



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 359 OF 2013

MARY ACHIENG HOSEAPLAINTIFF

VERSUS

LAKE VICTORIA SOUTH WATER SERVICES BOARD.....1ST DEFENDANT

S.C INTERNATIONAL ENGINEERING CO. LTD2ND DEFENDANT

J U D G M E N T

1. The plaintiff filed the instant suit against the defendants jointly and severally vide a plaint dated 23rd August 2013 filed in court on 26th August 2013. The plaintiff’s claim is that she was at all material times the sole registered proprietor of land parcels **Suna East/Wasweta I/7409, 7410 and 7411** all situate within Migori County (hereinafter referred to as “the suit properties”).

2. The plaintiff claims that on or about 2nd June 2013 the 2nd defendant acting as agent of the 1st defendant without any notice to the plaintiff and/or any consent or authority from the plaintiff entered onto the suit properties and committed wanton acts of waste thereon by digging trenches, laying high pressure water pipes and dumping waste materials thereon. The acts by the defendants, the plaintiff further claims rendered varying portions/parts of the suit properties unsuitable for use by the plaintiff and the plaintiff quantifies the damage/loss suffered as follows:-

- (i) Land parcel Suna East/Wasweta/7409kshs. 161,000/=**
 - (ii) Land parcel Suna East/Wasweta I/7410kshs. 322,000/=**
 - (iii) Land parcel Suna East/Wasweta I/7411kshs. 5,000/=**
- Total kshs. 488,000/=**

The plaintiff further claims special damages in the sum of kshs. 16,500/=.

3. The 1st defendant filed a statement of defence dated 15th October 2013 where she denied all the plaintiffs averments in the plaint and put the plaintiff to strict proof. The 2nd defendant through a statement of defence filed on 3rd February 2014 equally denied the plaintiff’s averments in the plaint but in her paragraph 6 of the defence pleaded thus:-

6. The 2nd defendant further avers that if at all she trespassed on LR Nos. Suna East/Wasweta I/7409, Suna East/Wasweta I/7411 and Suna East/Wasweta I/7410 which is

denied the same was at the behest of the 1st defendant who provided the drawings and plans on how and where to lay the pipeline works and her mandate was basically to implement the instructions of the 1st defendant and hence the 1st defendant assumes liability over the same, if at all.

The 2nd defendant denied the damages claim and in regard to the valuation tendered by the plaintiff in support of the plaintiff's claim stated that the valuation was inaccurate and was speculative and did not reflect the true position on the ground as the same was exaggerated for commercial reasons.

4. The suit was part heard before Hon. Justice Okongo on 9th March 2015 and 6th July 2015 when the plaintiff and PW2 testified and the plaintiff closed her case. DW1 one Samuel Nundu Ochanda testified before me on 24th November 2016 on behalf of the defence. The defence was closed following DW1's evidence whereupon the plaintiff and the 1st defendant filed final closing submissions.

5. Evidence of the parties;

The plaintiff testified that she was the registered owner of land parcels **Suna East/Wasweta I/7409, 7410 and 7411** situate within Migori County which fact was not disputed by the defendants. The plaintiff further testified that the defendants on 18th June 2013 without her permission, authority and/or consent entered into her said parcels of land in her absence excavated and laid water pipes thereon. The plaintiff further stated the actions by the defendants resulted in causing damage of portions of the suit properties and rendering part of the properties unusable. The plaintiff stated that she had allowed the defendants access to the site where they were to construct the water tank through her land but that she had not permitted the defendants to lay the water pipes on her suit lands. The plaintiff further stated she had permitted the defendants to assemble the construction materials on her land

6. The plaintiff testified that when she discovered the defendants had laid pipes through her parcels of land and had caused damage to her land she decided to engage the services of a valuer who could assess and quantify the damage and in that regard she enrolled the services of **Oliver Gwer Pacho**, a registered valuer who testified as PW2. She testified that the valuer assessed the value of the damage at kshs. 488,000/= made up as hereunder:

(a) Land parcel Suna East/Wasweta/7409kshs. 161,000/=

(b) Land parcel Suna East/Wasweta I/7410kshs. 322,000/=

(c) Land parcel Suna East/Wasweta I/7411kshs. 5,000/=

Total kshs. 488,000/=

The valuation report dated 15th August 2003 was produced as "PEX.12". The plaintiff stated that she paid kshs. 15,000/= for preparation of the valuation report and further paid kshs. 1,500/= to obtain official searches for the suit properties. The plaintiff in cross examination by Mrs. Asuna advocate for the 1st defendant admitted that she was paid kshs.30,000/= by the defendants for granting them an access road and permitting use of her land for assembling construction materials. She stated the agreement was made with a representative of the 2nd defendant but maintained the agreement did not relate to laying of water pipes on her land. The plaintiff further stated when cross examined by Mr. Abisai advocate for the 2nd defendant that the 2nd defendant offered compensation in the sum of kshs.49,000/= for laying pipes on her land but she rejected the offer. The plaintiff maintained she wanted to be compensated in regard to the water pipes laid on her land by the defendants.

7. PW2 testified that he was a licenced valuer and had worked as a government valuer for 26 years and that upon retirement in 2003 he set up his own private practice. He stated that on 15th August 2013 he received instructions from the plaintiff that the 2nd defendant had caused damage to her three parcels of

land namely **Suna East/Wasweta I/7409, 7410 and 7411**. The plaintiff wanted the damage assessed and quantified. The witness testified that he inspected the plaintiff's three parcels of land and established there was damage to the three land parcels. The witness stated the defendants had dug drainage for the purposes of laying water pipes across parcel **Nos. 7409 and 7411** and did in fact lay pipes on these two plots. In regard to parcel **7409** the witness stated the area affected was 90m² while the murrum dumping was 120m². In regard to parcel **7411** the affected area was 180m² while murrum dumping was 300m². Parcel **7410** only had murrum dumped thereon of 240m². The witness explained it was difficult to optimally utilize the suit plots as the underground laid pipes would always be an impediment. The witness explained that he only valued the affected parts on the basis of outright purchase. The witness further explained he used comparables to arrive at his valuation. The witness acknowledged the value of land is dependent on various factors and user would be one such factor.

8. Samuel Nundu Ochanda DW1 testified as the sole defence witness. He testified that his firm Otieno Odongo & Partners had been retained by the 1st defendant for Engineering Consultancy Services while the 2nd defendant had been contracted by the 1st defendant. The witness confirmed that he met with the plaintiff at the site where the 2nd defendant was building the water storage tank and they discussed and agreed with the plaintiff that the plaintiff would give access road for the defendants' vehicles through her land and that the plaintiff would also grant the defendants storage space for their materials. For the access and storage, a fee of kshs. 30,000/= was agreed with the plaintiff. However, there was no agreement in respect of the pipeline passing through the plaintiff's land and discussions with the plaintiff did not yield any agreement. The defendants offered the plaintiff compensation in the sum of kshs. 49,000/= which she rejected as too little.

9. DW1 stated that a valuation carried out by the government valuer respecting damage to the plaintiffs land fixed the value at kshs. 300,000/= as opposed to the valuation by the plaintiff's valuer of kshs. 488,000/=. The witness stated the valuation by the government valuer represents a rational valuer as this having been a government project any compensation would be based on the valuation by the government. The valuation of kshs. 300,000/= proffered by the government was based on the portion taken up by the water pipes and was equated to purchasing the equivalent land. The witness further explained that after completion of the project the contractor cleared the site of debris and restored the land to its original state save for the buried water pipes.

10. In cross examination by Sam Onyango Advocate for the plaintiff, the witness stated that at the time they were discussing with the plaintiff they did not have a valuation report. The witness further conceded that the plaintiff would not be able to put up a house over the pipeline and stated that a way leave of about 5 metres would be necessary on the path of the water pipeline where no permanent development can be effected.

11. Analysis and determination;

The parties exchanged final written submissions as directed by the court. The plaintiff's submissions were filed on 24th January 2017 while those of the defendant were filed on 31st January 2017. Having reviewed the pleadings, the evidence and the submissions by the parties the issues that arise for determination are as follows:-

1. Whether the plaintiff was the lawful and registered owner of the land parcels Suna East/Wasweta I/7409, 7410 and 7411.

2. If issue (1) above is in the affirmative, whether the defendants laid water pipes through the said plaintiff's parcels of land without the permission, authority and/or consent of the plaintiff.

3. If issue (2) above is in the affirmative, whether by reason of the pipes being laid on the plaintiff's said parcels of land the plaintiff has suffered any damage.

4. Whether the plaintiff is entitled to any compensation and if so, how much.

5. Who bears the costs of the suit.

12. There is no dispute that the plaintiff is the registered owner of the suit properties. Indeed the plaintiff produced copies of her title deeds and copies of official searches which confirmed her to be the registered owner of the three parcels of land the subject of the suit. The first issue therefore is answered in the affirmative.

13. The plaintiff agrees that she granted the defendants' permission to access the site where they were constructing a water storage tank through her land. The plaintiff also agreed she allowed the defendants storage of the construction materials on her land. For the access and storage of materials the plaintiff was paid a sum of kshs. 30,000/= by the defendants. The plaintiff was emphatic that she did not agree or consent to the water pipes to be laid through her land. The letter dated 4th June 2013 produced by DW1 as "DEX1" confirmed the agreement between the plaintiff and the defendants in regard to access and storage of materials. DW1 in his evidence stated thus:-

"We did not agree on the payment for the pipeline to pass through. We discussed and agreed to pay her kshs. 49,000/= to pass the pipes but before she was paid she raised issue that the payment was too little."

The witness further in cross examination stated as follows in regard to the plaintiff's land:-

"When we commenced construction we did not know the lower part of the hill belonged to the plaintiff. We came to know the land belonged to the plaintiff when she barred us from accessing the project site. We negotiated passage and storage of materials. We did not have a formal agreement permitting us to lay the pipes on the plaintiff's land."

14. From the foregoing, it is clear that the defendants did not have the authority or permission of the plaintiff to lay the water pipes through her land and hence I would equally answer the second issue in the affirmative that the water pipes were laid through the plaintiff's land without her authority or consent.

15. As regards issue number three, it is not disputable that the water pipes passed through the plaintiff's land. DW1 acknowledged that the defendants laid the water pipes through the plaintiff's land. The valuation reports tendered by the plaintiff and the defendants in evidence affirm that the water pipes indeed were laid through the plaintiff's land. It is also evident from both the plaintiff's and the defendants' evidence that both the plaintiff and the defendants attempted to negotiate the compensation that was payable to the plaintiff for the water pipes that were laid on the plaintiff's land. The defendants had made an offer of kshs. 49,000/= to the plaintiff as compensation which the plaintiff rejected. Hence there was acknowledgement on the part of the defendants that the plaintiff was entitled to some compensation.

16. The plaintiff in her evidence stated that she could not make full use of her land where the pipes had been laid. For instance she stated that she could not build permanent houses over the area the water pipes had been laid. This evidence was confirmed by DW1 when he stated under cross examination that:-

"A house cannot be put over the pipes. The piping would require a way leave of 5 metres. The plaintiff cannot build a house on the pipeline but can do farming over the pipeline."

17. It is evident therefore the plaintiff would have restricted use of the portions of her land affected by the pipeline. To the extent that the plaintiff cannot make full use of her land as she wishes, it is my view and holding that the plaintiff suffered damage by reason of the defendants' action of laying pipes on her land without her consent and/or authority. The plaintiff and the defendants attempted to negotiate the quantum of damages and/or compensation payable to the plaintiff without success precipitating the present suit.

18. Both the plaintiff and the defendants tendered expert valuation reports prepared by professional

valuers. PW2 in his general remarks stated inter alia that **“the three parcels of land were suitable combined for Hotel/ Restaurant Development or Residential Estate and that the properties are in a prime location with high demand.”** No doubt these observations influenced the valuation that he made. The valuer was considering optimal use of the properties without necessarily considering whether the plaintiff had any intention of putting the land to any such user.

19. The valuation report tendered in evidence by the defendants was made by one John M. Ng’ang’a, District Valuation Officer, Kisii/Nyamira/Migori/ Homa Bay Counties on 17th September 2013. His report indicated the affected area to be some 415sq metres. The report further indicated the area where the land was situate was designated residential and the area was vacant with no developments. The valuer returned a valuation of kshs. 300,000/= as opposed to PW2 valuation of kshs. 488,000/=.

20. I have considered the two valuation reports and I note the differential in the valuations may have arisen on account of the area each of the valuers took as being affected by the piping. In the case of PW2 I cannot rule out the element of speculation. The plaintiff in her evidence never stated what use she had intended to put the land and at any rate she never intimated she had any intention of putting a hotel on the suit properties or to put up housing estate. In cases of compulsory acquisition the basis of compensation is the current market valuation of the subject property as is. I am persuaded that PW2 valuation report had a tinge of speculation and I would fault the same on that account.

21. PW2’s report had also taken account of murram and rubble that was heaped on the land but which the evidence shows was removed by the contractor after the completion of the works. I am therefore inclined to accept the valuation as carried out by the government valuer and accordingly award the plaintiff damages of kshs. 300,000/=. Although I have faulted the valuation by PW2, I will award the plaintiff the sum kshs. 15,000/= which she paid for the preparation of the valuation report as it was a pre requisite for her to bring these proceedings. I also award the plaintiff the sum of kshs. 1,500/= which she paid to obtain certificates of official searches for the suit property.

22. The net result is that I find and hold that the plaintiff has established her claim against the defendants on a balance of probabilities. I accordingly enter judgment against the defendants jointly and severally in the following terms:-

(i) Kshs. 316,500/= together with interest at court rates from the date of filing this suit until payment in full.

(ii) Costs of the suit awarded to the plaintiff.

Judgment dated, signed and delivered at Kisii this 21st day of April, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Ms. Asunah for the 1st and 2nd defendants

Milcent court assistant

J. M. MUTUNGI

JUDGE