



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 910 OF 1997

MOHAN GALOT.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

NAIROBI CITY WATER & SEWERAGE COMPANY.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit in the High Court of Kenya Nairobi against the Nairobi City Council. The suit was transferred to the Environment and Land Court for hearing and determination. The Plaintiff is the registered proprietor of land reference number 7022/7 measuring 20.1 acres situated within Kiambu County, which is commonly referred to as Galot Estate. The Plaintiff erected a massive dam on his land at a considerable cost. The 1st Defendant erected a water reservoir upstream. The Plaintiff claims that on diverse dates in 1996, 2001, 2002, 2003 and 2004, Defendants negligently failed to have proper control of their water system as a result of which dirty water containing water treatment chemicals were discharged from the Defendant's water tanks and flowed into the Plaintiffs dam causing massive erosion and damage to the Plaintiffs land. The Plaintiff further claims that the water in his dam was polluted and caused destruction besides occasioning damage to the Plaintiff's boundary wall. The Plaintiff claims he suffered considerable loss and damage to his property as a result of the Defendant's negligence for which he seeks damages.

2. The Plaintiff seeks an order of injunction to restrain the Defendants or their agents from letting, permitting or otherwise discharging waste water or effluence into the Plaintiff's land commonly known as Galot Estate. He also seeks an order to compel the Defendants to rectify and prevent further overflow from its water tanks. In addition, he seeks special damages in the sum of Kshs. 50,000,000/= for the physical structural damage and rehabilitation of the wall as well as costs of 250,000/= for the preparation of the evaluation report. The Plaintiff also seeks the costs of the suit and general damages in the further amended plaint filed in court on 7/5/2010.

3. The 2nd Defendant denied liability in its defence filed on 22/6/2010. It denied taking over all liabilities from the 1st Defendant that may have resulted from its negligent acts. The 2nd Defendant averred that the suit was statute barred and urged the court to dismiss it.

4. Mohan Galot, the Plaintiff in this case gave evidence. He adopted his witness statement dated 21/11/2014. He stated that he erected a dam on his estate for his own use and the 1st Defendant erected a massive water reservoir on the land adjacent to his land for use by the residents of Kiambu and other adjoining areas. The 2nd Defendant, which is a wholly owned subsidiary of the 1st Defendant, was incorporated in December 2003 and it took over the mandate of provision of water and sewerages services.

5. He stated that on diverse dates in 1996, 2001, 2002, 2003 and 2004 the Defendants neglected or failed to manage their water system and caused dirty water containing various water treatment chemicals to be discharged from their water tanks which flowed into his land causing damage to his property. He stated that as a result of the dirty spillage, the water in his dam was polluted and there was massive destruction caused to his property including the perimeter wall. He stated that he had suffered great loss and damage as result of the Defendants' negligence and continues to suffer due to the Defendants' failure to rectify the spillage emanating from their reservoir. He urged the court to intervene and restrain the Defendants from permitting, letting or otherwise discharging waste water or effluence into his land.

6. While the Plaintiff was giving evidence, the Defendants' advocates objected to the production of the technical report by the Plaintiff. Further, they also objected that the photos were not clear and it was not indicated when the photos were taken. Mr. Kibe who appeared for the Plaintiff responded that they would call the relevant witnesses to produce the technical report.

7. The Plaintiff stated that the Defendants' reservoir was on the left side of Kiambu Road while his estate was on the right hand side of the road. The Plaintiff constructed the dam on his land about 40 years ago. He stated that water first spilled to his estate in 1996 and that the water which was dirty, contained chemicals which destroyed the vegetation, the dam and killed all the fish in the dam. He stated that the spillage also formed a layer of chemicals in the dam and damaged the wall due to the overflow. He stated that the last spillage happened in 2004. He stated that the first evaluation was done in 2001 and that the damage continued after that. His neighbour's property was also damaged by the spillage from the Defendant's reservoir. He sought damages of Kshs. 70,000,000 which he stated would be the cost of

rebuilding his dam. He confirmed that since 1996 when the first spillage took place, he had not rehabilitated the dam. He stated that he reported the spillage to the 1st Defendant but did not produce correspondence to confirm this.

8. Mr. Kibe advocate applied to stand down the witness to allow the Plaintiff to prepare a further statement which he was going to file when he was granted leave on 3/4/2017. The court directed the Plaintiff to file his supplementary witness statement, additional statements and documents within 7 days, and adjourned the hearing to 27/6/2017. Mr. Kibe sought more time to file the additional documents when the matter came up for hearing on 27/6/2017. The court directed that the matter would be heard on 12/10/2017.

9. On 12/10/2017, the court was informed that Mr. Kibe was attending an election petition in Ngong. Further, that he was seeking 14 days to file the Plaintiff's documents. The court adjourned the hearing of the case to 12/2/2018 and granted the Plaintiff the final adjournment. Mr. Kibe applied for an adjournment on 12/2/2018 when the suit came up for hearing stating that he was yet to file the Plaintiff's documents together with the additional witness statement. The court declined to allow the adjournment noting that this was an old matter. Mr. Kibe indicated he was calling two witnesses and the case was heard further.

10. Mr. Chrispus Nyaundi, who stated that he was an environmental expert licensed by the National Environment Management Authority gave evidence. He stated that he was invited to go and look at the dam that exists on Galot Estate and went there in on 23/6/2017. He observed from the dam that there were bio indicators of water pollution including lack of aquatic vertebrates, reduced visibility in the water, water not being clear and increased algal blooms in some sections of the dam. He stated that under normal circumstances, there would be less algal blooms, clear visibility of water and presence of aquatic vertebrates like fish and frogs in the water. He stated that he was informed that there used to be fish in the pond and there had been an influx of water getting into the dam even though no rain had been experienced. He confirmed that the water getting into the dam was from upstream where the 2nd Defendant's reservoir was located.

11. He confirmed that he did not test the dam water in a laboratory. He stated that he was again called to go to the dam on Galot Estate on 29/9/2017 when there was an influx of water getting into the dam. He could not produce his report owing to the objections raised by the defence which the court upheld. The witness stated that during his visit on 29/9/2017, he observed that there were shrimps and prawns which were dead on the side of the dam whose claws showed that they had died some time back. According to him, the dead aquatic life was an indicator of a constant inflow of pollutants into the dam from upstream. He stated that the pollutants could be nitrates, phosphates or acid which could poison the aquatic life. In his opinion, cleaning of water by the Defendants required large amounts of chlorine as does the cleaning of the water tanks. He stated that the inflow of chlorine into the dam increased the level of nitrates and phosphates which would be harmful to aquatic life as it increases the algal blooms leading to the depletion of oxygen for the aquatic life.

12. Further, he stated that chlorine would kill the aquatic life through suffocation if it is released into a water body. He concluded that the dead shrimps and prawns on the dam were an indication of the high levels of chlorine getting into the dam. He also stated that chlorine evaporated fast. He faulted the Defendants for releasing effluence into the water system without treating the effluence.

13. On cross-examination, he conceded that laboratory tests would be necessary to ascertain the cause of death of the aquatic life and to confirm if there were nitrates or phosphates in water and confirmed that he had not undertaken any laboratory tests. The witness stated that he could only testify about what he saw in 2017 and could not speak about what transpired between 1997 and 2004. He maintained that where there is no aquatic life in water, it showed continued inflow of poisonous substances into the water.

14. Chrispine Oduor who works for Surveillance of General Society Kenya Limited also gave evidence for the Plaintiff. He stated that he was the leader of the Field and Monitoring Services Team, which does environmental assessment. He stated that they were called in August 2016 to sample the water in the dam in Galot Estate. They prepared a report in 2016 on the soil and the water samples which they collected from the dam. He stated that they sent the water samples to the laboratory in Mombasa for analysis using the water quality regulations made under the Environmental Management and Coordination Act (EMCA). He stated that after doing the analysis in 2016 he could not tell if the pond water was fit for aquatic life. In 2017 they observed that the aquatic life was distressed. They noted that there was solid waste getting into the pond and that there were dead shrimps and others were struggling to get out, which meant that there were toxic substances in the water. The water was unclear. He confirmed that they did not analyse the water. The court directed the Plaintiff's advocate to file and serve the expert report prepared by Surveillance of General Society within 3 days. The hearing was adjourned to 9/4/2018.

15. On 9/4/2018 Mr. Kibe informed the court that he would be calling one witness and recalling the Plaintiff to give evidence based on the further statement. After looking at the new statement filed by the Plaintiff, the court ruled that there was no need to call the Plaintiff to produce the witness statement which he had already produced when he first testified. The new statement contained the same statements as the statement filed earlier. The court directed that the case would proceed for further hearing on 5/7/2018. The hearing could not proceed on 5/7/2018 following the Plaintiff's application dated 2/7/2018 seeking to file a further witness statement. The court allowed the Plaintiff to file and serve a further witness statement within 7 days when the matter came up on 12/7/2018. The case was fixed for hearing on 4/10/2018. The case could not proceed on 4/10/2018 owing to the 1st Defendant's advocate's illness. The hearing was put off to 17/1/2019. Mr. Kibe did not attend court on 17/1/2019. Mr. Mwathe advocate held his brief and only told the court Mr. Kibe was unable to attend court due to a personal issue. The court declined to grant the Plaintiff an adjournment. The hearing proceeded. The 2nd Defendant's witness testified.

16. John Kennedy Otieno, an engineering technician and water project manager of the 2nd Defendant gave evidence. He stated that he previously worked in the water and sewerage department of the former Nairobi City Council from 1992 before he moved to the 2nd Defendant when it was incorporated in 2004. He stated that he was in charge of operations of all reservoirs in Nairobi from 1987 to 2011. He confirmed that the 2nd Defendant had a reservoir in Kiambu which was used to collect, store and distribute clean water to the residents of Nairobi and its environs. The reservoir was commissioned in 1996 and supplies water to Zimmerman, Githurai, Kenyatta University, Kahawa Sukari, Kasarani, Mwiki and Ruai areas of Nairobi County. He stated that the Kiambu reservoir comprises an inlet, outlet, discharge pipes, offices and staff housing. Water in the Kiambu reservoir comes from Ng'ethu treatment works which is situated 40 kilometres away. He confirmed that there was a seasonal stream passing through the Plaintiff's land.

17. He stated that when the reservoir fills up or when there is an overflow, or when the reservoir is being cleaned or during heavy rains, water is discharged into the stream which is the natural water course. The discharged water and the storm water naturally flows downstream

through the Plaintiff's land. The witness stated that every natural water course has a riparian wayleave of 5 metres on either side of the water body. He stated that the Defendants held a discharge license and were therefore permitted to discharge any excess water into the wayleave or stream during the period complained of by the Plaintiff which is between 1996 and 2004. The witness urged that there was no basis to issue the injunction sought by the Plaintiff. He stated that there was a discharge pipe that directs all the treated or storm from the reservoir to the stream and that the pipe ensures the discharge is controlled.

18. The witness stated that no water treatment takes place in the Kiambu reservoir. He added that the reservoir is designed with a wash out facility which allows the tank to be drained in case of an emergency or for operational purposes. He stated that there was a discharge pipe that directs all treated water and storm water from the reservoir to the stream and that the pipe ensures that any discharge is controlled. He stated that the Plaintiff may have interfered with the flow of the stream which was the natural waterway. He stated that when the reservoir filled up and there was an overflow, or during the cleaning of the tanks, or during heavy rains, the water is discharged into the seasonal stream that runs through the Plaintiff's dam. He stated that there was no provision for the riparian reserve on the Plaintiff's land and that any discharge from the reservoir has to pass through the natural stream.

19. The witness stated that the water reservoir is cleaned using a high spray water jet to remove grit and that the water used for cleaning is the normal drinking water. He stated that such water would contain levels of 0.4 parts of chlorine per million in any volume of water. He stated that nitrates and phosphates, which are agricultural chemicals, are never used in the reservoir. The Kiambu water reservoir receives water from Ng'ethu where it is treated and then transported through a pipe to the Kiambu reservoir. He stated that the reservoir has a washout facility that pours the overflow into a discharge chamber which is on the seasonal stream.

20. The court visited the site on 15/2/2019 in the presence of parties. The court first went to the place where the Defendants' reservoirs are located before going to the Plaintiff's land. The seasonal stream that passes through the Plaintiff's land had dried up at the time. The court noted that the Plaintiff had erected a stone wall across the stream where the stream enters his land, and left some inlet to allow water to pass through during the rainy season. The court visited the dam but could not see the outlet from the Plaintiff's land that is to drain water from the dam and allow it to naturally flow downstream. There was another wall at the end of the Plaintiff's land. The court observed that the stream would have cut across the Plaintiff's land where his dam lies had he not constructed his dam right there on the stream's natural course. During heavy rains the water is likely to get into the Plaintiff's land and may not have a way to continue with its natural flow downstream. The small inlet under the Plaintiff's wall may not be sufficient to allow water through the Plaintiff's land in the event of heavy downpour upstream during the rainy season.

21. Parties filed submissions which the court has considered. The Plaintiff submitted that his cause of action relates to pollution and degradation of the environment and that EMCA and the Water Act of 2016 therefore come into play. The Plaintiff contended that the Defendants breached or failed to comply with the two statutes. He also urged the court to consider Articles 42 and 70 of the Constitution while contending that the offensive actions and omissions of the Defendants have negative effects on thousands of people downstream.

22. The Plaintiff relied on Section 75 of EMCA and regulations 6 and 11 of the Water Quality Regulations of 2006. He submitted that Regulation 11 prohibits the discharge of toxic or noxious pollutants into the environment which do not comply with the regulations. The Plaintiff added that the maximum allowable chlorine residual for discharge into the aquatic environment was 0.1 mgs/L under the Water Quality Regulations. The Plaintiff urged the court to find that the acts complained of by the Plaintiff occurred as pleaded while urging that the only defence put forward by the 2nd Defendant was that it had a discharge license allowing it to discharge any excess water into the wayleave. The Plaintiff contended that Kiambu reservoir did not have a sludge treatment system yet the standard procedure is that sludge should first be treated before being released into the environment.

23. The Plaintiff submitted that the most probable cause of the death of the aquatic organisms was due to the overflow discharge from the Defendant's reservoir caused by chlorine poisoning. The Plaintiff relied on the decision in **John Mutungu Waititu v China Wu Yi (Kenya) Company Limited [2018] eKLR** in which Oundo J. defined environmental degradation as the deterioration of the environment through the depletion of natural resources. The Plaintiff also relied on the case of **Rodgers Muema Nzyoka and 2 other v Tiomin Kenya Limited [2001] eKLR** in which Hayanga J. noted that environmental degradation affects the public at large and may lead to danger to health and pollution which may be detrimental to the population. The Plaintiff urged the court to order the restoration of the degraded dam by awarding the compensation sought.

24. The Plaintiff indicated in his submissions that he was seeking special damages of Kshs. 50,000,000/= and urged the court to award this sum. He also urged the court to award him general damages of Kshs. 70,000,000/= for pain, distress and suffering for the prolonged and accumulative degradation of the environment and pollution of the dam.

25. The 1st Defendant submitted that the Plaintiff has failed to prove his case to the required standards. The 1st Defendant submitted the Kiambu reservoir is not a water treatment plant, but only served as a water reservoir. The 1st Defendant contended that no evidence was adduced to show that the Plaintiff's dam had fish or any other aquatic life. Further, that there were no laboratory tests undertaken of the pond water to confirm that it was contaminated. The 1st Defendant submitted that nitrates and phosphates play no role in the treatment of water.

26. The Defendants made reference to the site visit which was conducted by the court and contended that it was evident that the Plaintiff constructed his dam without paying heed to the riparian reserve to give room for the free flow of water through his land during heavy rains or storms. The 1st Defendant submitted that the Plaintiff failed to prove the destruction to its property and that if there was any destruction it was occasioned by the Plaintiff's interference with the free flow of the natural stream. The 1st Defendant urged the court not to grant the prayers sought. The 1st Defendant contended that an order of injunction if ordered by court, would have far reaching consequences because it would affect millions of Kenyans who use water supplied from the Kiambu reservoir.

27. The court has considered the facts of this case and notes that the testimony given by the Plaintiff's expert witnesses is that of the visits they made to the Plaintiff's dam in 2016 and 2017 yet the Plaintiff's claim relates to activities which he alleges occurred in 1996, 2001, 2002, 2003 and 2004. No evidence was led to show the activities alleged to have occurred during this period. The court noted from the site visit that the Plaintiff had constructed a wall across the seasonal stream which would naturally be prone to damage in the event of heavy flow of

water in the stream during heavy rains or storm upstream.

28. The Plaintiff did not lead any evidence to prove his claim for special damages in the sum of Kshs. 50,000,000/= or the Kshs. 250,000/= quoted for the preparation of the valuation report. The Plaintiff failed to prove that he was entitled to general damages.

29. The court grants prayer (a) but declines to grant prayers (b), (c), (d) and (e) of the Amended Plaint dated 5/5/2010. Each party will bear its costs.

30. The court directs the Defendants to comply with the water pollution control standards established under the Environmental Management and Coordination Act failing which the Plaintiff may move the National Environment Management Authority to enforce the Environmental Management and Coordination Act and the Regulations under it relating to water pollution prohibition.

Dated and delivered at Nairobi this 8th day of August 2019

K.BOR

JUDGE

In the presence of: -

Mr. E. Oange for the 1st Defendant

Ms. R. Oloo for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff