



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO 129 OF 2017

EDWARD NYAOGA ONSONGO.....PLAINTIFF

VERSUS

JOB MEKUBO MOGUSU.....DEFENDANT

JUDGMENT

1. The plaintiff filed a plaint dated **17th July, 2017** seeking orders of permanent injunction to restrain the defendant from digging a hole for water discharge next to the plaintiff's house in **Plot No. Kitale Municipality Block 18/Bidii/994**. He also sought an environmental restoration order for refilling of the hole dug next to his house.
2. The plaintiff's case is that he owns **Plot No. Kitale Municipality Block 18/Bidii/994** while the defendant owns **Plot No. Kitale Municipality Block 18/Bidii/996**. The plaintiff avers in his plaint that the defendant has dug a hole for water discharge next to the plaintiff's house without any due regard for the safety of the plaintiff's house and that the hole poses a danger and nuisance to the said house.
3. The defendant's defence was filed on **13/9/2017**. In it he states that if the plaintiff owns his land then the same ownership is subject to overriding interests; that the hole was dug over a decade ago and used to be a pit latrine; that the act in question not having been committed on the plaintiff's land and the act having happened **10** years ago the remedy is time barred by statute; that the plaintiff has been the author of his misfortune in that he constructed a wall that blocks water that flows down from the road beyond the defendant's plot and through the defendant's plot from accessing lower grounds beyond the plaintiff's plot, that if the plaintiff allowed for a drainage path through his plot the problem could be solved; that the suit should be preliminarily struck out as the nuisance is of public nature and **Section 61** of the **Civil Procedure Act** has not been complied with.
4. The plaintiff testified on **14/12/2018**. He reiterated the matters in the plaint and in his witness statement dated **17/7/2017**.
5. He produced a title deed for his plot (**PEXh1**), a photograph of the hole complained of (**PEXh 2**). He stated that the defendant's hole is dug too close to his house; that he discussed the matter with the defendant; that when the defendant refused he approached public health office and the National Environment Management Authority office (NEMA) that he wrote a complaint to NEMA (**PEXh 3**), that the public health officer saw the hole and sent the defendant a letter; that despite these the defendant never acted on the nuisance to abate it; A restoration order was issued by NEMA but the defendant never complied. A demand was made in writing to the defendant by the plaintiff's advocate but he remained recalcitrant. The plaintiff alleged that water seeps into the foundation of his house when it rains and he is apprehensive that the same may collapse. He stated that at the beginning the hole was meant for a latrine and when it collapsed the defendant never refilled it. It was re-excavated by the defendant after the plaintiff built his house.
6. On cross examination the plaintiff stated that he has lived at the spot since **2009**; that he has a perimeter wall around his house; that he does not recall when the hole was dug. On reexamination he stated that they had tried to resolve the dispute as neighbours before a panel of elders in the village before he sought the help of other offices.
7. **PW2 Kennedy Wekesa** Senior Public Health Officer testified in the case. He stated that at the plaintiff's instance he visited the site and the defendant agreed to refill the hole but never did so, prompting him to write to the defendant requiring him to abate the nuisance. In his opinion the house may collapse and the occupants stand risk of contracting pneumonia or rheumatism owing to the problem. He stated that the plaintiff's house was not occupied.
8. **PW3, Nicholas Musonye**, Deputy Director of Environment Trans Nzoia County, testified in the suit and produced his report (**PEXh 5**); he stated that he had witnessed the hole; that he had given his advice in the report and that the hole was dug near the plaintiff's house for collecting storm water. He advised the defendant to relocate the hole to another site on his plot. On cross examination he stated that he was not aware if the plaintiff's house was occupied.
9. **PW5, Michael Wanjau Wahome**, County Environment Officer testified in the matter. He produced the restoration order that he had issued to the defendant as **PEXh 6**. It required refilling of the hole and its relocation, as well as affixing of gutters as catchment for roof

water. He confirmed that he served the order upon the defendant. When cross examined by the court he admitted that water flows from the highway and passes through the defendant's plot and into the defendant's plot where it is captured in the hole complained of and which is about two metres away from the plaintiff's house. However there is a wall between the hole and the plaintiff's house. He never verified the hole dimensions. He stated that if the water was not obstructed by the defendant's developments it would flow into the plaintiff's house.

10. The defendant testified and admitted that the hole exists and is about 2 metres from the plaintiff's plot. He added that it had been on his plot for ten years; that he dug it in order to control the storm waters from the road beyond from entering his house; that the hole is of great help to him in controlling the storm waters; that he built his house before the plaintiff; that the plaintiff came later and built his house and also a wall between them so that when it rains the water flows into his house, that he is aware that if he refilled the hole the water would not find an outlet and if the wall built by the plaintiff is removed the water can pass to the lower side. He does not dispute being served with NEMSA's recommendations but states that he never followed the advice contained therein because he does not have any room to store the water.

