



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 468 OF 2015

JAMES MWANGI NGATIA.....1ST PLAINTIFF

JONIMA FARM INVESTMENTS LIMITED.....2ND PLAINTIFF

VERSUS

CHINA ROAD & BRIDGE CORPORATION (KENYA) LIMITED...DEFENDANT

JUDGMENT

1. By a plaint dated 27th May 2015, the plaintiff seeks judgment against the defendant for:-

a. A permanent injunction restraining the defendant by itself, its agents and or servants from continuing to blast rocks and or carrying on excavation works at the Ngong Veterinary Farm Quarry until a proper Environmental Impact Assessment is carried out.

b. A mandatory injunction directed against the defendant to carry out repairs to the plaintiffs house in line with the structural engineers Ms Songa Ogoda & Associates and Quantity Surveyors report outline the bill of quantity.

c. Further and in the alternative, the defendant do pay to the plaintiff the sum of Kshs.7,104,645.00 being the amount assessed as required for repairs.

d. Kshs.11,025,00,00/=.

e. General damages for nuisance and environmental pollution by way of noise and dust.

f. Cost and interests.

g. Any other relief that this court may deem fit to grant.

2. Upon being served with copies of plaint and summons to enter appearance the defendant entered appearance through the firm of M/s Hamilton, Harrison & Mathews on the 9th June 2015. It also filed a statement dated 21st July 2015.

3. PW, James Mwangi Ngatia the 1st plaintiff told the court that he was adopting his witness statement dated 25th October 2010. He also told the court that this claim arose out of the activities of the defendant who was doing blasting on a quarry next to his house. The blasting caused a lot of damage to his residential house and to his farm. He produced the copies of title deeds to the two suit properties and certificate of official search as exhibits P1 and P2. He also produced photographs showing the damage as exhibit P3. He also produced copies of email between the Kerarapon Residents Association and the complaints by the Residents Association as exhibit P5.

4. He further told the court that the blasting has caused trauma to cows at the farm to the extent that there was reduction in milk production. The cows have also experienced miscarriages and death. Some rabbits have also died. He sought the services of a veterinary officer who prepared a report. The report was produced as exhibit p6 and the milk production schedule as exhibit p7. He also sought the services of a structural engineer who prepared a report. It was produced as exhibit p9. The bill of quantities was produced as exhibit p 11. Before instituting this suit, the plaintiff's advocates wrote a demand letter to the defendant, it was produced as exhibit p8. He prays that he be compensated for the damage. He also seeks the prayers in the plaint.

5. PW2, Peter Mwangi Thuku a registered structural engineer told the court that he prepared a report on behalf of the 1st plaintiff. He visited the site and confirmed that the perimeter wall was collapsing, there were cracks on the main house, including the roof, destruction of the farm house. He formed the opinion that the vibration from the blasting site had caused the damage. He produced the report as exhibit p9.

6. PW3 Shaban Shabir, a quantify Surveyor told the court that the plaintiffs sought his services. He assessed the damage and estimated the cost of repairs at Kshs.7,104,645/-. He produce the report as exhibit P11.

7. DW1, William Ochieng Ouko, a Public Relations Assistant with the defendant, adopted his witness statement dated 20th July 2015. He also relied on the defendant's list of documents dated 20th July 2015. The documents in the said list were produced as exhibits D1 to D6 respectively. He told the court that the defendant obtained the requisite licenses to carryout the blasting and excavation works at the Ngong Veterinary Farm Quarry in Ngong.

8. He further told the court that on 8th October 2014, the defendant received complaints from the plaintiffs regarding the blasting activities. The defendant engaged its quantity surveyor who assessed the damage to the 1st plaintiffs house and cost of repairs at Kshs.1,163,850/-. That the 1st plaintiff has not tendered proof that the building in question were done strictly to the design approved by the approving authority. The 2nd plaintiff's claim on loss of income due to reduction in milk production which is attributed to the activists in the quarry is baseless. No nexus has been established between the blasting and the alleged reduction in milk production. The 2nd plaintiff has not provided documents in the form of accounts to confirm the sales made prior to and after the blasting to assist in determining the compensation amount. He prays that the court finds are in favour of the defendant.

9. DW2 Fredrick Nyangacha Nyagaka a quantity surveyor told the court that he did an assessment of restoration of the plaintiff's house and farm. He produced his report as exhibit D6. At the close of the hearing parties tendered final submissions.

