



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NUMBER 144 OF 2009

ESTHER WANJIRU MWANGI.....1ST PLAINTIFF
PATRICK MAINA MWANGI..... 2ND PLAINTIFF
MORRIS MURIUKI MWANGI.....3RD PLAINTIFF
MILLICENT MURINGO MWANGI.....4TH PLAINTIFF

VERSUS

XINGHUI INTERNATIONAL(K) LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiffs are the Registered owners of land parcel numbers **Njoro/Ngata Block 1/3810, 3811, 3812, 3814, 3816** and **3821** respectively

It is their case that at all material times they have carried on developments and agricultural activities thereon.

Adjoining their land is a public road that separates their land parcels and parcel **No. Nakuru Municipality Block 8167**, the property of the defendant.

It is their case that in November 2008, the defendant dumped large quantities of lead wastes on the said road and as a consequence, the said hazardous wastes have affected negatively on their crops, animals and also their health. In particular, the plaintiffs state that they have lost three cows due to indigestion of the poisonous waste material and the continued dumping and staying on site of the waste pose real danger to their health as well as to their animals and crops.

They sought orders for:

1. *General and special damages in the sum of Kshs.270,000/=being cost of the three cows that died as a result of lead poisoning.*
2. *Loss of profits from sale of 35 litres of milk @Kshs.30 a litre thus Kshs.1,050/= from 21st November 2008 until payment in full.*
3. *Loss of 15 bags of maize at Kshs.33,000/=*

4. *Costs of drugs and veterinary fees at Kshs.12,290/=.*

The defendants in their statement of defence denied all the allegations and put the plaintiffs to strict proof.

2. The plaintiffs filed the following documents in support of their case.

1. *Analysis by Dr. Odindo Charles dated 27th November, 2008.*
2. *Report by Dr. James M. Mbaria dated 6th February 2009*
3. *Report by Dr. Kuna dated 22nd November 2008*
4. *Laboratory analysis from the University of Nairobi dated 26th November 2008*
5. *Report and Valuation carried by ADN Advisory dated 29th January 2009.*
6. *Demand Letter to the Defendant dated 10th February 2009.*

3. **The plaintiffs case** was urged through five witnesses:

PW1, Esther Wanjiru Mwangi is the first plaintiff. On behalf of the other four plaintiffs, she testified that the defendant in November 2008 deposited particles like Murrum at London Estate about 1½ – 2 Kms by a lorry along the public road adjoining their land parcels. Their cows were being grazed on the land parcels and would lick the stone like debris. It was her testimony that soon thereafter the cows became ill and three of them died. Upon the carcasses being taken to the veterinary laboratory for investigation, and the veterinary doctors upon analysis of the stone like debris that the cows licked, came up with reports dated the 20th November 2008 and 6th February 2009, which were produced by Doctors, as exhibits during the hearing.

4. In support of special damages as pleaded, it was PW1's evidence that each of the three cows were valued at Kshs.90,000/= which value was given by the Veterinary Doctor Ochodo. The loss of milk they used to sale from the cows of 35 litres a day was assessed, at Kshs.76,650/= as stated in the report by Dr. Ochodo up to the 21st November 2008.

It was her further testimony that all the plaintiffs lost their crops(maize) which were on the farms when the debris were deposited. It was her evidence that upon harvest, they were advised that it was unfit for human consumption and was thus destroyed.

This report is dated 12th August 2008 from the University of Nairobi and was assessed at Kshs.33,000/= . For the reports, the plaintiffs paid a sum of Kshs.8,290/= and Kshs.20,000/= being doctors fees.

The above documents were produced as exhibits by their makers.

5. **PW2 was Dr. James Mbaria** of the University of Nairobi Department of Health; Dean of Public Health and Senior Lecturer and Researcher.

Upon being called to assess the cause of death of the cows and damage to crops, as a team with Dr. Njuguna they examined the animals symptoms and took blood samples for analysis. A lab analyst (qualification of Lead) was done. He prepared a report dated 6th February 2009. He produced it as exhibit. It was his conclusion that the lead was from the defendants company and had found the dumpings near the factory on the path.

6. **PW3 was Doctor Charles Ochodo**, a Veterinary Surgeon – at the Department of Veterinary

Services, Ministry of Livestock Development. He stated that he treated the cows on the 10th November 2008 which were Friesian black and white about 3½ years and female. In his diagnosis, after looking at the laboratory results that there was high quantities of lead leading to lead poisoning. He produced his report dated 12th August 2008 PExh 13. It was his testimony that he also gave a valuation of the cows that died and gave a valuation of Kshs.90,000/= each. This he said was based on the breed, body conformation, age and history of parentage of the cows, and the milk production. On the cost of maize that was damaged, he based the value of the then prevailing rates as given by the farmers.

7. **PW4 Doctor Nicholas Ndiwikia Kuria** also a Veterinary Surgeon at the University of Nairobi testified that he was called to treat the plaintiffs cows. He diagnosed lead poisoning and took samples for testing at the laboratory. These included the carcass of the cows, maize and grass. He prepared his report and produced the same as PExh. 10.

8. **PW5, Millicent Mwangi Mwangi** testified that she saw the lorry that dumped the debris on the road and the driver, one Mr. Njuguna who requested her to assist him with a *Jembe* to offload the debris. She testified that the plaintiffs cows licked the debris and started foaming from the mouth. She also confirmed that the defendants manager came to the dump site and witnessed the same. She also confirmed that the cows that died belonged to the plaintiffs.

9. **The defendant did not call any evidence, but filed submissions.**

Earlier, the defendant had filed its list of documents that included **a Single Business Permit (2009) and an Environment Impact Assessment Licence dated 27th May 2009.**

In its written submission, the defendant posed only one issue that in its view upon determination would affect all other issues. This is:

“whether in the month of November 2008 the Defendant through its agents and or servants dumped large quantities of lead waste on the road adjoining the plaintiffs properties.”

It was its submission that PW1 did not witness the defendant deposit the debris on the road and that the maize stalks were not examined by the Doctors, and therefore PW1 did not establish ownership of the cows that allegedly died nor was she able to connect the Defendant with the deposit of the toxic materials on the public road. It was further submitted that no expert report on the toxicity of the maize was filed or produced in court.

10. On PW2 evidence, it was submitted that he never visited the defendant premises and did not know where the lead deposits came from.

On PW3's evidence, it was submitted that he did not pursue the request to examine samples from the cows and hence brought to court a soil sample nor could he, with accuracy establish the value of the dead cows. It was further stated that it was not confirmed that the lorry that dumped the toxic material was from the defendant company, and therefore the lorry could not be said to belong to the defendant nor that Njuguna, the driver of the lorry was sent by the company to dump the deposits. For those observations, the defendant seeks that the plaintiffs suit be dismissed.

11. On the matter of general damages, the defendant submitted that there is no basis upon which such damages could be payable, while it is submitted that special damages pleaded in the plaint were not proved and therefore not payable. It was submitted that the value of the cows was not established but “picked from the air” there having been no credible valuation from the Ministry of Livestock on the prices. Likewise, it was submitted that loss of profit of milk sales and loss of maize sales too were not proved and relied on the case **NBI C.A No. 283 of 1996 David Bagine -vs- Martin Bundi** where the Court of Appeal held that special damages must be pleaded and strictly proved and also **NBI C.A. NO192 of 1992 Coast Bus Service Ltd -vs- Sisco C. Murunga & 2 Others.**

It was urged that the plaintiff's claim having not been proved be dismissed with costs.

12. The plaintiffs' submissions were filed on the 8th December 2015. Issues for determination as framed by the plaintiffs are two:

1. Whether the Defendant was liable for negligence as established in *Rylands -vs- Fletcher (1861-73) All ER REP 1*.

2. If yes, whether the plaintiffs' are entitled to damages sought.

13. It was stated that the rule in **Rylands -vs- Fletcher** (Supra) is one that imposes strict liability on the owner of land for damages caused by escape of substances to a neighbour's land, that the defendant made a “non-natural” or “special” use of its land and brought into the plaintiffs' something that was likely to do mischief if it escapes, that the dumped materials caused damage to the property. It is a further submission that the defendant construed in its premises a Lead factory that is a non-natural use of the land and whose activity emissions was inherently dangerous and hazardous.

It was submitted therefore that resulting from the defendants activities, absolute liability resulting from the damage must be attached on the defendant and hence the Rule is applicable in the plaintiff's claim.

In answering whether the hazardous waste escaped from the defendants property, the court was urged that the transport of the waste from the defendant's factory and dumping it on the road adjacent to the plaintiffs' land amounted to the “Escape” as it spilled over when it rained, and caused damaged to both crops and animals.

14. On pollution to the plaintiffs soil, analysis by the various doctors of the symptoms and cause of death of the cows concluded that the cause was lead poisoning. It was submitted that the Environmental Impact Assessment result was that the escape of lead waste from the defendant's land to the plaintiffs land caused the damage.

15. Citing Principle 16 of the RIO DECLARATION ON ENVIRONMENT AND ADOPTED IN KENYA IN 1992, which provides:

“National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

The principle is captured in **Section 2 of the Environment Management and Co-ordination Act** in the following manner:

“--- the cost of cleaning up any element of environment damaged by pollution, compensation victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs connected with or incidental on the foregoing is to be borne by the person convicted of pollution under this Act or any other applicable law.”

It was its further submitted that the effects of lead on soil deposited thereon is transferred to the upper layers where it may be retained for many years and if the soils are cultivated, the lead mixes with the soil and on to grass and food. This then results in stunting the growth or killing the plants and causing premature aging.

16. The plaintiffs' submitted that the defendant has not provided any evidence to rebut the presumption that no Environment Impact Assessment Test was carried out and therefore concludes that the defendant ought to be held liable for the damages incurred by the plaintiffs.

Analysis of evidence an submissions and findings

17. There is no dispute that expert evidence by the various doctors in their reports that the three cows

died due to lead poisoning. I am also persuaded by the evidence on record as adduced by the plaintiffs' witnesses that the said cows belonged to the first three plaintiffs. They did not have to produce receipts or name tags to prove that indeed the cows belonged to them. The doctors who testified told the court that they went to treat them at their homes and it was the plaintiffs who paid for their treatment. If the cows did not belong to them, they would not have bothered to incur the costs they did. The plaintiffs produced title deeds to confirm ownership of the land parcels upon which the lead waste was deposited. I therefore have no doubt that indeed the lead waste material was deposited along the road bordering the defendants land parcels as aforementioned.

18. I have looked at the Defendant's documents, the Single Business Permit and the Environment Impact Assessment Licence dated the 27th May 2009. It is evident that the defendant was manufacturing Batteries on **LR NO. Nakuru Municipality Block 8/67** that is adjacent to the plaintiffs' land parcels. This was not controverted by any defence evidence. It was proposed battery manufacturing factory. Though dated May 2009 after the acts complained of, the defendant did not rebut the presumption that the factory was operational before the licence was obtained. Likewise, the Single Business Permit for 2009 did not exclude the presumption that there was such permit for the year 2008.

I have seen the Report filed by Dr. N.N. Kuria(PEXh 10). He stated that he was called to attend to a sick cow belonging to the first plaintiff. That a Chinese Company operating a few kilometres from the plaintiff's farm had dumped lead smelter waste on a road adjacent to the farm and that waste had spilled over into the plaintiff's farm after heavy rains. That the cows had licked the waste and the contaminated grass and other vegetation along the road side. This piece of evidence was not challenged at all. The doctor stated that the defendant company was in operation and that "together with the owners of the animal, they approached the company. They did not deny that they had disposed off the waste and they agreed to settle the matter by compensating the family appropriately."

From the above evidence it is also evident that the defendant company acknowledged that they deposited the toxic waste material along the road.

19. That being the case, the defence submissions are found to have no substance. The matter in issue as framed by the defendant, which as it stated, if answered in the affirmative would determine the matter of liability is therefore answered in the affirmative, that the defendant through its agents and servants dumped large quantities of lead waste on the road adjoining the defendants properties.

20. The above leads to the question, whether or not the plaintiffs' have proved their claim on both general and special damages as pleaded.

The three dead cows were given a valuation of Kshs.90,000/= each by PW3. Dr. Charles Ochodo, a Veterinary Surgeon – Ministry of Livestock Development. In his report he stated that the value of each was based on the breed of the cattle, body conformation, age, history of parentage of cow. He based the value of Kshs.90,000/= on his observations and milk production. This is evidence of an expert witness. It was not controverted. He gave the method of assessment of the value of a particular cow. I have no reason to doubt his valuation, as it is based on expert opinion. The claim for Kshs.90,000/= for each of the three cows is found to be proved.

