



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 22 OF 2016

HURLINGHAM PARK LIMITED.....PLAINTIFF

=VERSIS=

KINGS DEVELOPERS LIMITED.....1ST DEFENDANT

BALDESHVAR BUILDERS LIMITED.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 14th January 2016 and amended on 9th March 2016, the plaintiff seeks judgment against the defendants jointly and severally for:-

(a) A declaration that the manner in which the defendants have undertaken the development of LR No. 1/688 contravenes the plaintiff's right to quiet and peaceful possession and enjoyment of its property being LR NO. 1/311.

(aa) A permanent injunction restraining the defendants and any person claiming title under them from carrying on the construction/development on the land known as LR No. 1/688 or in any way using the property in a manner that interferes with the plaintiff's quiet possession of its property known as LR No. 1/311.

(b) Special damages of Shs.494,505.

(c) General and aggravated damages for negligence, nuisance and unlawful interference with the plaintiff's right to quiet possession and enjoyment of its property.

(d) Costs of this suit and interest.

2. Upon being served with summons to enter appearance and copies of plaint, the defendants entered appearance through the firm of M/S Kinyua Mwaniki & Wainaina Advocates on the 4th May 2017. They also filed a statement of defence dated 27th April 2017 and filed in court on 4th May 2017.

3. PW1, Martin Okumu, the Property Manager of the plaintiff told the court, that the plaintiff manages Hurlingham Park Estate. He adopted his witness statement and the documents in the plaintiff's list of documents dated 14th January 2016. He further told the court that a dispute arose because of construction on the adjacent property. The construction was done in a careless manner. A lot of debris was falling on to Hurlingham Park Estate and property was damaged. The defendants failed to put protective measures. The plaintiff made complaints to the police and other relevant authorities. National Environment Management Authority, stopped the construction after the complaints vide a notice issued on 30th July 2018.

4. The electric fence, water tanks, flower beds, residents' cars, Tv cables, got damaged and part of the parking could not be put to use. He produced the photographs of what was damaged and cost estimates, report of the repairs needed. The documents were produced as exhibits P1 to P26. The plaintiff prays for judgment against the defendants as prayed in the plaint.

5. PW2, John Kimani a quantity surveyor, told the court that he was requested by the plaintiff to prepare a cost estimates report. The report is dated 12th April 2017. He visited the site and found the damage was as a result of the construction on the neighbouring plot. He produced the report as exhibit P 26.

6. DW1, Boniface Nzioka, Ikuu, a supervisor and foreman with the 2nd defendant adopted his witness statement dated 4th May 2017. He also relied on the documents in the defendants' list of documents filed on 4th May 2017 and a supplementary list dated 18th August 2017. He told the court there was no further damage after a DSTV satellite dish was replaced. He produced the documents as exhibit D1 to D4 respectively. He also stated that the construction was not stopped by National Environment Management Authority or any other authority.

7. At the close of the oral testimonies, the parties tendered final submissions.

The Plaintiff's submissions

8. They are dated 18th February 2020. The plaintiff is the registered owner of the premises known as Hurlingham Park Estate erected on LR No. 1/311 situated along Argwings Kodhek Road. It comprises of three (3) blocks of apartments whose user is residential cum commercial. The defendants undertook their development in such a negligent and/or careless manner, that the development has been a constant and persistent nuisance to adjoining properties and the plaintiff's property in particular. This caused the plaintiff's premises to suffer substantial damages and untold inconvenience to the residents of Hurlingham Park Estate.

9. The defendants failed to install appropriate protection such as buffers, debris nettings and catch platforms to protect adjoining properties and members of the public from falling debris, throwing timber planks into the plaintiff's compound. The failure to provide appropriate protection led to the defendants being issued with an Improvement Notice by the National Environment Management Authority sometimes in 2015 which required them to stop construction and install protective barriers to National Environment Management Authority's approval.

PW2 John Kimani a quantity surveyor prepared a cost estimate of renovating the property. He provided a cost estimate of Kshs.439,600/-. This expert testimony was not controverted by the defendants as this could have only have been done through assessment and report by another expert.

10. The plaintiff raises three issues for determination:-

(a) Whether the defendants' negligently carried on construction on its premises LR 1/688 causing damages to the plaintiff's property LR No. 1/311.

(b) Whether the honourable court should award special and general damages for negligence, nuisance and interference to the plaintiff's quiet and peaceful occupation of its property.

(c) What is the quantum of the said damages?

(d) Who bears costs of the suit?

11. It is the plaintiff's case that the defendants construction over their property was conducted so negligently that it was a constant nuisance from July 2015 to February 2016. It has put forward the cases of **Livingstone vs Rawyards Coal Co. [1880] 5 App Cases 25; Prof David M. Ndeti vs Orbit Chemical Industries Ltd [2014] eKLR.**

12. Email correspondences exchange between residents of the plaintiff and the management of the continued exposure of the property to damage, the falling of a block damaging the roof to one of the block apartments and letters sent to the defendants upto December 2015 are evidence of continued damage. The plaintiff exhibited photos that show the letting with gaping holes and spaces that would have allowed debris to continue falling. The plaintiff has established a nuisance from July 2015 to January 2016 when the plaintiff moved to court.

13. The honourble court should award damages to restore the plaintiff to the position where it was before the damage. The plaintiff ought to be awarded Kshs.439,600 as per the report by the quantity surveyor. It also seeks Kshs.800,000/- being general damages for the nuisance caused by the defendants.

14. The plaintiff prays for costs of the suit. It has put forward the case of **Mike Maina Kamau vs Attorney General [2017] eKLR.** It prays that the court grants the orders sought on the amended plaint plus costs of the suit.

The Defendants' Submissions

15. They are dated 10th February 2020. They set out two issues for determination:-

(i) Whether there was damage to the plaintiff's property by the defendants and if so, to what extent?

(ii) What amount in damages should the plaintiff be awarded if any?

16. PW1, Martin Okumu relied on a National Environment Management Authority Improvement Notice dated 30th July 2018 to prove that National Environment Management Authority had intervened and required the defendants to ensure safety of the neighbouring properties by installing buffers and netting. DW1, Boniface Nzioka testified that at the time of issuing the National Environment Management Authority enforcement notice only a DSTV dish had been damaged. The owner of the DSTV had been compensated by the defendants. He produced a copy of the letter from Joan Emma Advocates dated 17th August 2015 as Exhibit D2. The plaintiff's witness maintained that its tenants continued to suffer damage as a result of the construction being undertaken by the defendants. The plaintiffs however failed to call the said tenants to give evidence in support of the plaintiff's case.

17. The defendants' witness testified that they had complied with the National Environment Management Authority notice, no subsequent notice was issued. The plaintiff did not contest this fact but maintained there was further damage to its premises. The plaintiff has failed to meet the threshold in civil cases which is on a balance of probabilities since the defendants rebutted the plaintiff's evidence. They have put forward the case of **Tadis Travel & Tours Ltd & Another vs Astral Aviation Limited [2015] eKLR**.

18. PW1 testified that the splashing of the concrete mixture caused the electric fence to malfunction. On cross examination he could not tell when the electric fence was installed and how much time had passed since its installation. The plaintiffs failed to prove that the defendants were to blame for the malfunction of the electric fence. They have put forward the case of **Statpack Industries vs James Mbithi Munyao [2005] eKLR**. The quantity surveyor also confirmed that in preparing his report he did not factor in the age of the machine used to operate the electric fence, dust, rain and rust in arriving at the figure of Kshs.90,000.

19. In the amended plaint the purchase of tanks, clearing of windows, walls and gutters was pleaded in a blanket form of Kshs.75,400/-. It was thus necessary to prove the specific amount of each item by way of evidence. The plaintiff's witness claimed the plaintiff used Kshs.37,800 to repair the roof. No receipts were produced in support of the special damages. With respect to the flower bed, the photographs provided by the plaintiff were not enough to show there was concrete in the flower bed. The plaintiff failed to prove that it had *locus standi* to claim the DSTV dishes since there was no authority from the owners thereof to claim the same through the present suit. The claim for DSTV should be rejected.

20. The plaintiff claimed general and aggravated damages for negligence, nuisance and unlawful interference of the plaintiff's right to possession and enjoyment of its property. PW1 on cross examination admitted he has not provided proof that tenants had left Hurlingham Park Estate due to the inconvenience caused by the defendants. This claim should be rejected. The plaintiff's witness confirmed that construction complained of is complete. The prayers for a permanent injunction has been overtaken by events. They pray that the plaintiff's suit be dismissed with costs.

21. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issue for determination are:-

(i) Whether the defendants negligently carried on construction on its premises LR 1/688 causing damage to the plaintiff's property LR No. 1/311.

(ii) What damages should be awarded to the plaintiff if any?

(iii) What is the quantum of the said damages.

(iv) Who should bear costs of the suit?

22. It is the plaintiff's case that the defendants' construction over their property was conducted negligently, that it was a constant nuisance, to the occupants of the plaintiff's adjacent building. In **Clerk and Lindsell on Torts, 17th Edition page 1354 paragraph 24**. It is stated;

“Nuisance” is defined as an act or omission which is an interference with, disturbance of or annoyance to, a persons rights used or enjoyed in connection with land. It is caused usually when the consequences of a person's actions on his land are not confined to the land, but escape to his neighbours land causing an encroachment and causing physical damage or unduly interfering with the neighbour's use and enjoyment of his land”.

23. It is on record that in July 2015 the Defendants' development was stopped by National Environment Management Authority for failure to install appropriate protective barriers. In page 17 of the plaintiff's list of documents dated 14th January 2016 there is an Improvement Notice (order) from National Environment Management Authority dated 30th July 2015. It is addressed to Kings Developers and Contractor. The effect of the order was “to stop all the construction activities and install appropriate protection (banners) within five (5) days to the approval of National Environment Management Authority”.

The defendants have not disputed the existence and the contents of this order. The said order was issued following complaints from the plaintiff. There is evidence that the defendants' construction was undertaken negligently and/or in a careless manner. The plaintiff has also availed photographs showing the extent of the damage to its premises. The photographs also show the nettings with gaping holes and spaces that would allow debris to fall into the plaintiff's property. There are letters sent by the plaintiff to the defendants confirming the damages. DW1 Boniface Nzioka Ikua confirmed there was damage to the plaintiff's premises. He confirmed a DSTV dish was replaced by the defendants. It belonged to one of the plaintiff's tenants. From the foregoing evidence, I find that the construction by the defendants on their premises caused damage to the plaintiff's property.

24. It is not disputed that the defendants development was a nuisance and interfered with the plaintiff's residents occupation of its property. In the case of **Livingstone vs Rawyards Coal Co. [1880] 5 App cases 25** the court defined the measures of damages as:-

“that sum of money which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation”

I am guided by the above authority.

25. PW2 John Kimani a quantity surveyor, confirmed that he visited the site for purposes of preparing the cost estimates report. He stated that there was damage on the roof, electric fence, satellite dishes, landscaping, plumbing and two DSTV dishes. He confirmed there were

repairs undertaken on the roof. He prepared the cost estimates report and produced it as exhibit P26. He estimated the repairs Kshs.439,600/- The report is dated 12th October 2017 and filed in court on 11th April 2019.

26. The report has not been challenged. The defendants did not tender another report to contradict the estimates given by PW2. His testimony corroborates that of PW1 as to the damages on various areas of the plaintiff's premises. It was incumbent upon the defendants to avail another report to dispute the specific damages enumerated by the plaintiff.

27. The plaintiff's contention is that they could not produce any receipts as the repairs had not been undertaken except for those in the roof. I find that the report by PW2 the quantity surveyor is proof that indeed renovations would be undertaken and how much it would cost to bring the premises into the state it was before. The report is by an expert. It ought to be challenged by the evidence of another expert and not by submissions.

28. The photographs attached to the report confirmed the damage to the premises. It is the plaintiff's evidence that the DSTV dishes were owned by individual tenants. They were not called as witnesses to confirm ownership and the damage. The amount awarded to the satellite dishes will be omitted from the cost estimates report hence Kshs.115,000 will not form part of the report. This means the plaintiff will be entitled to Kshs.324,600 as per the cost estimates report exhibit P26.

29. The plaintiff has proposed Kshs.800,000 as adequate damages for nuisance. However I award Kshs.200,000 which I think is adequate compensation. In the case of **Professor David M. Ndeti vs Orbit Chemical Industries Ltd [2014] eKLR**, Emukule J, referred to excerpts from the English case of **Rylands vs Fletcher [1861 – 73] ALL ER REP 1** where it was stated in part;

“.....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.....”

Emukule J went on to award the plaintiff Kshs.800,000/- general damages for nuisance.

30. Having found that the plaintiff has established its case against the defendants on a balance of probabilities, it goes without saying that it is entitled to the reliefs sought.

31. It was admitted by the parties that the defendants' building has now been completed. I find that the prayer for a permanent injunction has been overtaken by events.

32. The plaintiff shall be entitled to costs of the suit.

33. Accordingly judgment is entered for the plaintiff as against the defendants jointly and severally as follows:-

(a) That a declaration is hereby issued that the manner in which the defendants have undertaken the development on LR NO. 1/688 contravenes the plaintiff's right to quiet and peaceful possession and enjoyment of its property being LR No. 1/311.

(b) Special damages of Kshs.324,600/-.

(c) General damages for nuisance kshs.200,000.

(d) Cost of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 10th day of December 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mrs Kayugira for the plaintiff

No appearance for the defendants

Kajuju – Court Assistant