The Plaintiffs' submissions

10. The plaintiffs' submissions are dated 1st October 2019 and filed in court on the 4th October 2019. The plaintiff is the registered proprietor of Ngong/Ngong/17822,57546 and 57447 all situated in Ngong Town. The defendant has been carrying out activities at the Ngong Veterinary Farm Quarry situated in LR No. Ngong/Ngong/2627 within Ngong town. The defendant employed the method of excavating rocks by way of blasting which exercise subjected the plaintiffs' to excessive noise and vibration, thereby resulting in annoyance and nuisance. The blasting was so intense that it caused massive vibrations and tremor that resulted in damage to the suit properties. The defendant refused to stop the blasting exercise.

11. Section 3(1) of Environmental Management & Co-ordination Act, provides that every person in Kenya is entitled to a clean and healthy environment. The 1st plaintiff's right to a clean and healthy environment has been infringed by the defendant's act of engaging in excavation works. In the year 2012 the 1st plaintiff through an Estate Association raised concerns about the defendant's activities and made it known to them of the nuisance and damage caused by its excavations works. In September 2013, the defendant sent its representatives to assess the damage caused to the properties in question and undertook to repair the same but failed to do so.

12. The defendant in its defence asserts that in order to carry out its excavation works it obtained the requisite licenses and as such should not be held liable. This did not give the defendant a right to destroy the property of others or facilitate the degradation of the environment at large. They have put forward the case of **Charles Awiti & 19 Others vs China Road & Bridge Corporation Kenya Limited [2016] eKLR**. The defendant is not contesting that some damage was occasioned to the plaintiffs. The defendant did not show that it had obtained a licence to carry out excessive vibrations as required by Regulation 14(3) of the Environmental Management & Co-ordination (Noise and Excessive Vibration Pollution Control) Regulations 2009.

13. A permanent injunction is granted by a court at the end of a law suit. They have put forward the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others [2004] eKLR; Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**. The defendant has not disputed that damage had been occasioned to the plaintiffs as a result of its activities but only challenged the extent of the damage due to the discrepancy in the amount of compensation due. In view of the above the plaintiffs have demonstrated a prima facie case which warrants the grant of permanent injunction to preserve the plaintiffs' right and properties.

14. In support of this claim the plaintiffs adduced photographs of the damage occasioned to the properties. The report (EXP11) by the quantity surveyors corroborates the 1st plaintiff's averments of the damage to the properties. The milk production has reduced by 150 litres which translates to Kshs.11,025,000/=. This was supported by the schedule of milk production adduced showing the adverse effects of the defendant's activities. They have put forward the case of **Patrick M Makau vs Attorney General & 3 Others [2018] eKLR**. The bill of quantities produced by the defendant failed to rebut the damage and amount claimed by the plaintiffs. The defendant's activities have been a great nuisance to the neighbouring community and have greatly contributed to environmental pollution by way of noise and dust.

15. The plaintiff is entitled to Kshs.7,104,645/= as compensation for the damage to its properties and a further Kshs.11,025,000 being the loss of milk production together with the other prayers on the plaint.

The Defendant's submissions

16. The plaintiffs have not produced approvals of their building plans and neither have they tendered proof that the buildings in questions were built strictly according to the design approved by the approving authority. The 2nd plaintiff's loss of income due to reduction of milk production which is attributed to the activities in the quarry is baseless. The 2nd plaintiff has not submitted proper documents and material in this court to confirm any alleged sales made prior to and after blasting in order for this court to be guided in making its decision The schedule of milk production roster (exp 10) is not dated, does not indicate the maker. It is not signed nor sealed and not accompanied by audited accounts to back the same. There are many factors that cause loss or reduction in milk production in cattle and that no scientific report or

assessment has been produced by the plaintiffs to prove that it was caused by the blasting activities.

17. There is no evidence to prove that the 2nd plaintiff runs an animal rearing business on the parcels of land. No certificate of incorporation to prove that the 2nd plaintiff is a registered entity or not. No company resolution giving the 1st plaintiff authority to represent and plead on behalf of the 2nd plaintiff in court. No evidence that the 1st plaintiff is a director of the 2nd plaintiff. It has put forward the case of **Dare vs Pulham [1982] 148 CLR 658 at 664**. The claim by the 2nd plaintiff ought to fail.

