REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PROFESSOR DAVID M. NDETEI.....PLAINTIFF

VERSUS

ORBIT CHEMICAL INDUSTRIES LIMITED.....DEFENDANT

JUDGEMENT

1. By a Plaint amended on 9th October 2001 and filed in this court on 11th October 2001, the Plaintiff sued Orbit Chemical Industries Limited *(hereinafter referred to as the Defendant, the Company or as the case may be OCIL)*, and sought the following orders-

causing or continuing to cause nuisance by odours, noise, dirt, industrial dust, sewage or percolation of effluents or untreated contaminated storm water coming into or about the Plaintiff's L.R NO. 1504/13;

3. *emptying untreated septic tank contents or dumping untreated sewage water on the open ground*

(i) re-direct all storm water that originates from the Defendant's premises away from the Plaintiff's property using drainages with impervious lining,

(c) damages for nuisance or in the alternative damages under the rule in RYLANDS VS. FLETCHER

(e) special damages

(g) costs

THE PLAINTIFF'S CASE

3. PW1, the Plaintiff, testified that sometimes between the years 1988 and 1989, the Defendant herein (OCIL), acquired the adjoining parcel of land No. L.R. 14817 Athi River. It subsequently applied for change of user of the parcel of land from agricultural/residential to industrial and after giving an undertaking to the Director of Medical Services by the letter dated 17th February 1989 commenced construction of a chemical industrial plant for manufacture of soaps, detergents and related products.

5. The Plaintiff further accused the Defendant of being negligent in the construction and operation of the plant aforesaid. The particulars of negligence, according to the Plaintiff are as follows -

(b) permitting escape of untreated sewage and/or contaminated water through unlined sewage or drainage system into the Plaintiff's premises,

3. *(d) allowing stagnation of waste water next to the Plaintiff's property which is the source of offensive odours and provides a breeding ground for mosquitoes and other vectors,*

(f) failing to empty the septic tank in time or at all,

5. The Plaintiff consequently averred that his premises were defiled and rendered unhealthy and unfit for occupation by the Plaintiff or sue for agricultural purposes. As a result he has been unable to enjoy the use of his premises and suffered the loss and damage as particularized hereunder-

(b) Loss of animals.....Kshs. 800,000.00/=

Cost of consultation.....Kshs. 1,155,000.00/=

(e) Cost of materials for restoration of land..... .Kshs. 267,439,464.15/=

THE DEFENDANT'S CASE

7. The Defendant further averred that in observance of an undertaking it had given to the Director of Medical Services vide the letter dated 17th February 1989, it does not produce any solid or liquid effluents. All solid and liquid waste from the chemical processing plant is collected and either recycled for use in the plant or sold. Further, the sanitary waste from the Defendant's factory is disposed off in a septic tank whose capacity and structure is in conformity with local authority and civil engineering standards.

9. The Defendant also filed a claim and set-off against the Plaintiff accusing him of making false and malicious misrepresentations to the press, public, public officials and the Defendant's Licensee that the Defendant's activities would lead to production of dangerous emissions and pollutants. As a result of these unjustified complaints, the Defendant has not only been subjected to harassment, inconvenience and embarrassment but has suffered economic loss due to the delay in obtaining of its operation license. For those reasons the Defendant prayed for -

(b) an injunction restraining the Plaintiff, his servants or agents from entering in the Defendant's premises;

3. *(d) general damages;*

(f) interest on the special damages from the date of filing the counter- claim at court rates and interest on general and exemplary damages from the date of the judgment.

10. The parties put in written submissions in support of their respective cases. The Plaintiff relied on the submissions dated 8th March 2013 and filed a further reply to the Defendant's submissions on 16th December 2013. It was his contention that he had proved on a balance of probability that the Defendant allowed affluent, rain water, noxious detergent dust, noise vapour and other noxious substances to escape from its premises into the Plaintiff's land. Further as a result of the escape the Plaintiff suffered loss and damage in that he was forced to abandon his agricultural activities and projects.

