



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 255 OF 2016

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

= AND =

IN THE MATTER OF ARTICLES 69, 42, 70 AND 165 OF THE CONSTITUTION OF KENYA 2010

= AND =

IN THE MATTER OF THE ENVIRONMENT MANAGEMENT AND COORDINATION ACT CAP 387 LAWS OF KENYA

ROMANS WAEMA GISHINGA.....PLAINTIFF

= VERSUS =

SHREEJI ENTERPRISES (K) LIMITED.....DEFENDANT

J U D G E M E N T

1. The plaintiff's suit filed on 13th September 2016 against the defendant relates to the protection of the right to a clean and healthy environment provided under article 70 of the Constitution 2010. The plaintiff pleaded that the operations of the defendant has affected him, his family and other residents in the area to the detriment of their health. The plaintiff pleaded that the defendant deals in clinker dust and manufacture of silicate/silica which emits dust and pungent smells respectively that engulfs the entire areas of Kasarani and Miritini where they live.

2. That they complained to NEMA which paid an inspection visit and found their complaint as genuine. That NEMA issued a notice according to law for the defendant to cease the bad practice but to date the defendant has ignored and or failed to comply. The plaintiff listed the particulars of nuisance by the defendant as follows:

- (a) Permanently polluting the air with contaminated dust and pungent odours;*
- (b) Exposing the plaintiff and others to noxious and dangerous doses of chemicals and contaminated dust;*
- (c) Causing corrosion by emission of such harmful gases onto the roofs of the plaintiff's properties and that of the public at large which corrodes galvanized iron sheets;*
- (d) Causing smelly air to be permanently emitted onto the plaintiffs' property and the environment and*
- (e) Causing harmful and noxious effluent to be discharged from its factory and to flow intermittently into the surrounding villages where the plaintiff resides causing flooding of effluent and stagnation on the surrounding villages and residential areas which poses health risks.*

3. The plaintiff stated that the defendants are also in breach of the laws and therefore culpable to mitigate and pay damages. The particulars of breach pleaded are:

- (a) Failure to comply with both National Environmental Management Authority (NEMA) and Public Health regulations on operational procedures and standards.*

(b) Failure to comply with both National Environmental Management Authority (NEMA) and Public Health regulations on waste disposal management.

4. The plaintiff states that as a consequence of the nuisance, negligence and breach of the laws, he has suffered damage. He therefore prays for judgment to be entered in his favour against the defendant as follows:

(a) A declaration that the plaintiffs are entitled to a clean and healthy environment as guaranteed by Article 42 of the Constitution of Kenya, 2010.

(b) An order prohibiting/stopping the operations of and/or work in the Shreeji Enterprises (K) Limited by the defendant and/or any other entity without the requisite Environment Impact license obtained after due process has been observed.

(c) An order directing the restoration / cleaning of the environment.

(d) An order directing the defendant to pay for medical costs of treatment and Medical Scheme.

(e) The Honourable Court be pleased to make an order for general damages to the plaintiff and residents of Miritini and Kasarani Area.

(f) This Honourable Court be pleased to issue any other order that it may deem to be fit and just to meet the ends of justice.

5. The suit is defended by the statement of defence filed on 21st November 2016. The defendant admitted the 1st to 3rd paragraphs of the plaint in their descriptive form. She denied that the plaintiff or residents of the area stated have suffered ill health as a result of the operations of the defendant as pleaded in paragraph 4 and 5 and put the plaintiff to strict proof. The defendant denied all the remainder of the plaint and put the plaintiff to strict proof. She urged the court to dismiss the suit with costs.

6. The parties adduced oral evidence after the close of pleadings with the plaintiff calling 2 witnesses while the defendant called one witness. The plaintiff testified as **PW1** and started by stating that he lives in Miritini. With respect to his claim, **PW1** stated that the environmental pollution started in 2013. To stop it, he together with others held protests. That they also visited NEMA offices and subsequent to their visit, NEMA wrote to the defendant (doc No. 9). **PW1** continued that they also visited the offices of the Public Health to present their complaint. That acting on this complaint, the Public Health Department took the defendant to court to stop their operations in Municipal Case No. 3405 of 2014.

7. **PW1** continued in evidence that the case file at the municipal court got lost, making them to complain to the Ombudsman on 12th September 2014. The Ombudsman acting on their complaint wrote to the defendant who therein started issuing threats to the plaintiff which resulted into his arrest. The witness also said they held a meeting with the representatives of the defendant intended at getting a solution. He presented the minutes of that meeting and meetings with NEMA as part of his exhibits. That irrespective of these meetings and complaints from members of the public no action has been taken by the defendant. He thus urged the court to grant the orders sought in the plaint.

8. In cross-examination by Mr. Oonge learned counsel for the defendant, **PW1** stated that he lives in his own house at Kasarani-Miritini although he did not have a title for it. That his house is approximately 200m from the defendant's premises. He said that he met with the defendant in 2013 and after that meeting, they went to the offices of NEMA. **PW1** was not aware that NEMA gave the defendant a licence to operate. **PW1** was then shown defence documents which said they had complied with the public health requirements.

9. **PW1** stated that he does not have any goats or cows. That he had not filed any documents to show there were children suffering from the effects of dust. Further that he had not annexed any documentation for loss of animals. He has not sued NEMA or the Public Health Department. **PW1** said he wanted the court to stop operations of the defendant. In re-examination, **PW1** stated that NEMA's letter required the defendant to do regular air quality surveys. That they have not been served with any report post 2015 yet they still have problems.

10. **MOHAMED GORI MWENDWA** testified as **PW2** on 19th March 2018. He also lives in Kasarani-Miritini. He was in court because the defendant has caused damage to the environment by discharging chemicals to the environment. That the chemicals drained on the plaintiff's house causing it to collapse. That the Director of NEMA came, saw it and took action. That the dust produced by the factory has also caused harm to the grass and the trees in that area.

11. **PW2** further stated that despite NEMA closing the factory, it is still operating. That they were not consulted during the preparation of the EIA report. That the net the defendant was told to fit is now torn. In cross-examination, **PW2** said he lives in own house behind the defendant's factory but he has no title for it. That the house which collapsed belonged to Hamisi Mwendwa. He was testifying because many people were suffering. **PW2** had not sought treatment as a result of the pollution. That the factory was closed in 2014 but is now operating. That they were tested in the presence of the assistant chief and the doctor reported that the harm was minimal. The plaintiffs' case was then closed after production of the documents in the list filed with the plaint.

12. The defence witness, **Mark Odhiambo Otieno** testified on 19th November 2018. He adopted his witness statement made on 7th September 2018 and filed on 11th September 2018 together with the list of documents filed on 21st November 2016. **DW1** said that the letter dated 6th October 2015 showed that the defendant had almost fully complied. That when this suit was filed, the defendant had fully complied. **DW1** in his written statement said the location and operations of the site are licensed and generally compliant with all applicable laws. That the company undertakes regular reviews of its operations and commissions periodic studies after which reports are prepared and presented to relevant government agencies. **DW1** denied the allegations put forth by the plaintiff that the same are made without basis.

13. In cross-examination by Miss Mayabi counsel for the plaintiff, Mr. Otieno said that the defendant came to Miritini in 2011. That the

defendant has never been closed from the time it began its operations. That the letters from NEMA dated 13/8/2014 and 25/8/2014 did not close down the factory. That they have done several air quality reports to NEMA but he was not advised to file a copy in this case. **DW1** admitted that he did not have in court any emission certificates from NEMA. That they do annual audits. In re-examination **b** said he lives in the neighbourhood but he has not been affected nor have they received complaints from their employees. This marked the close of the defendant's case.

14. The parties filed written submissions. The plaintiff in his submissions referred this court to the provisions Rule 17 of the Waste Management Regulations of 2006, Article 42 and 70 of the Constitution and Sections 3 – 5 of the Environmental Management and Co-ordination Act. He also cited the case of **Martin Osano Rabera & 2 others Vs Municipal Council of Nakuru ELC Petition No. 53 of 2012** in support of his case.

15. The defendant filed her submissions on 15th April 2019. The defendant started by giving a summary of the evidence adduced. The defence also pointed out issues she felt were for determination to be as follows:

a) Whether the plaintiff has a cause of action against the defendant.

b) Whether failure to enjoin NEMA to these proceedings is fatal to the plaintiffs' case.

16. In answering the first question, the defendant submitted that the plaintiff had not demonstrated a cause of action by failing to show how close he lives to the defendant's premises or prove the alleged medical issues he is suffering from. That the prayers in the plaint are ambiguous since the defendant has in place all the approvals from the statutory bodies.

17. On the second issue, the defendant submitted that this suit ought to have been filed before the National Environment Tribunal. It is the defendant's submission that this court lacks jurisdiction to entertain the case. The defence supported this submission by relying on the case of **Mbole Nzomo Anthony and 3 others Vs Shreeji Enterprises Ltd & 4 others (2011) eKLR**.

18. Having analysed the pleadings, the evidence and the submissions rendered, I frame the following questions for determination:

(i) *Whether or not this court has jurisdiction to entertain this claim.*

(ii) *Whether the plaintiff has established a case against the defendant.*

(iii) *Who bears the costs of the suit?*

19. In the statement of defence filed, the defendant has admitted the jurisdiction of this court. However, the defendant in the submissions now denies jurisdiction. Since jurisdiction can be raised at any stage of the proceedings, I shall deal with the question although raised at a stage when the plaintiff does not have an opportunity to respond to it. The plaintiff's claim is that the operations of the defendant of having a clinker yard and storing silicate which emits dust and pungent fumes has been breached their right to clean and health environment. The claim as pleaded falls under Section 3 of EMCA No. 8 of 1999. Section 3(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 association or in the public interest may apply to 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 -"

3(5) states that: **"In exercising the jurisdiction conferred upon it under Section 3, the Environment and Land Court shall be guided by the following principles of sustainable development -"**.

20. The EMCA thus confer original jurisdiction upon the Environment and Land Court. Article 70(1) of the Constitution also states that any person who alleges that his right to clean and healthy environment is being denied or violated may apply to a court for redress in addition to any other legal remedies that are available. The court is referred to in my view is the Environment and Land Court created under article 162(2) (b) of the Constitution. The submission by the defendant that this Court lacks jurisdiction is in my opinion misplaced. The case law of **Mbole Nzomo Anthony** supra is distinguishable since the case before does not refer to issuance of a licence per se.

21. The second question is whether the Plaintiff has made out a case against the defendant on a balance of probabilities. The Plaintiff put reliance on the documents he presented in evidence which included a notice dated 25th August 2014 issued under section 119 of the Public Health Act. The notice required of the defendant;

(i) *"provide a shed for the clinker to mitigate or minimise dust emission and smell nuisance*

(ii) *Provide or avail emission certificate and impact assessment report from NEMA"*

22. The Plaintiff also produced the letter by NEMA dated 13th August 2014. The letter was headed thus "IMPROVEMENT ORDER FOR THE CLINKER STORAGE YARD ON L.R NO. 593/6/II, MIRITINI". The letter stated that there has been serious dust pollution of the neighbouring villages from the open clinker storage yard on named property. The letter informed the defendant on the provisions of section 3(1) of EMCA.

23. According to the Plaintiff, the defendant had not complied with requirements set out in the two letters which allegation the defendant denied. In countering, the defendant produced NEMA's letter dated 25th Aug 2015 and an assessment report on the Clinker yard carried out by the County Government on 6th Oct 2015. The letter of 25th August 2015 was not copied to the plaintiff who were amongst the people that had lodged a complaint with NEMA. The letter noted that after their inspection, it was observed that measures had been undertaken to contain the dust to minimum levels.

24. The County Govt's Public Health report was a little detailed since it stated that the Defendant had constructed a curtain wall around the storage yard. Secondly that the Defendant had provided two water tanks that were being used to sprinkle water around the yard and the road inside/outside the clinker area. Lastly the report stated that the Clinker was being covered with a tough cover material awaiting transportation.

25. It is therefore true that the defendant's activities produced dust that polluted the environment as at 2014 which prompted the residents to complain. Acting on their complaints, NEMA & the Public Health Department visited the premises and set conditions to be met to mitigate the dangers the dust emitted would cause to the humans and the environment. The same officers returned in the year 2015 and confirmed that the Defendant had complied. PW2 said the net put was torn to corroborate the report of the County Public Health office that a net was constructed. However, the Plaintiff failed to present to this Court evidence that the nets were now torn and or photos of roofs that were corroded by the harmful gases.

26. The Plaintiff also gave evidence that the health of the people living in that had been affected. Neither the Plaintiff nor his witness presented any medical evidence to support the claim of ill health. The Plaintiff also did not present any expert opinion on the amount of dust that was being emitted and its effect if any. Although the plaintiff is entitled to a clean and healthy environment, he did not endeavour to prove that indeed that right was violated or was likely to be violated.

27. In the circumstances, I find that the plaintiff did not prove his case. I hereby order it struck out with an order that each party meets its costs of the suit.

Dated and signed at BUSIA this 30th day of September 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 14th Day of October, 2019

C. YANO

JUDGE