18. It has also put forward the cases of **Susan Mumbi vs Kefula Grebedhin Nairobi HCCC no. 3320 of 1993; Treadsetters Tyres Ltd vs John Wekesa Wepukhulu [2010] eKLR; East Africa Produce (K) Ltd vs Christopher Astiado Osero Civ Appeal NO. 43 of 2001**.

It prays that the plaintiffs suit be dismissed with costs.

19. I have considered the pleadings, the evidence on record, the submissions made on behalf of the parties and the authorities cited. The issue for determination are:-

(i) Whether the activities of the defendant resulted in damage to the 1st plaintiff's properties.

(ii) Whether the 1st plaintiff is entitled to the reliefs sought.

(iii) Whether the claim by the 2nd plaintiff ought to stand.

(iv) Who should bear costs?

20. In paragraph 1 of the plaint, the 2nd plaintiff is described as a limited liability company. The 1st plaintiff states that he is a director of the 2nd plaintiff. The documents filed before court show that Sera Wacuka Mwangi is the managing director of the 2nd plaintiff. I have gone through the documents filed by the plaintiffs and find that no certificate of incorporation was duly filed to show that the 2nd plaintiff is a registered company under the Companies Act.

There is also no company resolution giving the 1st plaintiff authority to represent and plead on behalf of the 2nd plaintiff.

21. Order 4 rule 4 of the Civil Procedure Rules provides:-

“Where the plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so”.

I find that the 1st plaintiff herein has not complied with the above provision. The said provision is worded in mandatory terms. I find that failure to comply is fatal to the 2nd plaintiff's case.

22. Assuming, even that the 2nd plaintiff was properly before court, the said plaintiff has not ascertained that the activities in the quarry have contributed to the reduction in the milk production. I have gone through the report by the Chief Livestock Health Officer, dated 20th April 2015. The same appears to me, to be a general information provided by the owner of the farm. It does not confirm details of the animals which the farmer lost. The same does not give a scientific explanation or the nexus between the blasts and the reduction of milk production. I also agree with the defendant's submissions that the plaintiffs have not submitted sufficient material to confirm the alleged sales made prior to and after the blasting. The 2nd plaintiff, alleged schedule of milk production is not dated, not signed or sealed. It does not indicate the author, it is not accompanied by audited accounts. For the foregoing I find that the 2nd plaintiff's case against the defendant fails and the same is dismissed.

23. It is not in doubt that the defendant carried out blasting activities at Ngong Veterinary Farm Quarry. It is also not in doubt that the vibrations and the tremor resulted in damage to the 1st plaintiff's house. The defendant confirms that the 1st plaintiff made a complaint in 2014 and sought compensation. The defendant assessed the damage and produced a bill of quantities which put the costs of repairs at KShs.1,163,850/-. The said report was produced by DW2 as exhibit D6.

24. The 1st plaintiff on his part relies on the bill of quantities produced by PW2 as exhibit P11. He gave the costs of the repairs to be KShs. 7,104,645/-. He concluded that the building was structurally affected. This was in 2015. There was no evidence at the trial as to the state of the building five years later. I believe the same is still standing. I find that the figures given by PW2 to be an exaggeration. I have gone through the two reports, it is not in doubt that that the 1st plaintiff house was damaged. I award KShs.4,000,000 which I think is reasonable to cater for the cost of repairs.

25. I would be hesitant to grant an injunction for the reason that though the construction of the Southern Bypass is complete, the quarry still supports the ongoing projects the defendant is undertaking in the country.

26. I agree with the 1st plaintiff that blasting exercise has subjected him to excessive noise and vibration thereby resulting in annoyance and nuisance. I award KShs.300,000 as general damages which I think is reasonable.

27. In conclusion, I find that the 1st plaintiff has proved his case on a balance of probabilities as against the defendant. Accordingly, judgment is entered in his favour as follows:-

a A mandatory injunction is hereby issued directing the defendant to carryout repairs to the 1st plaintiff's house in line with the structural engineers M/S Sirga Ogonda & Associates and Quantity Surveyor's Report outlining the bill of quantity which is now assessed at Kshs.4,000,000/-. In the alternative the defendant do pay the plaintiff the sum of Kshs.4,000,000/- to cater for the repairs.

b. General damages for nuisance and environmental pollution by way of noise and dust Kshs.300,000/-.

c. Costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of MAY 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiffs

No appearance for the Defendant

Kajuju - Court Assistant