



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 530 OF 2016

NAKURU INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

CHINA ROAD & BRIDGE CORPORATION.....DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that the defendant entered her land and excavated building material from it; plaintiff in her plaint pleading that the entry was violent; no evidence of any violence led; no direct or circumstantial evidence to bring one to the conclusion that it could only be the defendant who entered the plaintiff's land and did the excavation; suit dismissed with costs).

1. This suit was commenced by way of a plaint which was filed on 26 November 2007. In the suit, the plaintiff averred that she is the registered proprietor of the land parcel LR No. 12570/184. The plaintiff has contended that in the month of January 2007 the defendant wrongfully and without any lawful authority or consent of the plaintiff, through its agents and workers, violently entered the plaintiff's said land and commenced the excavation of soil, stones, and rocks therefrom, carted away the same and used it for the construction of the Lanet-Nakuru road. It is averred that the plaintiff has now been deprived of the exclusive use of her land and has been subjected to great loss given that the defendant left gaping valleys and unfilled dams and holes, and also scooped out important material from the land. In the suit, the plaintiff has asked for the following orders :-

- (a) A permanent injunction to restrain the defendant by itself, its agents, its servants or employees or workers from remaining on, continuing in occupation, carrying out any excavations or other works on the plaintiff's parcel of land LR No. 12570/184.
- (b) General damages for trespass.
- (c) Costs of this suit.

2. The defendant filed a statement of defence vide which it denied that the plaintiff is the registered owner of the suit land; denied having entered the suit land or removing any materials; and denied depriving the plaintiff of the use of the land. In essence, it refuted all the claims of the plaintiff.

3. PW-1 was Mr. Raj Shah, the managing director of the plaintiff company. He produced a copy of the title to the suit land to demonstrate that the same is owned by the plaintiff company. He stated that the defendant came to the land and dug up the soil and excavated on about one acre of the land. He testified that they had not allowed them to do any such excavation. He had a sketch map to show the area excavated and some photographs showing the said excavation. He stated that when they learnt of the excavation, they wrote a letter dated 12 February 2007 to the defendant but the same elicited no response. They did a reminder on 23 March 2007 which also was not responded to. They then issued a demand notice on 30 March 2007 again without a response. In addition a report to the National Environment Management Agency (NEMA) was made and NEMA did write a letter dated 14 November 2013 to the defendant for a restoration of the site. Again no response was made by the defendant. NEMA did a report on the status of the site which was produced as an exhibit by PW-1.

4. Cross-examined, he testified that the trespass occurred around January/February 2007, but could as well have been in December 2006. The land is about 4 km from where the offices of the plaintiff are located. He himself went to the site around 10 February 2007 or thereabout. The quarrying of the land had already occurred and this had happened without them knowing. He explained that they have several pieces of land and they only check on them once in while. There had also been quarrying in the neighbouring land. He stated that upon writing the letter dated 12 February 2007, Mr. Ken Son, of the defendant company came to see him about two days thereafter and stated that they will do the backfilling. He testified that the defendant tried to backfill but they could not do it properly. Cross-examined on his letter of 23 March 2007, he conceded that it does not refer to any meeting or that there is agreement to restore the land, and neither did the demand letter from his advocates. He stated that it is difficult to backfill the land, and what the plaintiff now wants is compensation. He stated that at the moment there is dumping still on going by contractors who throw in their waste and also there is dumping of domestic waste. He however does not

know who does this dumping. He was aware that the Dundori-Lanet Road was being done by S.S Mehta & Sons who did excavation on the same area but on different land after the year 2007. They (plaintiff) did file a case in court and they were compensated. He insisted that it was the defendants who excavated the land although he personally did not see them.

5. I questioned him on why he thought it is the defendant who has excavated the land and he stated that he used to see their lorries going towards that area and that they are also the ones who excavated the neighbouring land.

6. PW-2 was Pius Isaiah Khaoya a practising valuer since the year 1987. He testified that in November 2013, he received instructions from the plaintiff to carry out a valuation of the site. He proceeded to do so and prepared a report. He testified that the whole land is 3.906 Ha, which is equivalent to 9.652 acres. The affected area is 0.7 acres. He stated that there were attempts to backfill the site but which was not done well and the area is thus susceptible to collection of rain and surface runoff. He valued the whole land at Kshs. 143,750,000/= if it was not excavated, but with the excavation, the land value is Kshs. 140,000,000/= .

7. With the above evidence, the plaintiff closed her case.

8. DW-1 was Li Song Qiao, the personnel manager of the defendant company in respect of the Lanet-Njoro and Timboroa Project. He affirmed that the defendant company did the construction of the Lanet-Njoro road and that they started the project in the year 2006 and completed it in the year 2010. He stated that they used to get construction material from private land and would negotiate with the owner the cost. They would then enter into an agreement. After excavation, they would back fill and level the land. He testified that they have no agreement with the plaintiff for excavation of their land and that their company never entered the plaintiff's land, nor did it use any material from their land. He denied that their company received any letter of complaint from the plaintiff although he did admit receiving the letter dated 14 November 2013 from NEMA which they responded to.

9. Cross-examined, he stated that for the construction of the Lanet-Njoro road, they got materials from Njoro, Bahati and Lanet but denied that they got materials from the area where the plaintiff's land is situated. He stated that what they had in this area was a site for mixing materials. He affirmed that their company had a person by name of Kan Sun, who was the commercial manager, but was not aware that he received any of the letters written by the plaintiff. He was also aware of Bruce Lee, another of their employee, but he was not aware that he received any letter from the plaintiff.

10. DW-2 was David Ntara Arimi, a practising valuer with 32 years of experience. He did a valuation report of the site on 11 December 2017 after inspecting the site on 6 December 2017. He affirmed that there is an excavated area which according to him was about 0.6 acres. He thought that this excavation had taken place about 2012/2013. He noticed dumping on this area. He placed the value of the disturbed area at Kshs. 1,800,000/= as at the years 2012/2013. He stated that it is difficult to restore the land to its pre-excavation state, as you may not get similar materials, although the land could be restored to some satisfactory state.

11. With the above evidence the defendant closed its case.

12. In his submissions, Mr. Ntabo, learned counsel for the plaintiff, inter alia submitted that the plaintiff has produced ownership of the suit land and that the defendant committed the tort of trespass in entering the land and taking away materials from it. He asked for the sum of Kshs. 7,000,000/= as damages for trespass basing this on the lost value of the land. He relied on the case of **Brooke Bond Ltd vs James Bii (2013) eKLR** and **Nakuru Industries Limited vs S.S Mehta & Sons, Nakuru HCCC No. 36 of 2013**. The first case was one of trespass, which was allowed on appeal, and in the second case, an award of Kshs. 500,000/= was made as damages for trespass.

13. On his part, Mr. Orege, learned counsel for the defendant, inter alia submitted that PW-1 was not sure of when the trespass occurred and only guessed the time. He also pointed out that PW-1 never witnessed the trespass. He further submitted that no witness was called to prove that it was the defendant excavating the neighbouring land. He submitted that despite PW-1 stating that he held a meeting with the defendant, his letters do not mention any meeting. He submitted that PW-1 had testified of encroachment by S.S Mehta & Sons for which they were awarded damages but did not state when the said company encroached on the land.

14. I have considered the matter and taken into consideration all matters and hold the following view.

15. What I have before me is a case where the plaintiff alleges that the defendant has trespassed into her land and taken away construction materials. This is categorically denied by the defendant. It follows that the plaintiff needs to prove the following on a balance of probabilities :-

- i. That she is the owner of the suit land.
- ii. That the defendant trespassed into the said land.
- iii. That the defendant dug up the land and excavated material from the said land.

16. On the first issue, I have no problem holding that the plaintiff owns the suit land. PW-1 did produce a copy of its title deed and there was no serious contention that the suit land is not owned by the plaintiff. Nothing therefore turns on this first preliminary point.

17. On the second issue, I need to be satisfied that I have been given ample evidence that the defendant did trespass on the suit land. On this, I am afraid that I am not persuaded that there is evidence of trespass by the defendant. First, the plaintiff did not call any person who witnessed the said excavation of the land. PW-1 himself never witnessed the said excavation and he said that he only came to know of it when he made a routine visit to the land. The excavation was to a fairly large area, and it could not be that this took place in one or two days. If the plaintiff looked hard enough, she would have found a person who would have pointed out who exactly was doing the

excavation. It is not of course in all cases that there must be an eye witness for the court to reach the conclusion that an act was committed by the person claimed to have done it, for it may happen in many instances, that no person is available to see the act. In such cases, one needs to table some circumstantial evidence, that will enable the court arrive at the conclusion that it is the defendant who committed the act. In the instance of this case, I do not even have any circumstantial evidence that can lead me to this conclusion. The only evidence that can enable me place the defendant on site, is the fact that they were making the Lanet-Njoro road. If you remove that from the equation, there is nothing that connects the defendant to the plaintiff's land. However, there is evidence of other on-going road constructions at the time, including one by another company named S.S Mehta & Sons.

18. PW-1 did mention that it was the defendant who excavated the neighbouring land, and if this was the case, there would have been nothing easier than to call this neighbour to say that, yes, the defendant did excavate on my land. With this sort of evidence, you would have placed the defendant within the proximity of the area, and probably hold that there is a good chance that the defendant may have strayed into the plaintiff's land. But, as I have mentioned, I do not have this evidence.

19. The plaintiff did state that he held a meeting with Mr. Son of the defendant company and that he did promise to fill up the land. Again, I have no evidence of such meeting. As pointed out by Mr. Orege, this does not come out in any of the correspondences written by the plaintiff. The plaintiff also tried to point me to the letter written to the defendant by NEMA. But I note that this letter was written in the year 2013, more than 6 years from the time of the alleged excavation. I have no evidence that NEMA did any independent investigation that it was the defendant who did the excavation on the land. Indeed, that letter dated 14 November 2013, from NEMA does state that NEMA has only received a complaint that the defendant abandoned this quarry. This complaint must of course have come from the plaintiff. Why was the plaintiff complaining 6 years after the fact? Why didn't the plaintiff make a complaint immediately it saw the site excavated or soon thereafter?

20. I really have nothing that places the defendant at the site of the plaintiff's land and as I have mentioned, this excavation work could not have been done in the stealth of the night so as to afford no witnesses. Excavation is a notorious exercise which is highly visible if not impossible not to hear. The plaintiff really should have done better in finding persons who may have witnessed the excavation and brought them to court to support her case. Without evidence, I am afraid that I will be speculating that it is the defendant who dug up the land of the plaintiff, and that would be unfair to the defendant, for I may be holding a very innocent party to be guilty. The plaintiff could as well have pointed at anybody engaged in any construction and state that they are the ones who dug up her land. That mere statement, that it is the defendant who did the excavation, with nothing more, in the circumstances of this case, is not enough to find the defendant culpable.

21. Before I close this issue, I do note from the plaintiff's own plaint, the averment that the defendant "*through its agents and workers violently entered the plaintiff's land.*". This is how the plaintiff has pleaded the defendant entered her land. I was not given any specific date of entry, leave alone any evidence of violence. If there was any violence, you would imagine that there would be a person who is injured or at least threatened with injury. Maybe there would even be a police report of violent entry to one's land and possible prosecution for the offence of forcible detainer. I have nothing of this sort from the evidence tendered.

22. The only conclusion I can reach is that the plaintiff speculates that the defendant is the entity that entered its land. It may be true, or not true, but for me, what is important, is that I have no evidence of any sort that it is the defendant who entered the plaintiff's land so as to enable me make a finding against the defendant. The plaintiff has hopelessly failed to prove on a balance of probabilities that it is the defendant who entered her land and for that reason alone, this case must fail.

23. I need not make any finding against the defendant since I am not convinced that the plaintiff has proved to the required standard that it is the defendant who entered her land and did the excavation. However, I find it necessary to address the plaintiff's claim for damages. The plaintiff did avail an expert to quantify the actual loss that the plaintiff has suffered. This is in the form of special damages, and for the court to have made an award under this head, the plaintiff needed to have pleaded special damages. None were pleaded so that even if I had been persuaded that it is the defendant who entered the plaintiff's land, I would not have made any award for the loss of value of the land. The only form of damages pleaded is general damages for trespass. If I had found that the defendant actually entered the land and excavated material, I would have awarded the plaintiff the sum of Kshs. 500,000/= in general damages, as a recognition that his right of ownership and exclusive use of the land has been interfered with. I would also have issued the prayer of permanent injunction as sought.

24. But as I have stated, not being persuaded that the plaintiff has proved on a balance of probabilities that the defendant entered its land, I have no option but to dismiss the plaintiff's case. The same is hereby dismissed with costs to the defendant.

25. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 21st day of February 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Ntabo for the plaintiff.

Mr. Orege for the defendant.

Court Assistant :Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU