



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 372 OF 2013

STEPHEN MURIITHI MATHENGE.....PLAINTIFF

VERSUS

S.S.MEHTA & SONS LTDDEFENDANT

JUDGMENT

(Plaintiff having contract with defendant for extraction of murram from his land; claim that defendant went beyond the agreed depth; claim that defendant left the area with an open pit and destroyed the fences and trees; claim that defendant re-routed an existing river; evidence showing that defendant went beyond the agreed depth; however parties agreeing that plaintiff will take over the pit after excavation; no evidence of destruction of trees or fences more than would be expected; evidence that river was rerouted; judgment entered for the plaintiff for the excess excavation by defendant; defendant to restore river to its original path)

1. This suit was commenced by way of plaint filed on 22 May 2012. The plaintiff is the proprietor of the land parcels Dundori/Muguathi Block 1/765 and Dundori/Muguathi Block 1/767 whereas the defendant is a construction company which was engaged in the construction of the Lanet/Dundori tarmac road in Nakuru County. The plaintiff has pleaded that on 8 March 2011, he entered into a 1 year agreement allowing the defendant to excavate a quarry in his parcels of land. He has averred that it was his plan that upon excavation, the pit would be sloped to enable him put up a fish rearing venture. He has averred that they had agreed that the defendant will excavate murram only up to a depth of 2 metres below the existing river bed and the defendant would back slope the pit upon excavation. The approval of the National Environmental Management Authority (NEMA) was given. It is the plaintiff's case that in blatant violation of the terms of agreement and the terms of NEMA, the defendant excavated 8 metres, destroyed trees planted on his plots, destroyed the fence surrounding the plots and diverted the course of an existing river passing through the plaintiff's land. It is pleaded that the river is now threatening the plaintiff's house and has destroyed the pit walls. It is also pleaded that after destroying the fence, the defendant failed to erect another fence hence exposing members of the public to grave danger of falling into the deep pit left after excavation. It is also pleaded that the defendant failed to slope the excavated pit and therefore the plaintiff cannot now use it for fish rearing. He has averred that in order to safeguard the lives of members of the public, he has at his own expense erected a fence to replace that destroyed by the defendant at a cost of Kshs. 72,885/=. He has pleaded that the damaged fence was of Kshs. 97,885/=.

2. In this suit the plaintiff has asked for the following orders :-

(a) An order for payment of Kshs 119,885/= being the expenses incurred in erecting another fence and surveyor's fees.

(b) A mandatory injunction compelling the defendant to reroute the existing river to the original position to avoid further damage to the public road, to plant trees on the excavated site, to slope the pit as per the agreement of 8 March 2011 and the terms of the NEMA report of 7 April 2011.

(c) An order that the defendant does compensate the plaintiff to the tune of Kshs. 610,530/= for the 6 metres excess scooped murram soil.

(d) Costs of this suit.

3. In its statement of defence, the defendant admitted having a contract for quarry acquisition. It is stated that the company wound up its business on the suit properties in June of 2011 with the knowledge and approval of the plaintiff. It is admitted that it did not back-fill the pit so that it may be used as a dam. It has however denied that it violated the terms of agreement or terms of NEMA or that it excavated metres not agreed upon. It has denied that there was any requirement to put up any fence and pleaded that the plaintiff regularly supervised the works. It has pleaded that the obligation to secure the land was not removed from the plaintiff.

4. In his evidence, the plaintiff testified that his two land parcels are adjacent to each other and each measures 0.9 acres. The area that was to be dug up was 0.68 acres. An EIA was done before the excavation commenced and excavation started in March of 2011. He later discovered that the defendant had excavated more than 2 metres deep and the site excavated was 0.8 acres. He stated that the river used to cut across the land parcel No. 767 but this was diverted by the defendants so as to pass next to a public road feeding the main Dundori-Lanet Road. He also stated that waste was dumped onto the site and vegetation cut. He wrote to the defendant on 22 June 2011 to complain. The defendant wrote back through a letter dated 29 June 2011. Inter alia, they stated that they are within the radius of 0.54 acres; that they could not extract the murram without affecting trees; they agreed they had affected the fence and diverted the river; and stated that they left the top soil because the plaintiff did not want a back-fill. He testified that according to the EIA report, the defendant was to fence the area quarried and replant the vegetation. He stated that he took it upon himself to re-do the fence using the sum of Kshs. 97,885/=. He engaged a surveyor, M/s Wahome Werugia, to assess the land and a report was done. He paid Kshs. 22,000/= for the report. He testified that he will need to back-slope the pit so that he can embark on fish rearing. He stated that he wants to be compensated for the extra excavation and the defendant to re-route the river back to its original position.