11. Upon cross examination by the court the defendant averred that once he had built a wall but the water felled the wall hence the digging of the hole. He asked the plaintiff at one time to open up his fence so that a pipe may be installed to direct the storm waters to the land beyond the disputing parties' plots and into the river but the plaintiff refused to concede ground.

Determination.

Issues for determination

12. I have considered the pleadings and the evidence of the parties in this case and the following are the issues for determination.

(a) Is the nuisance a public nuisance and should the suit be dismissed for want of compliance with section 61 of the Civil Procedure Act?

(b) Does the hole pose a danger to the plaintiff?

(c) Should a permanent injunction issue against the defendant from digging a hole for water discharge next to the plaintiff's house?

(d) Should the defendant be issued with an environmental restoration order?

(e) Who should bear the costs of the suit?

(a) Is the nuisance a public nuisance and should the suit be dismissed for want of compliance with section 61 of the Civil Procedure Act?

13. The provisions of *Section 61 of the Civil, Procedure Act* provide as follows:-

61. Public nuisance

(1) In the case of a public nuisance, the Attorney-General, or two or more persons having the consent in writing of the Attorney- General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall limit or otherwise affect any right of suit which may exist independently of its provisions.

14. The provisions of this Act require to be juxtaposed with the provisions of the **Environmental Management and Co-Ordination Act** at **Section 3** states as follows:

3. Entitlement to a clean and healthy environment

(1) Every person in Kenya is entitled to a clean and healthy environment in accordance with the Constitution and relevant laws and has the duty to safeguard and enhance the environment.

(2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environment for recreational, educational, health, spiritual and cultural purposes.

(2A) Every person shall cooperate with state organs to protect and conserve the environment and to ensure the ecological sustainable development and use of natural resources.

(3) If a person alleges that the right to a clean and healthy environment has been, is being or is likely to be denied, violated, infringed or threatened, in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may on his behalf or on behalf of a group or class of persons, members of an association or in the public interest may apply to the Environment and Land Court for redress and the Environment and Land Court may make such orders, issue such writs or give such directions as it may deem appropriate to-

- (a) prevent, stop or discontinue any act or omission deleterious to the environment;
 - (b) compel any public officer to take measures to prevent or discontinue any act or omission deleterious to the environment;
 - (c) require that any on-going activity be subjected to an environment audit in accordance with the provisions of this Act;
 - (d) compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
 - (e) provide compensation for any victim of pollution and the cost of beneficial uses lost as a result of an act of pollution and other losses that are connected with or incidental to the foregoing.
- (4) A person proceeding under subsection (3) of this section shall have the capacity to bring an action notwithstanding that such a person cannot show that the defendant's act or omission has caused or is likely to cause him any personal loss or injury provided that such action-
- (a) is not frivolous or vexatious; or
 - (b) is not an abuse of the court process.

15. The provisions of the **Civil Procedure Act** in **Section 61** also require to be juxtaposed with the provisions of **Articles 42, 69-70 of the constitution** which provides as follows:

42. Environment

Every person has the right to a clean and healthy environment, which includes the right-

- (a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
- (b) to have obligations relating to the environment fulfilled under Article 70.

69. Obligations in respect of the environment

(1) The State shall-

- (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
- (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
- (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
- (d) encourage public participation in the management, protection and conservation of the environment;
- (e) protect genetic resources and biological diversity;
- (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
- (g) eliminate processes and activities that are likely to endanger the environment; and
- (h) utilise the environment and natural resources for the benefit of the people of Kenya.

(2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

70. Enforcement of environmental rights

(1) If a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(2) On application under clause (1), the court may make any order, or give any directions, it considers appropriate-

- (a) to prevent, stop or discontinue any act or omission that is harmful to the environment;
 - (b) to compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment; or
 - (c) to provide compensation for any victim of a violation of the right to a clean and healthy environment.
- (3) For the purposes of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.

16. Article 21 of the Constitution of Kenya opens up the corridors of justice to any person thus:

22. Enforcement of Bill of Rights

- (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.

17. Article 50 also emphasizes that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

18. The impact of the provisions of Section 61 of the Civil Procedure Act is therefore obliterated by the provisions of Section 3 of the EMCA which are backed word for word by Article 62 of the Constitution. In my view if the Constitution, the supreme law or the land removes the requirement of *locus standi* in environmental disputes lodged before this court, this court should not fetter itself with discordant provisions of a statute that has not been amended to rhyme with the spirit of the constitution, for to do so would amount to denying a citizen of a constitutional right to be heard on his own accord as an individual on matters environment. This ground therefore has no merit and must be dismissed.

(b) Does the hole pose a danger to the plaintiff?

19. Evidence from the plaintiff’s witness, testified on this issue. He stated that the occupants of the house stand risk of contracting pneumonia or rheumatism owing to the problem. No evidence to the contrary was presented by the defendant. I am of the view that it is settled that the hole poses a danger to both parties.

(c) Should a permanent injunction issue against the defendant from digging a hole for water discharge next to the plaintiff’s house?

20. This court had an agonizing moment while considering this prayer because of the manner in which it is framed. The hole is already dug. This much was stated in the court’s ruling on the application seeking a temporary injunction yet the plaintiff never amended his prayer. The court can not assume what the plaintiff wished to state. In this adversarial system the pleadings of the parties must be taken to be stating what the parties desire. Without more, I find that the prayer is defective as it seeks to injunct an action that has already been undertaken. That prayer must be dismissed.

(d) Should the defendant be issued with an environmental restoration order?

21. The plaintiff seeks that the defendant be issued with a restoration order. It must be presumed that the plaintiff wishes the court to issue that order. No submission was made in this suit which enable the court could know under which provisions of the law the prayer is being sought.

22. In my view the defendant was issued with a restoration order (PEXh 6) under the EMCA upon complaint to the relevant authority administering matters environment under that law that is NEMA. That is the sole body that is mandated under that Act. Section 108 of that Act provides as follows:

108. Issue of Environmental Restoration Orders

- (1) Subject to any other provisions of this Act, the Authority may issue and serve on any person in respect of any matter relating to the management of the environment an order in this Part referred to as an environmental restoration order.

(2) An environmental restoration order issued under subsection (1) or section 111 shall be issued to-

(a) require the person on whom it is served to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the order;

(b) prevent the person on whom it is served from taking any action which would or is reasonably likely to cause harm to the environment;

(c) award compensation to be paid by the person on whom it is served to other persons whose environment or livelihood has been harmed by the action which is the subject of the order;

(d) levy a charge on the person on whom it is served which in the opinion of the Authority represents a reasonable estimate of the costs of any action taken by an authorized person or organization to restore the environment to the state in which it was before the taking of the action which is the subject of the order.

(3) An environmental restoration order may contain such terms and conditions and impose such obligations on the persons on whom it is served as will, in the opinion of the Authority, enable the order to achieve all or any of the purposes set out in subsection (2).

(4) Without prejudice to the general effect of the purposes set out in subsection (2) an environmental restoration order may require a person on whom it is served to-

(a) take such action as will prevent the commencement or continuation or cause of pollution;

(b) restore land, including the replacement of soil, the replanting of trees and other flora and the restoration as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land or sea as may be specified in the particular order;

(c) take such action to prevent the commencement or continuation or cause of environmental hazard;

(d) cease to take any action which is causing or may contribute to causing pollution or an environmental hazard;

(e) remove or alleviate any injury to land or the environment or to the amenities of the area;

(f) prevent damage to the land or the environment, aquifers beneath the land and flora and fauna in, on or under or about the land or sea specified in the order or land or the environment contiguous to the land or sea specified in the order;

(g) remove any waste or refuse deposited on the land or sea specified in the order and dispose of the same in accordance with the provisions of the order;

(h) pay any compensation specified in the order.

(5) In exercising the powers under this section, the Authority shall-

(a) be guided by the principles of good environmental management in accordance with the provisions of this Act; and

(b) explain the right of appeal of the persons against whom the order is issued to the Tribunal or if dissatisfied with the decision of the Tribunal, to superior courts.

23. It is manifest that this court has no role in issuing a restoration order *qua* restoration order under the provisions of the provisions cited above. This is not to state that the court has no power to intervene in environmental disputes. It may. However in a scenario where the restoration order has already been issued one would expect the plaintiff with a different prayer for its enforcement which has not been done in the instant case. This order can not be granted by this court.

(e) *Who should bear the costs of the suit?*

24. This is a matter in which the plaintiff and the defendant have acted contrary to each other's interests in an attempt to promote their individual welfare. The defendant has dug a hole near the plaintiff's wall to contain storm water and the plaintiff has built the wall to keep out the same storm water.

25. As I pen off on this issue, I must note that in any event the National Environment Management Authority is to be faulted for failing to take action against the offender in this case as is intimated in restoration order (PEXh. 6). Public authorities entrusted with certain duties under the law must be seen to be anxious to act to enforce the law they are mandated to.

26. It should not be left to individual neighbours to engage in a tussle over the issue of enforcement. Private law litigation emanating from the laxity to enforce the law on the part of public authorities must also be discouraged for such litigation undermines amity among citizens and unnecessarily divests the litigants of time and verve for otherwise productive enterprise.

27. The County Government planning department must be held to account as to what action it has undertaken to safeguard the citizens in the parties' neighbourhood from floods. It is a matter in which if proper action had been undertaken by the county planning authorities to safeguard the citizens in general from floods, the dispute would not have arisen at all and NEMA and the Public Health Officer would not have needed to target any of the parties with their orders or directives.

28. I have considered that the matter here arose out of the need for both parties to safeguard themselves from the elements. I order that each party do bear his own costs.

29. In the final analysis I issue the following orders:

(a) The plaintiff's suit is hereby dismissed.

(b) Each party shall bear his own costs of the suit.

Dated, signed and delivered at Kitale on this 4th day of February, 2019.

MWANGI NJOROGE

JUDGE

4/02/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio for plaintiff

N/A for defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

4/02/2019