



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 350 OF 2012**

**TIM MWAI.....1ST PLAINTIFF**

**CAROLYNE NASIMIYU LAVATSA.....2ND PLAINTIFF**

**RIMA TELL.....3RD PLAINTIFF**

**VERSUS**

**EXTRA MILE LIMITED.....DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiffs instituted this suit through a plaint dated 30/5/ 2012 and filed it in court on 18/6/2012. They alleged that they owned and/or occupied residential properties in Vital View Court situated on Land Reference Number 209/10345/3, Brookside Drive, Westlands, Nairobi (hereinafter referred to as the “**suit property**”). The plaintiffs stated that the defendant who owned premises in the neighbourhood of the suit premises and had on 4/5/2012 commenced construction works in the marginal areas adjoining the suit premises and the said construction works had grossly interfered with their enjoyment and access to the suit premises. They contended that the defendant had diverted the existing storm water drainage system set up by the City Council of Nairobi from its premises by erecting a parallel drainage tunnel from its premises which cut across the plaintiffs’ drive way and the plaintiffs’ front garden. The plaintiffs further alleged that they were not consulted by the defendant; that the construction works by the defendant exposed them to safety hazards and that the said works were undertaken without due compliance with the law. The plaintiffs averred that they had suffered and stood to suffer substantial damage owing to the defendant’s unlawful actions.

2. Consequently, they sought the following orders:

- i. An order directing the defendant to remove, demolish and dismantle the purported drainage system constructed adjacent to the suit property failure which the plaintiffs be at liberty to demolish the same at a cost recoverable from the defendant.**
- ii. Damages for reinstatement of the driveway and adjacent flower garden destroyed by the defendant.**
- iii. Special damages in respect of the loss and damage suffered by the plaintiffs.**
- iv. General damages for nuisance, loss and damage suffered by the plaintiffs.**
- v. Costs of the suit plus interest at court rates.**

3. The defendant filed a defence dated 23/10/2013 denying the plaintiffs’ claim. It stated that Urban Earth Apartments erected on Land Reference Number 209/10345/1, Brookside Drive, had been in existence since 2001. The defendant stated that following heavy rains which took place in October and December 2011, water from the adjacent river and the storm water drainage back- flowed to Urban Earth Apartments pushing against the boundary wall which collapsed as water flowed towards the river. It added that heavy rains in March 2012 flooded Land Reference Number 209/10345/1. Consequently, it approached the nearby City Council of Nairobi which advised them to prepare plans to divert the storm water from Land Reference Number 209/10345/1 to the nearby City Council Way Leave. The defendant contended that it complied with all the conditions set by the City Council and that having taken all the requisite legal steps, no claim could lie against it.

**Evidence**

4. Hearing commenced on 9/3/2017. The 2nd plaintiff testified as PW1. She adopted her witness statement dated 20/1/2016 and testified that

the plaintiffs were owners of town houses in Vital View Court, whose leases she produced as PExh.1(a), (b) and (c). PW1 informed the court that they bought the town houses in 2008 and they enjoyed peaceful occupation until 2012 when the defendant diverted storm water drainage by digging trenches cutting across their main gate and running along their perimeter wall. PW1 produced pictures showing how the construction works were undertaken as PExh. 2(a), (b) and (c). She contended that since construction works were not completed as piping was never done, storm water runs along their perimeter wall and stagnates at the backside of the wall. Pictures showing erosion on the perimeter wall as well as storm water running and stagnating along the perimeter wall were produced as PExh.4, 5(a) and (b) respectively.

5. In further evidence, PW1 stated that during the construction, the defendants also dug across their drive way onto their plant garden exposing electric cables as shown by a picture which was produced as PExh.6. She testified that the drive and garden were poorly reinstated. The evidence of PW1 was that they were never notified about the construction works and further that, there was no public participation whatsoever. She added that the stagnating water had dampened the perimeter wall and was seeping underneath. PW1 contended that the wall had weakened, necessitating them to do repairs. She produced a demand letter as PExh.7 and averred that their objections and demand for remedial action from the defendant had not yielded a positive response.

6. In cross-examination, PW1 stated that the defendant's property had flats erected thereon. She maintained that there was no flooding before the storm water was diverted. She contended that there was a Nairobi City County way leave immediately after the perimeter wall and averred that there was no storm water drainage through the way leave. She denied knowledge that the defendant had obtained approvals. She averred that the letter dated 3/5/ 2012 from the City Council of Nairobi authorized the defendant to improve the existing storm water drainage on Land Reference Number 209/10345/1 but not to divert the storm water. The evidence of PW1 that they wanted reversion to the original drainage course marked the close of the plaintiffs case.

