

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: MUSINGA, (P), KIAGE & GATEMBU, JJ.A.)

**CIVIL APPEAL NO. 456 OF
2019 BETWEEN**

EXTRA MILE LIMITED.....APPELLANT

AND

TIM MWAI.....1ST RESPONDENT

CAROLYNE NASIMIYU LAVATSA..... 2ND

RESPONDENT

RIMA TELI.....3RD

RESPONDENT *(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (B.M. Eboso, J.) dated 19th December 2018*

in

***ELC Case No. 350 of
2012)***

JUDGMENT OF THE COURT

1. In this appeal, Extra Mile Limited, the appellant has challenged the judgment of the Environment and Land Court (ELC) at Nairobi (**Eboso, J.**) delivered on 19th December 2018 in favour of the respondents in Nairobi ELC Suit No. 350 of 2012. In that judgment, the ELC found the appellant liable for undertaking unauthorized diversion of storm water drainage

system and disrupting the respondents" quiet enjoyment of their properties;

ordered the appellant to re-route the storm water drainage

system; and awarded the respondents general damages of Kshs.1,500,000.00 for the disruption and suffering caused to them by the appellant"s illegal works.

2. The background is that the respondents, as owners and/or occupiers of residential housing units situated on a development known as Vital View Court on Land Reference Number 209/10345/3, Brookside Drive, Westlands, Nairobi, filed suit against the appellant. In that suit, they complained that the appellant had, without notice or consultation, commenced construction works on its property in the neighbourhood and had diverted existing storm water drainage system set up by the erstwhile City Council of Nairobi from its premises by erecting a parallel drainage tunnel which cut across their drive way and front garden and thereby interfered with their enjoyment and access to their properties.

3. The respondents contended that the works complained of which were undertaken by the appellant were substandard and defective, exposed the respondents to perils, and were

done

without the requisite approvals under the Physical Planning Act.

4. For reliefs, the respondents prayed for judgment against the appellant, for an order directing the appellant to remove, demolish and dismantle the drainage system constructed adjacent to the respondents' said premises, failing which the respondents would be at liberty to demolish the same at the appellant's cost; damages for reinstatement of the driveway and flower garden destroyed by the appellant; special damages for the loss suffered; and general damages for nuisance, loss and damage.
5. In its statement of defence, the appellant denied the respondents' claim, asserting that its development, Urban Earth Apartments on Land Reference No. 209/10345/1 Brookside Drive, Westlands, Nairobi, had been in existence since 2001; that following heavy rains in 2011, water from an adjacent river and the storm water back flowed to its said development, causing the boundary wall to collapse; that heavy rains in March 2012 flooded its property; that it

approached the

City Council of Nairobi, which advised it to prepare plans to divert the storm water from Land Reference No. 209/10345/1 to the nearby City Council of Nairobi way leave; and that it complied with the conditions set by the City Council in doing so, and consequently the claim by the respondents was not well founded.

6. During the trial, Carolyn Nasimiyu Lavatsa, the 2nd respondent, testified as PW1 on behalf of the respondents and produced leases of their respective housing units they had purchased on the said development. She testified that the respondents had enjoyed peaceful and quiet enjoyment of the houses until 2012 when the appellant dug trenches across the main gate of Vital View Court and running along the perimeter wall to divert the storm water drainage; that construction was left incomplete as piping was not done, with the result that storm water ran along their perimeter wall stagnating at the backside of the wall; that the stagnant water dampened the perimeter wall and water was sipping underneath; that prior to the diversion by the appellant there was no flooding. It was her

testimony that they were never consulted prior to the
appellant

undertaking the diversion and prayed that the appellant be ordered to restore the original drainage course.

7. Sammy Muthama, a Civil Engineer employed by the Nairobi City County Government testified as DW1. He visited the site in 2012 and in 2017 and compiled a report which he produced before the trial court. He also produced a survey plan of the area. He stated that following flooding in the area, the area residents approached the City Council of Nairobi which approved the construction of a canal to enhance storm water drainage and approval was given on 24th June 2016; that initially storm water used to end up in LR No. 209/10345/1 but was then diverted to the area between LR No. 209/10345/2 and LR No. 209/10345/5; that while approval was given for conversion of storm water drainage, this was not supposed to be along the boundary wall. He stated that the appellant had a duty to involve the residents who were affected by the re-routing of the storm water drainage.
8. Simran Manku, an owner of an apartment within Urban Earth Apartments testified as DW2. She stated that she was

involved

in the diversion of the storm water drainage; that while originally the storm water drainage was meant to run along the road, it ended up draining into the respondent's property; that the area was prone to flooding and her apartment was flooded in 2011 and blamed the appellant for leaving the storm water drainage in the place where her apartment is.

9. As already indicated, upon reviewing the evidence and submissions tendered before him, the trial judge in his judgment the subject of this appeal found in favour of the respondents and granted the reliefs we have already mentioned.
10. The appellant has challenged that judgment on eight grounds as set out in the Memorandum of Appeal dated 17th September 2019 which were canvassed before us during the hearing of the appeal on 30th June 2025.
11. Learned counsel **Mr. Aboge** relied on the appellant's written submissions dated 26th June 2025 in which it was urged that every citizen has a right to enjoy their property; that the action taken by the appellant to legally divert storm water

drainage system onto a public way leave did not deny the respondents

their right to enjoy their property; that had the appellant engaged in illegal or unlawful activity by diverting the storm water drainage system, the Nairobi County Government, which has the mandate to ensure compliance with any conditions imposed on any development touching on roads and way leaves, would have taken action against it; that in any event, the rehabilitated storm water drainage system developed by the appellant drains water underground and not onto the respondents' properties.

12. Counsel for the appellant referred to the Physical and Land Use Planning Act, No. 13 of 2019 for the procedure for seeking permission for developments and submitted that the appellant complied with all requirements under that Act and under the regulations made thereunder; and that the remedy that was open to the respondents was to lodge an appeal to the County Physical and Land Use Planning Liaison Committee but they did not do so. The decision in the case of ***James Mungai Munene & Another vs. Joseph Githinji Kamau & 3 Others [2022] eKLR*** was cited in support. It was submitted that the

appellant did involve the neighbours in the affected area prior to rehabilitating the drainage system.

13. Opposing the appeal, learned counsel **Mr. Allan Otieno** for the respondents in highlighting the written submissions dated 12th October 2020 urged that this Court should not interfere with the findings by the trial court, as the same are well supported by the evidence. In that regard, learned counsel cited the case of **Kenya Revenue Authority vs. James Omondi Were [2020] eKLR.**

14. It was submitted that the trial court rightly found the appellant liable for diverting the storm water drainage system; that the evidence established that the appellant purported to block and divert the existing drainage system of the defunct City Council of Nairobi from its premises by erecting a parallel drainage tunnel which cut across the respondents' driveway and the front garden.

15. As for the contention that the trial court granted orders against the wrong party, counsel referred to the testimony of DW1 and correspondence between the appellant and the City

Council of

Nairobi in relation to approvals, as well as communication with Water Resources Management Authority which demonstrate that the appellant is the correct party to have been sued.

16. We have considered the appeal, and the submissions. This is a first appeal. The Court is mandated under rule 31(1)(a) of the Court of Appeal Rules to re-appraise the evidence and draw inferences of fact. As stated by the Court in **Odera t/a Aj Odera & Associates v Machira t/a Machira & Company Advocates (Civil Appeal 161 of 1999) [2013] KECA 208 (KLR):**

“...our primary role as a first appellate court [is], to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

17. With that in mind, the question for determination is whether

the finding by the trial court that the appellant is liable for undertaking unauthorized diversion of storm water drainage

system is well supported by the evidence. If so, whether the Court should interfere with the award of damages.

18. The basis upon which the trial court found the appellant liable to the respondents was that the appellant undertook unauthorized diversion of the storm water drainage system. In that regard, the learned trial Judge stated in his judgment that there is no controversy that previously, the storm water drainage tunnel existed on Land Reference Number 209/10345/1 and that the diversion of the storm water drainage cut across the respondents' driveway and affected their front garden.
19. With reference to the authority granted to the appellant by the City Council of Nairobi in connection with the storm water drainage system, the Judge found that the City Council of Nairobi did not authorize diversion of the storm water drainage in the manner that the appellant did.
20. The question, therefore, is whether those findings are supported by the evidence tendered before the trial court. Testifying for the respondents, PW1 Carolyne Nasimiyu

Lavatsa stated that the

respondents, as owners of Town Houses on Land Reference Number 209/10345/3, had peacefully stayed and enjoyed their houses until 2012 when the appellant began construction works and diverted storm water drainage by digging trenches “cutting across our main gate and running along our perimeter wall.” She stated that the appellant “dug across our driveway onto our plant garden”. She produced photographs showing the works undertaken.

21. It was PW1’s testimony that the appellant “directed the storm water” to the respondents’ perimeter wall and that the respondents were never notified about the construction. In the words of PW1:

“...we woke up and found men digging across the drive. There was no public participation in any way. The end result is that the water spills into our compounds. The water which settles at the perimeter wall has dampened the wall and is sipping underneath. The wall is weakening every day. We have had to do repairs to the wall.”

22. Under cross examination, the witness maintained that the respondents did not have a problem with the storm water until it was diverted; that while the appellant was allowed by the City Council “to improve the existing storm water drainage” it was

not allowed to divert the cause, and prayed that the drainage system be reverted to the original drainage course.

23. Engineer Sammy Muthama (DW1) stated that while the City Council gave approval to the appellant vide a letter dated 3rd May 2012 “for conversion of the storm water drainage, it was not supposed to be along the boundary wall.” He stated, under cross examination, that the appellant “had a duty to involve residents who were going to be affected by the re-routing.”
24. Simran Manku (DW2) stated that she is the wife of one of the directors of Urban Earths Apartments Limited, the manager of the apartment units on Land Reference Number 209/10345/1 Brookside Drive where she owned a basement apartment in Urban Earth Apartments, a development constructed by the appellant on Land Reference Number 209/10345/1 Brookside Drive, Westlands; and that LR No. 209/10345/1 adjoins the respondents’ apartments erected on Land Reference Number 209/10345/3.
25. It was her testimony that in the year 2008, there had been in

existence a storm water drainage system that had been

developed through LR. No. 209/10345/1 which allowed storm water to drain into the river; that storm water originating from various parts of Brookside eventually collected and passed through 209/10345/1 and into the Kibarage river behind that property; that during the heavy rains of October 2011, rain water had no access to the river due to blockage caused by erection of walls that cut across the river and the rain water ended up back flowing into LR. No. 209/10345/1 occasioning flooding and damage to her apartment, swimming pool and pool pump equipment room; and that the excessive water pressure brought down the perimeter boundary wall.

26. She went on to say that following similar flooding in December 2011, Urban Earths Apartments Limited, the manager of the apartments, invited National Environment Management Authority (NEMA) to intervene; that after the rains in March 2012, her apartment was flooded and she approached the City Council of Nairobi who advised them to prepare plans for diversion of the storm water from their property into the City Council Way Leave; that after obtaining approval and following

all conditions set by the City Council, the works required,

involving construction of open drain, were carried out and completed but the respondents interfered with the completed works. She produced a letter dated 3rd May 2012 addressed to the appellant in reference to „proposed storm water improvement to serve plot L.R. No. 209/10345/1'.

27. The witness maintained that originally the storm water drainage was meant to run along the road but it ended up draining into their property and then into the river; that that was not the proper location of the storm water drainage and the effect was that in 2011 there was rain and her apartment was flooded; that they did the storm water drainage system, and the total cost incurred on the diversion was Kshs. 939,700.00.

28. Under cross examination, DW2 stated that when she bought her apartment, she did not anticipate the flooding. She blamed the appellant for leaving the storm water drainage in the piece of land where her apartment is, contending that the appellant as the developer should have blocked it at the time they were undertaking the Urban Earths Apartments

development.

29. Based on the foregoing, and having ourselves reviewed the evidence, there can be no doubt that appellant's development, Earths Apartments development, and the respondents' properties, Vital View Court, are adjoining; and that following repeated incidents of flooding, the appellant sought approval from the City Council of Nairobi to ameliorate the situation. In that regard, in its letter dated 3rd May 2012 addressed to the appellant under the subject reference "Proposed storm water improvement to serve plot L.R. No. 209/10345/1 Westlands", the City Council of Nairobi indicated that it had no objection to the appellant's request to improve the existing storm water drain on Brookside Gardens to serve 209/10345/1 in accordance with the drawings the appellant submitted.

30. There is, however, nothing in the letter of approval from City Council of Nairobi dated 3rd May 2012 that authorized the diversion of the storm water to the respondents' property. We are, therefore, fully in agreement with the learned trial Judge when he stated in the judgment as follows:

"...the authority granted to the [appellant] related

***to improvement of the existing storm water
drainage on Land***

Reference Number 209/10345/1, Westlands. The approval letter did not authorize the [appellant] to divert the existing storm water drainage in the manner they undertook the works. What the [appellant] did was to remove the storm water drainage system from Land Reference Number 209/10345/1 and divert it across the [respondents'] gate, continuing along the [respondents'] perimeter...into the nearby county Government Way Leave. There is no evidence that these particular works of the year 2012 were authorized by the Council. There is also no evidence that the [respondents] whose access to their homes was disrupted were consulted. I therefore find the [appellant] liable for undertaking unauthorized diversion of the storm water drainage system and disrupting the [respondents'] quiet enjoyment of their properties."

31. As for the contention by the appellant that it was the wrong party, there is no doubt that it was the developer of Urban Earth Apartments and as the learned trial Judge found, the approval letter from the City Council of Nairobi dated 3rd May 2012 for the improvement of the drainage system was addressed to the appellant in response to its application in that regard. There is also no doubt that it is the appellant that carried out the offending developments and diversion.

32. Regarding the award of damages, we do not see any error on the part of the learned Judge which makes his award inordinately high as to represent an erroneous estimate. See

Butt vs. Khan [1978] KECA 24 (KLR). We therefore do not

have a basis for interfering the award.

33. All in all, we have no basis for interfering with the judgment of the trial court as the same is well supported by the evidence tendered. Consequently, the appeal fails and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 25th day of March 2026.

D.K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

P.O. KIAGE

.....
JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb, C.Arb.

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed
DEPUTY
REGISTRAR