



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 250 OF 2015

**CENTURION CONTRACTORS & AGENCIES (K) LTD.....
PLAINTIFF/APPLICANT**

VERSUS

NYERI CONCRETE (K) LTD.....DEFENDANT/RESPONDENT

RULING

1. On **2nd October, 2015** Centurion Contractors & Agencies (K) Ltd (hereinafter referred to as the applicants) filed the notice of motion dated **1st October, 2015** seeking, among other orders, **a temporary injunction to restrain Nyeri Concrete (K) Ltd** (hereinafter referred to as the respondent) **from carrying out rock extraction/ quarry mining operations in the parcel of land known as L.R No. Aguthi/Gatitu/1601 or anywhere near the parcel of land known as Aguthi/Gatitu 2381 pending the hearing and determination of the application and the suit herein.**2. The application is premised on the grounds that the respondent has been carrying out rock extraction/quarry mining operations in the parcel of land known as Aguthi/Gatitu/1601. The said activities of the respondent are said to have occasioned damage to the applicant's property. For that reason, it is contended that unless the orders sought are granted, the respondent will continue carrying out the impugned activities and exposing the applicant to grave danger.

3. The application is supported by the affidavit of the applicant's managing director one, Johnson Gikandi Ngibuini, wherein the grounds on the face of the application are reiterated. In addition to reiterating the grounds on the face of the application, the deponents of the supporting affidavits deposed that on 25th day of September, 2015 the respondent through its servants, employees and/or agents so negligently extracted rocks near the applicant's office that it caused the applicant's weighbridge office and a store under construction to be damaged. The respondent's activities are also said to have fatally wounded a sheep belonging to the applicant's employee, John Nderitu Warutere.

4. It is further deposed that the respondent's business is prohibited in the area owing to its proximity to Kagumo Teachers College and the road.

5. The applicant's case is also supported by the affidavits of John Ndiritu Warutere, Robert Ngatia Kariithi and Stephen Muchoki Muriithi, all of whom reiterate the contention that rock extraction by use of explosives is prohibited in the area owing to its proximity to the road and because the area has a high population.

6. In reply and opposition to the application, one of the directors of the respondent company, John

Chege Taiti filed the replying affidavit he swore on 19th October, 2015 in which he deposes that the respondent is licensed to carry out the impugned works by the relevant authorities and that the respondent's immediate neighbours have no problem with the respondent's activities.

7. The deponent explains that the applicant's are the respondent's competitors in the quarry mining business and attributes the applicant's complaints to business rivalry. In support of that contention, the deponent explains that the applicant only raised the issues concerning the respondent's activities after the respondent terminated a contract that existed between it and the respondent.

8. The applicant is also said to be disentitled to the orders sought because it has acquiesced to the respondent's activities.

9. The following documents are annexed to the replying affidavit sworn in support of the respondent's case:-

a) Letter from the Commissioner of Mines and Geology dated 18th September, 2015 granting the respondent authority to use blasting materials at the suit premises marked **J-1**;

b) Letter from the County Director of Environment Nyeri County dated 19th July, 2013 marked **J-2**;

c) Business permit No.2015/41808 issued by the County Government of Nyeri to the respondent to engage in medium mining or Natural Resources Extraction Operation, marked **J-3**;

d) Map of the suit premises showing that the applicant's and the respondent's premises are separated by other parcels of land, marked **J-4**;

e) Agreement executed between the applicant and the directors of the respondent for carrying out the impugned activities.

10. When the application came up for hearing, counsel for the applicant, Mr. Machira, urged the court to allow the application on the grounds that:-

a) The respondent does not have a valid license to deal with explosives;

b) The explosives being used by the respondents have caused damage to his client's properties; and

c) That the licence issued by Nema was for a limited period, 24 months (has expired).

11. Counsel for the respondent, Mr. Kingori, referred to the licenses/documents annexed in support of the respondent's case and submitted that all those licenses/documents are valid.

12. Concerning the applicant's contention that the licenses are not valid, Mr. Kingori submitted that the burden was on the applicant to prove that the licenses were invalid, which burden the applicant failed to discharge.

13. Arguing that the applicant's case is based on nuisance (the rule in Ryland v. Fletcher), Mr. Kingori submitted that for the rule to apply, the applicant's must prove none- natural use of the land. Explaining that the parties to this dispute and their neighbours use their parcels of land for stone mining, Mr. Kingori submitted that the activities of the respondent cannot, in the circumstances, be termed none natural use of land.

14. With regard to the damage allegedly caused by the respondent's activities, Mr. Kingori submitted that there is no proof that the damage was caused by the respondent.

15. Contending that there is a possibility that the dead sheep was deposited at the scene, counsel for the

respondent reiterated the respondent's contention that the applicant had by its conduct acquiesced to the respondent's activities.

16. Counsel for the respondent further submitted that other than the dead sheep, nothing extra ordinary has happened. He urged the court not to allow the application.

17. In a rejoinder, Mr. Machira stated that explosives were only introduced recently and submitted that under **Section 108** of The Environment Management Coordination Act(EMCA), this court has power to deal with a license that has been misused.

Analysis and determination

18. From the pleadings and documents filed in this suit, it is clear that the applicant is challenging the activities of the respondent on among other grounds, that they are harmful to the environment. The applicant also contends that the respondent's activities are unlawful.

19. A review of the evidence adduced in this case shows that both the applicant and the respondent have been carrying out the impugned activities/business in the area in question. The only area of divergence is the allegation that the respondent recently started using explosives, which the applicant feels should not be used owing to the proximity of the area to the road and given the fact that the area has a high population.

20. Although the deponent of the main affidavit sworn in support of application claims that he has technical competence to vouch for the allegation he has made concerning the activities of the respondent, I note that other than stating that he is an Engineer, he has not annexed any report from an independent and impartial party capable of guiding this court in making an informed determination on his contentions. Moreover, there is no report linking the damage to the applicant's structures to the respondent's activities. In the absence of any report from the concerned authorities or a competent but impartial witness concerning the activities of the respondent, this court is unable to link the alleged damage to the activities of the respondent.

21. I say this because, despite the applicant having painted the respondent's activities as very dangerous, the only evidence led in support of the alleged danger is the photograph of the fatally wounded sheep and the alleged damage to the applicant's property.

22. Concerning the wounded sheep, there been no evidence of where the sheep was when it got wounded and cognizance of the fact that, a sheep is a mobile animal, I would, in the circumstances of this case, not consider the isolated incident of killing of a sheep to be evidence capable of proving the applicant's case against the respondent.

23. With regard to the alleged damage to the applicant's weigh bridge and store, I reiterate my observation that in the absence of any report by a competent and impartial witness, this court cannot make an informed decision concerning that matter. In any event, the applicant has not demonstrated what effects the respondent's impugned activities have had on the other parcels of land adjacent to the respondent's parcel of land.

24. In view of the foregoing, I find and hold that the applicant has not established a *prima facie* case with probability of success.

25. In my view, the issue raised in the applicant's application can easily be sorted by restraining the respondent from using the explosives that are allegedly causing the alleged damage. Unfortunately the applicant has neither sought to restrain the said activity nor proved any linkage between the said activity and the alleged damage caused to his properties and those of its employees.

26. It is trite law that an injunction will not issue if the claimant can be adequately compensated by award of damages. In the circumstances of this case, the claimant does not claim that damages will not

adequately compensate him for the alleged destruction of his property.

27. In my view the balance of convenience tilts in favour of maintenance of status quo.

28. For the foregoing reasons, I find and hold that the application dated 1st October, 2015 has no merit and dismiss it with costs to the respondent.

Dated, signed and delivered at Nyeri this 26th day of January, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Machira for the applicant/plaintiff

Mr. Muthoni holding brief for Mr. King'ori for the defendant/respondent

Court assistant - Lydia