7. The defendant called two witnesses. Sammy Muthama (DW1) testified that he was a civil engineer working with the Nairobi City County Government. He visited the site in 2012 and 2017 while in the company of lawyers for both parties. He prepared a report dated 12/6/2017 which he produced as DExh.1. DW1 stated that they gave approval for conversion of storm water drainage but the same was not supposed to be along the boundary wall. He averred that the drainage was supposed to cut across the entrance to the plaintiff's estate. He produced the approval and plan as DExh.2 and 3 respectively.

8. It was the evidence of DW1 that initially storm water used to end up in Land Reference Number 209/10345/1 before it was diverted to the area between 209/10345/2 and 209/10345/5. He produced a survey plan as DExh.4. He averred that in May 2016, there was flooding along Brookside Drive and the area residents approached the County Office for help. The County approved the construction of a canal to enhance storm water drainage and the approval dated 24/6/2016 was produced as DExh.5.

9. During cross-examination, DW1 stated that he did not participate in the impugned re-routing of storm water drainage. He contended that the defendant had a duty to involve the residents who were to be affected by the re-routing of storm water drainage. He saw a complaint from the residents demanding stoppage of the illegal construction and re-routing and he averred that as at June 2017 when they visited the site, the County Government had taken over the repair of the way leave which had been destroyed by the storm water and re-routed the same to proper culverts. DW1 stated that the culverts had been fixed to drain the storm water without interfering with adjacent properties.

10. DW1 averred that the works of 2017 were not related to the works of 2012. He maintained that the County Government was not party to the works of 2012 save for issuing authorization. He could not tell when the flats on Land Reference Number 209/10345/1 were constructed or whether there existed a drainage system prior to the construction. He did not know why the City Council approved development on a storm water drainage which existed on Land Reference Number 209/10345/1. He stated that DExh.5 did not include all the plots which had been affected and in particular the suit property was not included.

11. The 2nd defence witness was Simran Manku (DW2). She testified that she owned Apartment No. 9 in Urban Earth Apartments. She adopted her witness statement dated 10/3/ 2016 as part of her evidence. She informed the court that she was involved in the diversion of the storm water drainage and the project was undertaken by Urban Earth Apartment Ltd. She stated that originally, the storm water drainage was meant to run along the road but ended up draining into their property. Her evidence was that in 2011, her apartment was flooded as evidenced by photographs which she produced as DExh.7 and 8. She stated that the area was prone to flooding as there were walls which were perpendicular to the riverbed. DW2 produced documents at pages 1, 8 and 9 of her bundle as DExh.9(a),(b) and (c) respectively.

12. DW1 averred that they rehabilitated the premises after building the storm water drainage system. She averred that the diversion cost Kshs.939,000/-. Photographs of the new storm water drainage and the rehabilitated works were produced as DExh.10 and 11. DW1 averred that the flooding was not as a result of the storm water as indicated in a NEMA report which she produced as DExh.12. She stated that the plaintiff's flower bed and drive way were restored.

13. In cross examination, DW2 stated that there was an existing storm water drainage system where Urban Earth was constructed. She blamed the developer, Extra Mile Ltd for leaving the storm water drainage in the place where her apartment stood. She stated that the Water Resources Management Authority noted in its letter dated 29/11/ 2013 that the defendant had encroached on the riparian reserve. She averred that the suit property was not among the properties covered in the letter dated 2/10/2016. DW2 did not have receipts to support the expenditure. She averred that deeper culverts were done by the Nairobi City County in September and October 2017.

## **Submissions**

14. The plaintiffs filed written submissions dated 30/3/2018 in which they argued that the defendant was under a duty to refrain from undertaking activities which would interfere with their enjoyment of the suit premises. Counsel submitted that the construction and diversion of storm water drainage system into the purported way leave was a nuisance and an unlawful interference with the use and enjoyment of their properties. Counsel argued that the defendant had failed to give an undertaking to make good any loss and damage suffered by the plaintiffs during execution of the construction works and that following the destruction of the drive way and front garden, the plaintiffs had to incur extra costs in repairing the same.

15. It was submitted that the defendant failed to consult the plaintiff when it interfered with their driveway and garden while re-routing the storm water drainage. Counsel argued that the diverted storm water drainage system constructed near underground power lines posed a danger to the plaintiffs.

16. The plaintiffs submitted that the works undertaken by the defendant were illegal in that they were undertaken without compliance with the applicable laws. Counsel contended that the defendant failed to erect a board bearing the relevant approval details on the site. Further, it was argued that the approval produced as DExh.2 only allowed the improvement of the existing drainage system and not diversion. Counsel argued that this was a proper case for the grant of a mandatory injunction against the defendant and reliance was placed on the case of Ahmed Ibrahim Suleiman & another vs. Noor Khamisi Surur (2013)eKLR and Ezekiel Sukuru Maumba vs. Thomas Indieki Nyairo(2013)eKLR. Lastly, the plaintiffs submitted that no Environmental Impact Assessment Licence was produced to show any canalization of River Kibarage in 2012 on the suit property and Land Reference Number 209/10345/5 respectively where the way leave joins River Kibarage.

17. The defendant in its submissions dated 8/2018 stated that its action to legally divert a storm water drainage system onto a public way leave did not deny the plaintiffs the right to enjoy their property. Counsel submitted that the plaintiffs had failed to demonstrate what actions by the defendant had violated their constitutional right to enjoy their property. The defendant relied on the case of Minister of Health & others vs. Treatment Action Campaign & others(2002)5LRC 216 and submitted that an effective and appropriate remedy in this case would require the participation of the Nairobi County Government which is mandated to address flooding.

18. The defendant argued that the plaintiffs' right to use and enjoy their property was not absolute and that since the plaintiffs live in a community, they cannot insist on exercising their rights without regard to the rights of others. Further, it was argued that the plaintiffs could therefore not impose unnecessary burdens on other property owners which prevent them from enjoying their property. Lastly, the defendant submitted that no negligence was attributable to it under the rule in Rylands vs. Fletcher (1868)LR 3HL 330

### **Determination**

19. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant law and jurisprudence on the key issues arising in the dispute.

20. During trial, the court had the opportunity to visit the area. The court saw the original storm water drainage which hitherto ran through Land Reference Number 209/10345/1. It also saw the diverted storm water drainage system which runs through the way leave abutting the plaintiffs' property.

21. There is common ground that previously, the storm water drainage tunnel existed in Land Reference Number 209/10345/1. There is also common ground that diversion of the storm water drainage cut across the plaintiffs' drive way and affected their front garden. The defendant contends the diversion works were undertaken by Urban Earth Apartment and were authorized by the City Council of Nairobi through a letter dated 3/5/2012. The said letter was addressed to Extra Mile Limited. It is therefore clear from the letter that the party who sought authority to undertake works was the defendant. Secondly, the authority granted to the defendant related to improvement of the existing storm water drainage on Land Reference Number 209/10345/1, Westlands. The approval letter did not authorize the defendant to divert the existing storm water drainage in the manner they undertook the works. What the defendant did was to remove the storm water drainage system from Land Reference Number 209/1034/1 and divert it across the plaintiffs' gate, continuing along the plaintiffs' perimeter water 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 plaintiffs whose access to their homes was disrupted were consulted. I therefore find the defendant liable for undertaking unauthorized diversion of the storm water drainage system and disrupting the plaintiffs' quiet enjoyment of their properties.

22. The plaintiffs have sought a reversion to the original storm water drainage. Land Reference Number 209/10345/1 on which Urban Earth Apartments stand borders River Kibarage. Having visited the site, I am certain that reversion to the original storm water drainage will result into more problems. A more holistic approach would be to require the defendant to obtain approval to undertake remedial works involving bigger enclosed culverts stretching from the point of diversion all the way to River Kibarage. Secondly, for undertaking unauthorized diversion of storm water and unlawfully disrupting the plaintiffs' peaceful enjoyment of their properties without prior notice to the plaintiffs, the defendants will bear modest general damages which I hereby assess at Kshs. 1,500,000/-.

23. The plaintiffs prayed for damages for reinstatement of their drive way and their flower garden. They also sought special damages for loss and damage suffered by them. No evidential material was tendered to support the two limbs. In the absence of supportive evidence, the same would not be awarded. In any event it is expected that during execution of the remedial works set out herein, the defendant will restore the drive way and garden to their original state prior to the unlawful works of 2012.

### **Disposal Orders**

24. In light of the above findings, the court makes the following disposal orders:

**a. The defendant is at liberty to within 120 days seek approvals and undertake proper re-routing of the storm water drainage through the nearby Nairobi City County Government's way leave into the nearby River Kibarage.**

**b. The said drainage shall entail adequate size of enclosed culverts which shall extend up to the River Kibarage.**

**c. In default of (a) above, the plaintiffs shall be at liberty to re-route the storm water drainage back to the original cause through Land Reference Number 209/10345/1 at the defendant's costs.**

**d. For the disruption and suffering caused to the plaintiffs by the illegal works, the defendant will pay the plaintiffs general damages of Kshs. 1,500,000.**

**e. The defendant will bear costs of this suit.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF DECEMBER 2018.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

.....advocate for the plaintiffs

.....advocate for the defendants

June Nafula - Court Clerk