21. On the price of maize stated to have been damaged, I find that the same was adequately proved by PW3, the Veterinary doctor who estimated the same to have been Kshs.2,200/= per bag, being the prevailing cost. However, the plaintiffs did not prove that they indeed lost fifteen bags of maize. It was hearsay. That goes for the loss of profit for sale of 35 Litres of milk. The plaintiffs did not provide evidence to.

22. A special claim for cost of drugs and veterinary fees of Kshs.12,290/= may be genuine as indeed the veterinary doctors testified that they treated the cows, and also conducted laboratory tests that they produced in court for a fee of Kshs.20,000/-. However, the only evidence of payment of the treatment costs availed to court is a receipt of Kshs.350/= only for laboratory services.

The two claims having not been proved are disallowed save for Kshs.350/=. Special damages must not only be pleaded but also proved.

23. The plaintiffs have extensively submitted on the adverse effects that lead poisoning poses to both human, animal and plant health. Continued exposure of lead poison would no doubt result to grave health hazards as stated in the “**Final review of scientific information lead.**” - an extract from the **United Nations Environment Programme** – version of December 2010.

Those inclusive **Human exposure** and health effects (on page 43) Health effects in humans – Page 53 – that may lead to neurotoxicant – an impaired neuro development in children, that may result from exposure in utero and during early childhood – whose accumulation in the skeleton and its mobilization from bones during pregnancy and lactation causes exposure to foetus and breastfed infants. Lead exposure too has adverse effects on the human nervous system, and causes anemia, personal effects, cardiovascular effects, Gastrointestinal and reproduction effects.

24. Lead in soil is said to reduce oxidizing agents causing low uptake by plants resulting in relatively low concentration of lead in foodstuffs. Ingestion of lead in soil by infants and young children from dust is also hazardous to their health. The expert doctors that testified for the plaintiffs all agreed that lead poisoning causes death to animals and as stated above, may have extremely adverse health concerns to human beings.

25. The plaintiffs seek that this court do direct the defendants to scoop out the dumped lead waste from the affected portion by removing the top soil and replacing it with uncontaminated soil to secure a clean and healthy environment.

Having stated though briefly of the effects of lead both to animals, plants and human beings, I think the plaintiffs' request it is not far fetched. I have carefully considered the entire evidence and submissions, I find there is overwhelming evidence that the defendants acts of dumping polluted lead waste adjacent the plaintiffs land parcels is a threat to their health, their animals and crops. The plaintiffs claim for general damages has not been properly supported and it is therefore declined.

26. In the **David M. Ndeti -vs- Orbit Chemical Industries Ltd (2014) e KLR**, the matter of chemical pollution and its effects was ably discussed. The court found that the defendant was liable in line with the Rule in **Rylands -vs-Fletcher (Supra)** and proceeded to award damages for cost of restoration of soil and for nuisance. In addition, the court issued an injunction to restrain the defendant by its agents from disposing contaminated sewage water from its premises into the plaintiffs property.

In substance and principle the case before the court is very close to the **David M. Mulei case** above.

27. For reasons stated above there shall be judgment for the plaintiffs jointly against the defendant for:

1. *Kshs.270,000/= being value of the three dead cows property of the plaintiffs.*
2. *An order directing the defendant to forthwith remove the dumped lead contaminated soil and waste on the road between its and parcel No. **Nakuru Municipality Block 8/67** and the plaintiff's land parcels Nos. **Njoro/Ngata Block 1/3810 3811, 3812, 3814, 3816, and 3821** and replacing it with clean and uncontaminated soil to the satisfaction the plaintiffs on the said road, or in the alternative to meet the cost of such removal and restoration of the soil.*
3. *A mandatory injunction is issued to restrain the Defendant by its agents and servants from dumping any lead contaminated soil or any hazardous waste from its factory on the plaintiffs land parcels or unapproved dumping sites whether adjacent to the plaintiffs' properties or otherwise.*
4. *The claim for general damages is dismissed.*
5. *Costs of the suit shall be borne by the defendant.*

Dated, signed and delivered in open court this 2nd day of June 2016.

JANET MULWA

JUDGE