

**3. Whether or not the Plaintiff was entitled to the reliefs he had sought in his suit.**

**4. Who should bear the costs of this suit.**

20. The court deemed it prudent to address the said issues under the following heads.

### **I. LIABILITY**

21. Issues Nos (1) and (2) hereinabove were dealt with together as they were related.

22. It was not in dispute that the Defendant contracted the Third Party to construct a sewer line along the Nairobi River and that the Plaintiff's crops, trees and fence were damaged. There was also no dispute that there were certain aspects of the Plaintiff's subject parcels of land that were not returned to the original state they were in before the construction of the sewer line by the Third Party. This court did not therefore find any need to analyse the evidence relating to the undisputed issues and delved straight into what was in contention.

23. In their evidence, the Plaintiff herein and Eng Joshua W Ichang'i (hereinafter referred to as "DW I") who testified on behalf of the Defendant herein restated their respective cases as shown hereinabove.

24. During his cross-examination, the Plaintiff stated that he was promised compensation as per the Defendant's letters. He said that the Defendant was to compensate the land owners who were along the proposed sewer line, trees, crops and lost land. He averred that he attended the Stakeholders' public meeting at Ndururu CDF grounds on 9<sup>th</sup> August 2009 where this was agreed upon.
25. He contended that the issue of compensation due to damaged land was not discussed during the said meeting but was emphatic that he was not aware that any third party was required to compensate him for the damage to his land until the Defendant referred him to the Third Party who in turn referred him back to the Defendant herein. He stated that he was confused as to who would compensate him.
26. On being Re-examined, while admitting that the Defendant paid him for the damage, he averred that he was not aware of the relationship between the Defendant and the Third Party herein.
27. As can be seen hereinabove, DW 1 was categorical that the Third Party was responsible for the damage that occurred on the Plaintiff's land, if at all.
28. This court noted that the Defendant invited land owners of parcels of land along the sewer line wayleave along the Nairobi River to attend a Stakeholders' meeting on 9<sup>th</sup> August 2009. The said letter was dated 11<sup>th</sup> August 2009. This was on pg 46 of the Plaintiff's Exhibit 1.
29. In its letter dated 12<sup>th</sup> October 2009 (pg 45 of the Plaintiff's Exhibit 1), which was once again addressed to all land owners, the Defendant alluded to the fact that the said Stakeholders' meeting had been held. The said land owners were being notified of the commencement of the construction of the sewer line on 10<sup>th</sup> August 2009 and 17<sup>th</sup> September 2009 in different sections. It had also asked the said land owners who had planted crops/trees along the sewer line way leave to accord the Defendant's officers co-operation during the crop assessment exercise at their respective parcels of land.
30. He also relied on the Defendant's letter dated 1<sup>st</sup> October 2012 on pg 49 of the Plaintiff's Exhibit 1 in which it had written to the Third Party informing it that pursuant to a joint inspection of its officers, its Resident Engineer and him, it had been agreed on which claims the Contractor and the Defendant were to meet. There were also other letters written by his advocates to the Defendant and Third Party demanding for compensation and his letters to the Defendant and the Third Party showing the back and forth that he was taken through.
31. The court had due regard to the Contract dated 9<sup>th</sup> June 2009 between the Defendant and the Third Party and noted that the Defendant was the Employer while the Third Party was the Contractor. The Third Party was required to execute works known as Construction of Lavington- Riruta Trunk Sewers extensions for a contract price of Kshs 124,851,690/=.
32. In Clause 1.13 of the Standard Technical Specifications (Defendants Exhibit 1 pg 53), the Third Party was required to preserve the Survey beacons. Clause 1.31 of the Standard Technical Specifications (Defendants Exhibit 1 pp 57) further provided that the Third Party was required to backfill holes and trenches. In the event there was damage to the land, under Clause 2.2 of the Standard Technical Specifications (Defendants Exhibit 1 pp 63), the Third Party was required to make any good to such fence, hedges, tree, land or crop to the satisfaction of the Project Manager and the owner thereof.
33. The Defendant's duty was limited to negotiating and obtaining rights of way and serving all notices upon owners or occupiers of land. Under Clause 2.3 of the Standard Technical Specifications, the Third Party was required to clear the site on inspection. (Defendants Exhibit 1 pp 63)
34. These obligations were captured in the letter dated 1<sup>st</sup> October 2012 (Plaintiff's Exhibit 1 pg 49) to the Third Party that was relied upon by the Plaintiff in which it was agreed that the Third Party would reinstate the site by removing of boulders and flattening the area, fencing of the land, reinstating the beacon and repairing the damaged masonry tank foundation if it was established that it was the Third Party which was responsible for the same.
35. It was therefore clear to this court that it was not in doubt that the Plaintiff's fence and beacons were damaged by the Third Party and he was required to make good in accordance with the relevant clauses in the Standard Technical Specifications. There was, however, no evidence to show that the damage to the Plaintiff's masonry tank foundation was as a result of the Third Party's acts and /or omissions because it was not ascertained by the Defendant's Resident Engineer who was present at the time of assessment of the damage that the damage to the tank had been caused by the construction of the sewer line.
36. The Plaintiff argued that because the Defendant had obtained interlocutory judgment against the Third Party herein, it would be able to recover any monies it paid him from the Third Party.
37. On its part, the Defendant relied on the provisions of Order 1 Rule 17 of the Civil Procedure Rules, 2010 that provides as follows:-

**If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the "third party") desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third party notice:**

**Provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the Court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit.**

38. Further, Order 1 Rule 21 of the Civil Procedure Rules stipulates that:-

**Where a third party makes default in entering an appearance in the suit, and the suit is tried and results in favour of the plaintiff, the court may either at or after the trial enter such judgment as the nature of the suit may require for the defendant giving notice against the third party:**

**Provided that execution thereof shall not be issued without leave of the court, until after satisfaction by such defendant of the decree against him.**

39. As was held in the case of Stephen Psiwa Cheprot vs Mary Mutheu Muia & Another [2018] eKLR, third party proceedings relate to the apportionment of liability between a defendant and a third party. It has nothing to do with a plaintiff. There was no privity of contract between the Plaintiff and the Third Party. Since the Defendant was the one who contracted the Third Party, the Plaintiff could only pursue the Defendant for compensation. The Defendant would then pursue the Third Party for indemnity.

40. In Clause 13.1 of the Contract (Defendant's Exhibit 1 pg 22), it is provided that the Contractor was to take out insurance cover. The said Clause provides as follows:-

**The Contractor shall provide, in the joint names of the Employer and the Contractor, insurance cover from the start date to the end of the Defects Liability Period in the amounts and deductibles stated in the SCC for the following events which are due to the Contractor's risks:-**

**a. Loss of or damage to the Works, Plant and Materials;**

**b. Loss of or damage to Equipment;**

**c. Loss of or damage to property (except the Works, Plant, Materials, and Equipment) in connection with the Contract;**

**d. Personal injury or death.**

41. It was therefore the considered view of this court that by privity of the understanding between the Defendant and the Plaintiff during the Stakeholders' meeting, the Defendant was liable for the damage that was caused to his subject parcels of land. This was, however, limited to the removal of boulders and destruction of the beacons and fence.

42. The above notwithstanding, for the reason that the Third Party was responsible for the actual commissions and/or omissions on the Plaintiff's land and it did not enter appearance as required under Order 1 Rule 21 of the Civil Procedure Rules, the responsibility lay on it to indemnify the Defendant herein for any monies that may have been found due to the Plaintiff as he did not sue the Third Party as a defendant herein.

## **II. QUANTUM**

43. Issue No (3) was dealt with under this head.

44. On pg 47 of the Plaintiff's Exhibit 1, the Plaintiff had annexed a letter from the Defendant in which he had listed the affected crops and trees. These were the Eucalyptus, Mutundu, Mukinduri, maize, kale and napier grass. He conceded that damage to the land was not discussed during the Stakeholders' meeting. He also admitted to having been compensated by the Defendant as far as those trees and crops were concerned.

45. DW 1 had admitted in its letter dated 1<sup>st</sup> October 2012 (Plaintiff's Exhibit 1 pg 49) that the Plaintiff's fence and beacons were damaged and that the Third Party was to remove the boulders and flatten the Plaintiff's subject properties.

46. Moses Mureithi Njuguna (hereinafter referred to as "PW 2") was a registered and practising valuer. His testimony was that the land that was damaged was valued at Kshs 5,000,000/= as per his Valuation Report that was in the Plaintiff's Exhibit 1 pp 65-77. He assessed the items that had been itemised in Paragraph 4 of the Plaintiff's Plaint at Kshs 2,043,072/=. He also indicated that he charged his fees Kshs 49,424.90. This is what brought the Plaintiff's claim to Kshs 7,043,072.00.

47. He had also indicated the computation of how he arrived at the figures for removal of the boulders, repair of the irrigation scheme, repair of the chain link, loss of income from sale of tomatoes for three (3) years and the landscaping with red soil. However, there was nothing to show how the said figures were arrived at. While he adduced expert witness, it was expected that he would have given documentation to support his computation. He was also expected to have showed the court how he arrived at the figure the surveyor would have charged to restore the beacons.

48. During cross-examination, he stated that what he gave was a cost estimate and not a valuation. It was not sufficient that he was basing his figures on what a farmer in a reasonable season could make. This court was not persuaded that PW 2 linked the loss of sale of tomatoes for a period of three (3) years to the construction of the said sewer line. It would have perhaps assisted the court if the Plaintiff had called an expert such as an agronomist, who could have shown this court the relevance between the works that were done in the sewer line and his failure to farm the tomatoes during the said period thus justifying his claim for loss of income of sale of the tomatoes.

49. Going further, the Plaintiff did not demonstrate how the inability to use the land had anything to do with the construction of the sewer line. He did not lead evidence to show the proximity of the sewer line and the land he was planting tomatoes. This could perhaps have guided the court in making ascertaining whether or not his irrigation system was damaged during the said construction. There was a possibility that the crops may have failed due to harsh weatherconditions and the irrigation system damaged by wear and tear.He did not also adduce to demonstrate that the napier grass did not grow for three (3) years as a result of the construction of the sewer line.

50. It was not clear to this court why the Plaintiff was claiming a sum of Kshs 5,000,000/= as compensation of the land. This was the open market value of the land as given by PW 2. Unless, he was saying that he was no longer in occupation of the subject parcels of land, it was the considered view of this court that being awarded a sum for the land as had claimed would have amounted to double and unjust enrichment. He did not adduce any evidence to show that he was no longer in occupation of the said subject parcels of land.

51. Further, he did not also demonstrate that the improvements to the land were linked to the construction of the sewer line. It was necessary for the Valuation Report to have been supported by cogent documentation.His claim for value of damaged land was thus unjustified.

52. In addition, he did not also demonstrate how the construction of the said sewer line caused his tank to crack. There was a possibility that the tank may have cracked due to wear and tear. Indeed, from the documentary evidence before it, this court noted his complaints about the tank arose in 2011, which was about two (2) years after the works were done on the sewer line.

53. While he showed that he was owed a duty of care by the Defendant and the Third Party herein, he did demonstrate the nexusbetween the damage to his tomatoes, napier grass and tank and the Third Party's actions and/or omissions.There was remoteness of damages in these claims. He was required to have demonstrated that the damages that he incurred and/or suffered were not remotebut that they were foreseeable by any prudent person.

54. Bearing in mind that the damage to the fence was in 2009 when the Third Party was constructing the sewer line, it was not clear to this court why the Plaintiff did not lodge his claim at the time he claimed for compensation for damage to trees and crops on 12<sup>th</sup> October 2009. However, as the Defendant acknowledged that the said fence was damaged, this court took the view that he ought to be compensated for the same.

55. This court was also not persuaded to award the Plaintiff the Professional Valuation Fee as it was not clear how the sum of Kshs 49,424.90 was arrived at. It was irrespective that PW 2 testified that he was paid the said sum. The burden was on the Plaintiff to have shown that he indeed paid PW 2 the said sum. Nothing would have been easier than for him to have adduced documentary evidence to prove that he indeed paid the said fees.

56. It is important to point out that this court could not make a determination relating to the reinstatement of the beacons because it had not been claimed by the Plaintiff and it was not clear to it whether he was compensated for the same. The court is only obligated to award what had been pleadedbecause parties are bound by their pleadings.

57. For the reason that the following claims which were not rebutted by the Defendant, it found that it could therefore award the Plaintiff compensation. However, his figures were not supported by any documents giving this court difficulties in arriving at a proper assessment.It therefore proceeded on what appeared to be reasonable and bearing in mind the inflationary trends since 2009.

58. This court therefore determined that the Plaintiff was entitled to a sum of Kshs 44,720/= that was made up as follows:-

**1. Removal of boulders from the land and**

**depositing them along the river.....Kshs 13,000/=**

**2. Fencing off the land with 57 metres of chain link and barbed**

**wired with cedar posts and labour costs.....Kshs 31,720/=**

**Kshs 44,720/=**

**DISPOSITION**

59. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit that was filed on 7<sup>th</sup> February 2012 was partially merited that the same is hereby allowed as follows:-

**a. THAT judgment be and is hereby entered in favour of the Plaintiff against the Defendant for the sum of Kshs 44,720/= plus interest thereon from the date of filing suit until payment in full and costs.**

**b. THAT the Third Party shall indemnify the Defendant the said sum of Kshs 44,720/= plus interest thereon from the date of filing suit until payment in full and costs.**

**c. THAT for the avoidance of doubts, the costs payable herein will be on the lower court scale as the subordinate court had pecuniary and territorial jurisdiction to hear and determine the matter as envisaged in Paragraph 58 of the Advocates (Remuneration) Order that provides as follows:-**

**“In causes or matters which, having regard to the amount recovered or paid in settlement or the relief awarded, could have been brought in a resident magistrate’s or other subordinate court, costs on the scale application to subordinate courts only shall be allowed unless the judge otherwise orders.”**

60. It is so ordered.

**DATED and DELIVERED at NAIROBI this 10<sup>th</sup> day of December 2019**

**J. KAMAU**

**JUDGE**