5. PW-2 was Justin Mwago, from the firm of M/s Wahome Werugia Licenced Surveyors. He testified that he visited the site and did a topographical survey on the instructions of the plaintiff. According to him, the excavated area was of a depth of 8 metres below the original existing river bed. The excavated area is 0.5 acres. He also noted that the course of the river had been diverted. There was also foreign matter dumped on the site.

6. The defendant called Hitesh Kamalkant Choksi as its witness. He is a site engineer with the defendant company. He confirmed that the defendant company had a contract with the plaintiff for excavation of materials for the Lanet-Dundori Road. He explained that the plaintiff's land is hilly and has a slope. The difference between the upper and lower parts is about 6-7 metres. He stated that they did not go beyond the agreed area and in fact went less than what was agreed. He testified that they only affected about 0.5 acres of the land yet the contracted area was 0.6 acres. He denied that they went below 8 metres. He stated that they only excavated from the upper side and on the lower side to the river bed level. He averred that the plaintiff used to visit the site but never made any complaint. He testified that they had no agreement where they would slope the area or replant trees and grass. According to him, the agreement was that the area be left as an open earth dam. In cross-examination, he conceded that he has no report to contradict that made by the plaintiff's surveyor. He stated that when they got the plaintiff's letter, they stopped all activity on the land and could not go back without the owner's consent. He agreed that Clause 4 of the agreement required them to slope the area but they have not done so.

7. I invited both counsels to file submissions but only Mr. Situma for the defendant opted to make submissions. He submitted inter alia that Clause 7 of the agreement allowed the plaintiff to visit the site

from time to time. He also submitted that no formal complaint had been lodged by the public concerning the allegation that the river had been re-routed. He also pointed out that the plaintiff's intended fish farming venture was not captured in the agreement. He submitted that it was not clear what the plaintiff meant by the 2 metres requirement as the land was sloppy with some areas being higher than others. He submitted that there was no breach of contract as the defendant had excavated an area of 0.5 acres which was within the agreed 0.6 acres limit. He contended that it was the plaintiff who was in breach of the terms of the agreement. He submitted that the contract was for one year from 8 March 2011 but the plaintiff stopped the defendant from working on 26 June 2011 thus the defendant was unable to embark on slopping the excavated area. He averred that the defendant could not slope the pit owing to the demand letter. It was his view that the plaintiff frustrated the contract. He finally submitted that the survey report was biased as it was prepared by a person instructed by the plaintiff. He averred that the plaintiff does not deserve the order of mandatory injunction since he was at liberty to visit the site and give clear instructions on what he wanted. He submitted that monetary compensation will be appropriate. He was however of opinion that even the monetary compensation claimed has not been proved and that the plaintiff is not entitled to the reliefs sought. He relied on various authorities all of which I have read and considered.

8. I take the following view of the case.

There is no dispute that the plaintiff is the owner of the suit properties. There is also no dispute that he entered into a contract with the defendant, whereby he allowed the defendant to extract murrum from his parcels of land. It is not disputed that murrum was excavated and that there is now a pit. It is however the plaintiff's view that the defendant breached their agreement and that of the EIA.

9. I have looked at the agreement and the EIA report. The agreement is dated 8 March 2011. The key terms of the agreement are as follows :-

(i) That payment rate shall be at Kshs. 300,000/= per acre for the quarrying and the acquired are is 0.68 acres amounting to Kshs. 203,510/= (paraphrased).

(ii) That the excavation work shall commence upon execution of this agreement.

(iii) That the lease herein shall remain in force for a period of 1 year from the date of commencement and thereafter the same shall be renewable by agreement of both parties.

(iv) That the contractor shall excavate the fill material from the existing surface area up to a depth of 2m below the existing riverbed level and the contractor shall upon termination of this contract will not backfill the area but slope the excavated area and leave the area open with 2m depth to be used as a earth dam as per the owner's request.

10. There was obviously a project for the excavation of soil, and this needed the approval of NEMA. An EIA report was done and although I have not seen the EIA licence, I presume that one was given, for the project commenced. I also presume that the EIA licence was given on the basis of the contents of the EIA report. I have gone through the EIA report. It shows that there were two sites for excavation of murrum, one named site A and another site B. I believe that it is the site B which is for the project in issue in this case, for in site A, there was supposed to be back-filling of the pit. The report could of course have been done with better finesse, especially in identifying the actual sites in issue, who owns them, and their parcel numbers. Ideally, two EIA reports ought to have been done for each site, for the different sites have different impacts. I have also not seen any environmental management plan for the site B, which is the current land under dispute. The EIA report also ought to have identified the exact scope of the project and at the very least, the depth of the pits, which I have not seen in the report. I mentioned that it would have done with better finesse, but on reflection, let me just call a spade a spade, and say that it was a very poorly done EIA report if not shoddy altogether. The parties could also have helped greatly by availing the EIA licence from where the terms of the grant of the licence would have been discernible. I however have little choice but to work with the limited material before me.

11. The excavation site according to the agreement was to cover a maximum of 0.68 acres. I have not seen the site size noted in the EIA. Working with this area of 0.68 acres as the permissible area, the evidence tendered shows that the area excavated was 0.5 acres which is within the permissible area. I see no breach in the area excavated by the defendant. The plaintiff has contended that the defendant excavated 8m below the existing river bed whereas they had agreed that the defendant could only go up to 2m below the existing river bed. To support his allegation, the plaintiff produced the topographical survey report prepared by PW-2. I have gone through the report. It does state that the excavation went to 8m below the original course of the river. I take it that this also refers to the river bed.

12. DW-1 in his evidence denied having gone beyond the depth allowed in the agreement, and there was also argument that because the land is sloping, it is not clear what 2m would mean for it would be higher in some areas.

13. On my part, I do not think that there is any confusion. The river bed is a fixed base level. The maximum depth that the defendant could go within the circumference where the 0.68 acres is situated is 2m below the river bed level. It matters not that some points are higher than others. What is important is the depth below the river bed level. One will of course scoop more soil where the slope is higher than the lower points but whether or not you are scooping soil from the upper points or lower points, you ought not to go 2m below the river bed level. There is no ambiguity here.

14. The surveyor's report shows that the defendant went up to 8m below the river bed. The defendant has not tabled any report to show that it did not go to 8m as stated by the plaintiff. I have no reason to doubt the report of the surveyor. To me it matters not that it was done under the instructions of the plaintiff; of course it had to be done under the instructions of the plaintiff because it is him who was trying to demonstrate the extent of the excavation. If the defendant felt that the report is not portraying the correct picture, nothing prevented her from seeking a second opinion from another expert. We therefore have to live by the report of PW-2 and it shows that the excavation went beyond 2m and indeed went up to 8m below the river bed. On this point, I do find that the defendant was in breach of the agreement. What we have therefore is an 8m pit below river bed level and not a 2m pit as envisaged.

15. Upon excavation, the agreement states that the defendant was to slope the excavated area and leave it open so that it may be used as an earth dam. There is no mention in the agreement that the site was to be used as a fish pond. I will follow the words of the agreement which show that the site was to remain as a dam. There is nowhere in the agreement which states that the defendant was to back-slope the pit. In my view, it was to be left as it is, for the plaintiff to make use of as a dam, only that it was meant to have a depth of 2m and not 8m. The dam was thereafter going to be in the hands of the plaintiff who would then be responsible for its operations including the health and safety of the surrounding public. I have not found any obligation on the defendant to fence the site or plant any vegetation and since the excavated site was to be left in the hands of the plaintiff, I am unable to impose an obligation which the parties did not contemplate.

16. The plaintiff has complained of destruction of trees and fences. But save for the mere word of mouth, I have no proof that the damage went beyond the area of excavation. Of course there had to be damage to vegetation in the site being excavated and I am unsure whether the damage complained of by the plaintiff is within this area or outside it. The plaintiff had a duty to provide the particulars of this alleged damage and demonstrate what area is affected. The survey report does not mention any damage to vegetation or damage to any fence. I mentioned earlier that there is no environmental management plan in the EIA for the site in issue. I therefore cannot tell if there was any obligation upon the defendant to replant any trees or re-do any fences. There is of course no mention of this in the agreement of the parties. I therefore find the allegation that the defendant illegally destroyed trees and fences to be unsupported by evidence.

17. The plaintiff has complained that the defendant re-routed the river passing through the suit properties. There is the surveyor's report which shows that the river was re-routed. I have not seen any mention of such an impact in the EIA report and I do not know how the river got re-routed. But since it was the defendant undertaking activities on the land, I can only come to the conclusion that the river was re-routed by the quarrying activities of the defendant. There is evidence that the re-routed river is now a

danger to the public. I think the defendant has to bring back this river to its original course under supervision by NEMA.

18. The plaintiff has sought damages for various expenses and the extra murram scooped by the defendant. In his first prayer, he has asked for the sum of Kshs. 119,885/= as expenses for erecting another fence and the surveyor's fees. I have already held that the plaintiff cannot claim the costs of erecting another fence for it was never in their agreement with the defendant and the same is not captured by the EIA report. I disallow the claim for the sum of Kshs. 97,885/= for fencing. I only allow the sum of Kshs. 22,000/= paid for the survey report. The second prayer was for a mandatory injunction to re-route the river, and this as I have said, I will allow only that the same must be supervised by NEMA so that it is guaranteed that the river is put back to its original path. This needs to be done within the next 90 days. I am unable to allow the prayer to replant trees on the excavated site. That is the duty of the plaintiff and I in fact encourage him to do so.

19. The plaintiff has asked for orders to have the defendant slope the pit. I have no particulars of any such agreement. However, the defendant was only to go to 2m in depth. He has to back-fill the pit up to 2m below the original river bed so that it is restored to what was agreed by the parties. This must be done within 90 days from today. Once the defendant restores the site to 2m below the river bed and re-routes the river, his job on site will be done.

20. The final prayer is for compensation in the sum of Kshs. 610,530/= for the excess murram scooped. I have already held that the defendant went beyond the agreed excavation. She unjustly enriched herself. I have no problem with the quantification of Kshs. 610,530/= which is in line with the rate of Kshs. 203,510/= for a depth of 2m. I award this sum.

21. The plaintiff has asked for costs of this suit. I see no reason why I should deny him costs. If the defendant had only dug upto 2m depth, we would not have any issue to litigate upon. But it was of their own making that they exceeded the permissible level. They have to pay the costs of this case.

22. I believe that I have dealt with all issues touching on this suit. I now make the following final orders :-

(i) That the defendant is hereby ordered to back-fill the site up to a depth of 2m below the original river bed level.

(ii) That the defendant is hereby ordered to re-route the river back to its original position before the excavation started.

(iii) The execution of prayers (i) and (ii) above to be supervised by the National Environmental Management Agency and be done within 90 days.

(iv) That I make no orders against the defendant to re-do a fence or re-plant vegetation on the site in issue.

(v) That I award the sum of Kshs. 22,000/= as surveyor's fees and the sum of Kshs. 610, 530/= as the cost of the excess murram excavated to the plaintiff payable by the defendant within 30 days from today.

(vi) The plaintiff shall have the costs of the suit.

22 It is so ordered.

Dated, signed and delivered in open court at Nakuru this 8th day of November 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Ms. Lagat holding brief for Njeri Njagua & Company for plaintiff.

Mr Situma present for defendant

Court assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU