



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 820 OF 2017

DR. ALI KOLELA MONTET.....PLAINTIFF

VERSUS

CHINA ROAD AND BRIDGES

CORPORATION (K) LIMITED.....DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion dated the 15th March, 2017 brought pursuant to Order 40 rules 1 and 2 of the Civil Procedure Rules, Sections 1A, 1B and 3 A of the Civil Procedure Act and all the other enabling provisions of the law.

It is based on the grounds, which in summary is that the Applicant is the proprietor of land parcel number NGONG/NGONG/21558 at Kerarapon Area where he has put up rental premises. The Respondent has been involved in the construction of the Nairobi Southern By pass wherein it has engaged in the excavation works and blasting of rocks for the construction of the said road. The said excavation has consequently caused the Applicant's wall of the rental premises to crack and the perimeter wall to fall. The Respondent has failed and or declined to carry out an environmental impact assessment to ascertain and avert damage caused to the Applicant and other neighbours despite an undertaking to do so. The Respondent has not attempted to take any mitigating action to control the damage to the Applicant's rental premises and other adjacent premises. The Applicant has continued and will continue to suffer irreparable damage to his premises unless the Respondent is restrained by the Court.

The Application is supported by the affidavit of the Plaintiff herein where he deposes that the Respondent uses dynamite in its excavation works at the quarry which has resulted into cracking of his perimeter wall. He avers that he has on several occasions raised concerns and notified the Respondent of the nuisance and damage caused by the blasting and excavation works. He claims the Respondent sent his representatives to the suit premises to ascertain the damage caused due to the quarry, upon inspection they promised to make good the damage and requested for an assessed report including valuation of the damage resulting therefrom. He confirms that upon being supplied with the assessment report, the Respondent undertook to repair the damaged perimeter wall and compensate him for the costs incurred amounting to Kshs.770,000. Further that the Respondent declined to compensate him for the costs of repairs despite being supplied with the receipts. He insists the Respondent has continued to undertake blasting at its quarrying site without mitigating the damage caused on his perimeter wall as well as the rental houses. He reiterates that he continues to suffer irreparable harm and further damage to his perimeter wall including rental houses as the Respondent persists in carrying out excavation activities. Further, that it is only fair and unjust that an injunction be issued restraining the Respondent from its continued operation until it carries out a proper Environmental Impact Assessment and puts in place proper mitigation measures as well as pay for damages caused on his property. He contends that he consequently repaired his perimeter wall including his rental premises at his own expenses, forwarded the receipts to the Respondent so as to be reimbursed.

The Defendant opposed the application and filed a replying affidavit sworn by WILLIAM OCHIENG OUKO who is the administrator of the Defendant's Southern Bypass Road Construction where he deposes that the Defendant was contracted by the Government of Kenya to construct the Nairobi Southern Bypass. He avers that in order to carry out the construction works, the Defendant has been extracting raw materials from Embulbul in Ngong, which extraction involves blasting and excavation works at the quarry. He claims the Defendant obtained all the requisite licenses including Environmental Impact Assessment Licence from NEMA; Certificate of Registration of Workplace, under the Occupational Safety and Health Act; Licence to manufacture explosives from the Ministry of Mining; Authority to conduct blasting from the Ministry of Environment and Mineral Resources; Occupational Health and Safety Audits from the Directorate of Occupational Safety Health Services; Fire Safety Audits from the Directorate of Occupational Health Services; and Licence to store blasting explosives from Ministry of Mining. He contends that in June, 2015 the Defendant received complaints from the Plaintiff regarding the blasting activities and how the same had affected his perimeter wall including rental houses which had cracks. He states that the Defendant engaged its quantity surveyor who assessed the damage at Kshs. 243,610 and insist the discrepancy between the Plaintiff's assessment and their own demonstrated Plaintiff is out to extort money from it. Further, that the Plaintiff has failed to produce an approval of his building plan and neither has he tendered proof that the buildings in question were built according to the approved design by the local authority. He reiterates that the Plaintiff has not established a prima facie case to warrant the grant of an injunction, and damages will be an adequate remedy as he will not suffer irreparable injury if the injunctive orders sought are not granted. He wonders why the Plaintiff has taken long to file this application as blasting activities commenced in July 2012 but the Plaintiff first complained in January, 2014.

He contends that the construction of the Nairobi Southern Bypass is in the interest of the public as it will have an impact on development of the country, and an injunction stopping blasting will cause greater harm to the Defendant including the public. He reaffirms that this matter relates to the amount of compensation to be paid to the Plaintiff and he has not shown any special circumstances to warrant the grant of a mandatory injunction.

The Plaintiff further filed a supplementary affidavit where he reiterated his claim and insisted there was no public participation before the Environmental Impact Assessment report was done.

Analysis and Determination

Upon perusal of the materials presented by the Plaintiff and the Defendant in respect to the Notice of Motion the 15th March, 2017, I find that the only issue for determination is whether the Plaintiff is entitled to the temporary and mandatory injunction orders sought.

The fulcrum of the claim revolves around compensation for the resultant effects of the blasting activities by the Defendant.

The Plaintiff claims the Defendant's acts of blasting culminated in destruction of his property. He sought for compensation from the Defendant for the expenses he incurred for repairs, but the Defendant has failed to do so. The Defendant insists the costs of repairs were inflated and the Plaintiff has declined to furnish them with the approved building plans of the destroyed building to enable them compensate him. The Plaintiff hence seeks for the Defendant to be permanently restrained from its blasting activities.

In the case of **Mrao Limited Vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** the court held that: '*In civil cases, a prima facie is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanatory or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case.*'

I find that the Defendant is not denying in principle that its actions affected the plaintiff's premises. What it is disputing is the amount of compensation demanded by the Plaintiff. The Plaintiff has also submitted that the Southern Bypass was completed and commissioned by his Excellency the President Hon. Uhuru Kenyatta, yet the Defendant persists in its actions. It is against the foregoing and relying on the authority above that I find that the Plaintiff has indeed established a prima facie case with a probability of success.

In terms of balance of convenience, I find that the same tilts in favour of the plaintiff who is yet to be compensated for the damage on his premises.

On the issue as to whether damages is a good relief for the Plaintiff herein, it is the Plaintiff's contention that the acts complained of continue unabated. Further I note the suit herein revolves around compensation to the Plaintiff for damages caused to his premises, which the Defendant has failed to pay. In the case of **Charles Awiti & 19 others Vs China Road & Bridges Corporation Kenya Limited (2016) eKLR**, Justice Okongo held that: '.....**In any event, I do not think that it is in the public interest for the defendant to make excessive noise, cause illegal vibrations and damage private property. I am satisfied from what I have stated above that the Plaintiffs have established a prima facie case against the Defendant. I am also satisfied that the damage to the Plaintiffs cannot be compensated in damages. I don't think that the inconvenience and discomfort caused by excessive vibrations and the anxiety caused by the cracking of the walls can be compensated by an award of damages. That being my view of the matters at hand, I am satisfied that the Plaintiffs have met the condition for granting a temporary injunction.**'

I note in the current scenario, the Plaintiff had made repairs on the suit premises and sought compensation from the Defendant which they are yet to agree upon. The Defendant insists the Plaintiff wants to extort money from it, which allegations are refuted by the Plaintiff. I however note except for the averments in the supporting and further affidavits, the Plaintiff has not provided further proof of destruction to his premises. In the circumstances I find that the harm suffered by the Plaintiff can indeed be compensated by way of damages.

On the issue of a mandatory injunction, an applicant must prove that it is a clear case that the Court will be assured that the same will succeed after the trial. I note the Plaintiff wants the Defendant to be permanently restrained from its blasting activities. The Defendant insists the construction of the Nairobi Southern Bypass is in the interest of the public as it will have an impact on development of the country, and an injunction stopping blasting will cause greater harm to the Defendant including the public. In the case of **Kenya Breweries Limited vs. Washington Okeyo (2002) EA 109** the Court of Appeal stated that, '**a mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.**'

I reiterate that the suit herein is for compensation for costs incurred by the Plaintiff in repairing his premises that got damaged as a result of the blasting activities of the Defendant. I concur with the Defendant that there are no special circumstances at this juncture that would warrant the grant of a mandatory injunction sought by the Plaintiff to permanently stop blasting activities by the Defendant. I will hence decline to grant the orders of mandatory injunction as sought by the Plaintiff.

It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 15th March, 2017 is merited but noting that the Plaintiff already repaired his premises and has not indicated whether there is a future damage, I will allow it in the following terms:

- 1. The parties will observe and maintain the obtaining status quo pending the hearing and determination of the suit.**
- 2. The costs of the application will be in the cause.**

Parties are urged to comply with Order 11 within 30 days from the date hereof, and set the suit down for hearing as soon as possible

Dated signed and delivered in open court at Kajiado this 12th day of March, 2018.

CHRISTINE OCHIENG

JUDGE

Present

Cc Mpoye

N/A for Plaintiff

Rono for Muriuki for Defendant