12. The Defendant's Counsel, relying on the submissions filed on 18th October, 2013 urged the court to strike out the plaint as the same had not been signed. Counsel relied on the holding in the case of **WAKF COMMISSIONERS VS MALIM & ANOTHER [2006] eKLR** where it was held that a pleading which does not conform with the formal requirements prescribed or inferred in the rules is irregular. The court in that case, relied on the holding of the Court of Appeal in **ATULKUMAR MAGANLIR SHAH VS INVESTMENTS & MORTGAGE BANK LIMITED & 2 OTHERS C.A. NO. 13 OF 2001 [U/R],** that -

13. On liability for negligence, Counsel submitted that the of DW1, DW2 and DW3 was clear that the Defendant's processes were in a closed circuit and did not spill out raw materials. Therefore, if there was any pollution, then the pollutants did not emanate from the Defendant's premises. According to Counsel, the Plaintiff did not show any injury visited upon by the Defendant as DW4 testified that there was no pollution to the Plaintiff's land which was attributable to the Defendant.

15. Having carefully considered the pleadings, oral and documentary evidence produced by the parties, the submissions and authorities cited in support thereof. The issues for determination in this matter are-

(b) whether the Defendant was liable for negligence under the rule established in ***RYLANDS VS FLETCHER [1861-73] ALL ER REP 1,***

(d) whether the Defendant has established his claim or set/off as set out in the defence,

16. I will now consider these issues in turn.

17. The Defendant objected to the Plaint herein as the same had not been signed in accordance with the formal requirements of a plaint under order VI Rule 14 of the repealed Civil Procedure Rules.

19. In addition, the Defendant did not allude to any prejudice it has suffered as a result of the non-compliance with the formal requirements of the rule. The issues raised in the Plaint were clear to the Defendant and it has responded to the averments therein in its defence. I therefore find and hold that the Plaint herein is properly before the court and will proceed to determine the matter on its merits.

20. The rule in **RYLANDS VS FLETCHER** is one that imposes strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land. It was formulated in the English Case of **RYLANDS VS FLETCHER [1861-73] ALL ER REP 1.** In that case, the Defendant had employed contractors to build a reservoir on his land. While building it, the contractors discovered a series of old coal shafts and passages under the land filled loosely with soil and debris, which joined up with Plaintiff's adjoining mine. Rather than blocking these shafts, the contractors left them and as a result the Defendant's reservoir burst and flooded the Plaintiff's mine causing damage.

"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences."

"If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."

23. From this case the prerequisites of a strict liability claim are that the defendant made a *"non-natural"* or *"special"* use of his land; that the defendant brought onto his land something that was likely to do mischief if it escaped; the substance in question escaped; and the Plaintiff's property was damaged because of the escape.

Whether the defendant's activities amounted to non-natural use of land

26. This term has however evolved over time to mean more than bringing something not naturally on the land but instead connote out of the ordinary use of land. The Canadian Courts have interpreted it to mean special, exceptional, unusual or out of the ordinary. In **RICKARDS VS LOTHIUM [1913] A.C. 263** cited with approval in **SMITH VS INCO LIMITED 2011, ONCA 628**, Lord Moulton, speaking on the principle in Rylands, that the thing brought onto the defendant's land should be something *"not naturally there"*, said-

26. The Supreme Court of Colombia in the case of **JOHN CAMPBELL LAW INCORPORATION VS OWNERS STRATA PLAN, 1350 [2001]BSCS 1342,** relying on the above holding further stated-

27. According to the court, the principle of non-natural use of land under **RYLANDS VS FLETCHER** is not a fixed concept but rather an evolving rule which reflects the constant changes that occur in modern life. The English Courts have also adopted a similar view. In the case of **TRANSCO VS STOCKPORT MBC [2004] 1 ALL ER 589** the court held on the test of what amounts to non-natural use of land-

28. The test for determining whether an activity is abnormally dangerous was laid out by the Supreme Court of Kansas , quoting an excerpt from **THE RESTATEMENT OF TORTS, 519 AND 520-**

(a) existence of a high degree or high risk of some harm to the person, land or chattels of others;

(c) inability to eliminate the risk by the exercise of reasonable care;

(e) inappropriateness of the activity to the place where it is carried on; and

29. The Supreme Court of India has in addition introduced the concept of absolute liability in addition to strict liability where the defendant is engaged in industrial activities resulting in pollution. In the case of **M C MEHTA VS UNIION OF INDIA [1987] 1 SCC 395,** cited with approval in **INDIAN COUNCIL FOR ENVIRO-LEGAL ACTION & OTHERS VS UNION OF INDIA & OTHERS [1996] 2 LRC,** the court stated that the test upon which such liability is to be imposed is based on the nature of the activity. Consequently where an activity is inherently dangerous or hazardous, then absolute liability for the resulting damage attaches on the person engaged in the activity. It stated-

The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from

the hazardous preparation of the substance of any other related element that caused the harm, the enterprise must be held strictly liable for causing such harm as part of the social cost of carrying on the hazardous or inherently dangerous activity. If the enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item for its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried out carefully or not.....We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity, resulting for example in escape of toxic gas, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands Vs. Fletcher [1868] LR 3 HL 330, [1861-73].”

30. The question then is whether in light of the above the Defendant's use of its land can be deemed to be non-natural. The Defendant led evidence, through the testimony of DW1, its administration import manager, that it essentially carries out chemical trading that is import and sale of chemicals in bulk. It also manufactures soap, detergents and personal hygiene products among others. For its manufacturing processes, the Defendant used bromine, sodium, zinc, vanadium, potassium, lead calcium, chromium, lead, iron titanium and zirconium. The possible residues after production include bromides, carbonated sulphates, hydroxides, phosphates, benzene, silicates, oils, alloy chlorides and cellulose.

32. However, the Defendant argued that its processes were legal having obtained permits, licenses and approvals to set up and run its plant and its manufacturing processes have at all times been carried out in compliance with the various regulations. The fact that the Defendant's activities amounted to a reasonable use of land for a lawful purpose is not in my view an automatic defence to strict liability under the Rylands rule. This is more so in the instant case where although the Defendant had been granted change of user of the parcel of land from agricultural/residential to industrial, the land was still situated in a neighbourhood that was still largely agricultural and residential.

Whether the elements from the Defendant's factory escaped to the Plaintiff's land

35. On the allegation of escape of storm water, the Plaintiff alleged that the Defendant had interfered with the natural flow of rain water by directing it to the Plaintiff's land. He relied on the testimony of PW6, James Wambua Kaluli, a lecturer at Jomo Kenyatta University of Agriculture and Technology. He was instructed by the Plaintiff to find out the impact of the Defendant's manufacturing activities on the Plaintiff's property and prepared the report produced as exhibit 6.

37. The Defendant acknowledged that it has built a perimeter wall around its property. An earth embankment approximately 300mm in height has been provided for along the factory boundaries downstream of the perimeter wall. This embankment restrains storm water emanating from higher ground from flowing across the Defendant's factory into the Plaintiff's land. Any excess water not restrained is channeled through lined open drains and underground pipes to a storm water containment pond. Any overflow from this pond is is discharged through an underground pipe downstream of the Kenya Pipeline Wayleave. Therefore, according to the Defendant, there was no storm water escaping from its premises into the Plaintiff's land.

39. The second complaint by the Plaintiff was in regard to escape of untreated sewage and contaminated water through unlined sewage or drainage systems. PW2, who visited the Defendant's premises upon receipt of the Plaintiff's complaint, found that the Defendant's septic tank did not have air and water tight covers which resulted in overflow from the manholes to the Plaintiff's premises. She also observed that the Defendant did not have toilet facilities for its

workers who resided on the premises with their families. They relieved themselves in the open or at the keiapple fence next to the Plaintiff's land. She further testified that while at the Plaintiff's premises she could smell human waste and other chemicals. On his part, PW3 testified that upon his visit to the Defendant's factory, he found that the septic tank meant to contain human waste malfunctioned.

41. The above evidence is quite clear that the Defendant's facilities were not properly constructed or sufficient to cater for the human waste produced in its factory. PW2 testified of smelling a bad odour of human waste, while PW3 confirmed that at the time of his visit, the Defendant's septic tank was not functioning. The court, during its visit to the Defendant's land also observed that the septic tank was not covered. As a result it is my finding that the raw waste was carried into the Plaintiff's land by the flowing storm water.

43. Having carefully considered the evidence by the parties on whether the Defendant's processes were waste free, I find that there is overwhelming evidence that the Defendant's processes resulted in the production of elements. I concur with the report of PW4, who in his report (exhibit 4C) wherein he was commenting on the Environment Management Plan of Waste Water Effluent Orbit Chemicals Limited presented to the National Management Authority under Section 36 of the Environment Management and Control Act (EMCA) found the Defendant's allegation that there is no waste generated not to be true.

45. According to PW2, when the members of the Public Complaints Committee of the National Environment Management Authority (NEMA) visited the Plaintiff's premises they observed foul smelling brown coated effluent flowing from the Defendant's factory to the Plaintiff's land. They also found stagnant water in the canal of the trenched area in the Plaintiff's premises and upon a little stirring of this effluent, it foamed indicating detergent contamination. The Committee also found heavy presence of white powder evaporite (chemicals) on the Defendant's premises and in the canals on the Plaintiff's land. These indicated a high alkalinity *(pH 9 to 10.5)* associated with high concentration of soluble salts.

47. In the premises I find that the Plaintiff was able to demonstrate that there was flow of effluent from the Defendant's factory by way of waste water and storm water and by seepage of waste into the soil through the unlined pits of the Defendant's into his premises. This effluent was contaminated by human waste and other elements produced as a result of the Defendant's processes.

48. Having found that in deed hazardous elements from the factory escaped from the Defendant's factory into the Plaintiff's land, the question that then follows is whether they caused any damage to his land for which the Defendant ought to be held liable. The Plaintiff complained of pollution to water, soil and air.

50. PW6 explained the difference between a septic tank and a soak pit. A septic tank is used for treatment of water with waste for about 30 days when it is then ejected into a soak pit or leached fence. A soak pit is a hole made in the ground probably filled with rocks to facilitate infiltrated water to the environment. There was therefore a possibility of waste water from the Defendant's land being discharged into an unlined soak pit infiltrating into the land. This waste water also seemed to seep under the perimeter wall into the Plaintiff's property. PW6 attached to his report photographs of the unlined pit which was very close to the wall separating the Plaintiff's and the Defendant's properties. The photographs also showed evaporite on the wall separating the two lands.

52. DW7, was Krispin Gregory Wafula, a registered NEMA Lead EA/EIA expert and founder member of the Kenya Institute of Environmental Impact Assessment. He was instructed by the Defendant to prepare a response to the allegations of environmental pollution and in particular the destruction of the Plaintiff's property and infrastructure. In his report (DEX7), he found that the operations of the Defendant within the upstream sector cannot have the capacity to

cause water pollution. He acknowledged that an earlier report showed that when the water was tested in the year 1994 at the behest of the Defendant it was found to be suitable for drinking. However, its pH as at the year 2002 rendered it marginally unsuitable for drinking although it satisfied most criteria for domestic use. The water in the midstream areas was found to be high in Zinc but within the prescribed standard. The water downstream had high concentrations of sodium but this was due to extensive interactions with bare soil or exposed soil surface.

54. The above suggests that infact there has been massive pollution of underground water by elements from the Defendant's processes. It clearly failed to take steps to ensure that the waste water produced is treated properly before being released into the environment. As a result, it was contaminated with chemicals and other harmful elements which penetrated to the underground water rendering it unfit for use.

56. From the above, I am inclined to find that infact the soil elements in the Plaintiff's land changed over time because of accumulation of harmful pollutants. There is no other plausible explanation for the increase in the elements produced by the Defendant in the soil other than they are as a result of pollution from its emissions. The proven facts lead this court to no other conclusion other that the chemicals produced by the Defendant accumulated in the soil over time and caused damage to it.

58. The Plaintiff also complained of noise made during production and sirens from the Defendant's factory. PW3, Daniel Mutuku Saiva, a lecturer at the School of Architecture of Building Science at the Jomo Kenyatta University of Agriculture and Technology conducted noise valuation levels from the Defendant's factory to determine whether they were within the standard criteria for a mixed residential and industrial area. He visited the site on 20th June and 22nd July 2000 when he carried out measurements along the 7.5 metre fence from the boundary of wall of the factory which borders the Plaintiff's land.

60. On its part, the Defendant denied the allegations by the Plaintiff. DW3 Albert Wachira Muriuki measured the noise levels of the factory on the instructions of the Defendant and found that they did not constitute a health risk to workers or negatively affect the environment and as such implied that the noise could not affect the Plaintiff. DW7 also concurring with the findings of DW3 that the noise levels produced by the Defendant were within the regulations. According to him, the noise which was the basis of the study by the Plaintiff's expert witnesses included traffic noise from the busy Mombasa-Nairobi Highway and could not solely be attributed to the Defendant.

DAMAGES

63. The Plaintiff's evidence was that he had purchased his land with an intention of carrying out agricultural activities. To this end he built a cowshed for 6 grade cattle which died after drinking the filthy and toxic effluents from the Defendant's factory. The Plaintiff also built a chicken pen for 10,000 broilers and entered into a contract with Kenchic Limited for breeding 5 crops of 60,000 broilers per year. His project was however frustrated after the chicken coop was flooded by the storm water from the factory.

65. The Plaintiff therefore urged the court to make restoration and conservatory orders against the Defendant for the loss and damage caused. He relied on the polluter-pays principle provided for under the **RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT,** adopted by Kenya in 1992 in the following terms-

66. The principle is further defined under Section 2 of the Environment Management and Coordination Act as follows-

67. Considering the above principles, I find that the Defendant has a primary duty to ensure that its activities do not affect the environment and when they do, then he has an obligation to take

all measures to restore the environment. The Plaintiff has proved on a balance of probability that there was effluent which escaped from the factory into his land and caused substantial damage to the soil and water which in turn led to loss of plants. The court was shown an abandoned poultry house and zero grazing project. It was shown where the Plaintiff had planted crops which had all died except for the cactus.

69. As to the claim for special damages, I agree with the Defendant's submissions that the same has to be specifically pleaded and proved. Having failed to provide proof for the professional consultancy charges, the costs of transport and miscellaneous expenses, that leg of claim fails and will not be awarded.

THE DEFENDANT'S COUNTER-CLAIM

72. I find the allegations by the Defendant to be without merit. The Plaintiff cannot be faulted for raising concerns and complaints over the activities of the Defendant or on the fact that these complaints were acted upon. The Plaintiff did not err for trying to ensure that his property is not polluted. I therefore dismiss the counterclaim in its entirety with costs to the Plaintiff.

(a) an injunction to restrain the Defendant by itself, its servants or agents or otherwise from:

(ii) disposing contaminated or untreated sewage water through unlined and open drainage soak pit; and

(b) a mandatory injunction directing the defendant by itself, its servants or agents to re-direct all storm water that originates from the Defendant's premises away from the Plaintiff's property using drainages with impervious lining,

(i) costs of restoration of soil.....Kshs. 267,439,464.15/=

(iii) general damages for nuisance.....Kshs. 500,000.00/=

(d) costs of the suit and the counter-claim.

74. There shall therefore be orders as above.

M. J. ANYARA EMUKULE

JUDGE