



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 129 OF 2017

EDWARD NYAOGA ONSONGO.....PLAINTIFF

VERSUS

JOB MEKUBO MOGUSU.....DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion date **17th July, 2017** seeking orders of temporary injunction to restrain the defendant from digging a hole for water discharge next to the plaintiff's house in **Plot No. Kitale Municipality Block 18/Bidii/994** pending, first the hearing of the application *inter partes* and second, pending the hearing of the suit. The application is supported by an affidavit sworn by the plaintiff on **17/7/2017**.
2. The defendant filed a replying affidavit sworn by the defendant on **19/7/2017**. The counsel for both parties appeared before court on **20/7/2017** when the application was argued orally.
3. The plaintiff's case is that he owns **Plot No. Kitale Municipality Block 18/Bidii/994** while the defendant owns **Plot No. Kitale Municipality Block 18/Bidii/996**. The plaintiff avers in his affidavit that the defendant has dug a hole for water discharge next to the plaintiff's house without any due regard for the safety of the plaintiff's house and that the hole poses a danger to the house.
4. It further states that despite a notice from the Public Health Office requiring the defendant to manage and control the water within his plot, and thus abate the nuisance allegedly occasioned to his neighbour, the defendant did not do so. The said notice is dated **19/8/2016** and is exhibit **No. "ENO-4"** in the plaintiff's supporting affidavit. The County Director of Environment Water and Natural Resources also compiled a report dated **24/2/2017** on the disputed hole and made recommendations which the defendant has neglected to comply with.
5. The County Director of Environment has also issued the defendant with an Environmental Restoration Order to refill the hole, which the restoration order the defendant has neglected. A demand notice dated **30/5/2017** has also been ignored.
6. In his replying affidavit the defendant avers that he has not dug a hole next to the applicant's house; that the applicant has not demonstrated that the house is in danger; that the applicant barricaded the water path with a perimeter wall; which causes all the water to accumulate at the defendant's home; that after the rains the defendant intends to cement the hole to act as his water reservoir; that the plaintiff has no locus standi, that the act complained of is a public nuisance and the plaintiff has not complied with **Section 61 of the Civil Procedure Act**; that the applicant has not shown any loss suffered since June, 2016; that the actions complained of can be compensated for by way of damages, and finally that the prayers sought have been overtaken by events. An interim injunction is meant to forestall that which has not yet occurred.
7. I have examined the prayers in the application. They seek to restrain the digging of a hole by the defendant. The hole has already been dug by the defendant. It was dug ostensibly to serve a certain purpose. It is true that the orders sought cannot issue since the action intended to be restrained has already taken place.
8. The application dated **17/7/2017** is hereby dismissed with costs to the defendant. The parties should fix the suit for hearing on a priority basis.

Dated, signed and delivered at Kitale on this **24th** day of **August, 2017**.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Mr. Bororio for the Applicant

Mr. Wafula for Respondent

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017