REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 85 OF 2006

(formally Mombasa HCC NO. 424 of 2000)

MJANAHERI FARM LIMITED.....PLAINTIFF

=VERSUS=

CHINA ROAD & BRIDGES CORPORATION

HOLA GARSEN MALINDI ROAD PROJECT.....DEFENDANT

J U D G M E N T

Introduction:

1. This matter was filed in Mombasa by way of a Plaint dated 25th August 2000. The matter was transferred to this court and was allocated a new case number in the year 2006.

2. In the Plaint, the Plaintiff has averred that in October 1996, the Defendant, acting as an agent of Kenyan Government, and in accordance with the provisions of the Land Acquisition Act, proceeded to use a portion of his land known as Mjanaheri Farm/M9/Malindi for the purpose of quarring murram for the construction of a road.

3. The Plaintiff has averred that the Defendant also leased to him two water sewerage tanks and that in contravention of the provisions of the law and the Lease Agreement, the Defendant did not restore the land upon completion of occupation.

4. The Plaintiff is seeking for special damages of Kshs.506,000, general damages and for an order compelling the Defendant to restore its land to the condition it was in before as per the provisions of the Land Acquisition Act.

5. The Defendant filed a Defence and Counterclaim and averred that its the Plaintiff who offered and allowed the Defendant to use the two water tanks free of charge in exchange of the Defendant providing a bull dozer to work for him for four days; that the Plaintiff voluntarily allowed the Defendant to use its store and that the suit property was compulsorily acquired by the Government of Kenya and it was the Government to restore the piece of land as per the agreement.

6. In the Counterclaim, the Defendant has averred that the Plaintiff refused it to access the land and as a consequence the Defendant suffered loss amounting to Kshs.1,330,550.

7. When the matter came up for hearing, it is only the Plaintiff's representative who testified. The Defendant did not call any witness.

The Plaintiff's case:

8. The Plaintiff's director, PW1, informed the court that in October 1996, he allowed the Defendant to excavate murram from his land for the purpose of constructing Malindi-Lamu road. It was his evidence that the Defendant also put up big stores on his farm and that the Defendant used the Plaintiff's big tanks which were underground.

9. According to the Plaintiff's director, the two tanks were hired by the Defendant for the storage of their fuel and the Defendant was to pay for the same in kind. The agreement that the Plaintiff had with the Defendant was that the Defendant clears the Plaintiff's land which was bushy and the Defendant was also supposed to rehabilitate the Plaintiff's dam. It was the evidence of PW1 that the Defendant was also required to rehabilitate the area that it had harvested the murram.

10. It was the evidence of PW1 that although he reduced what they had agreed in writing, the Defendant refused to sign his part.

11. The witness produced in evidence the Environmental Assessment Report, the agreement and a bundle of letters.

12. According to PW1, the Government compulsorily acquired the land in question for construction of the road but not the part that the Defendant excavated the murram from.

13. The witness produced the title document which shows a notification of acquisition of 2.8Ha by the Government for the construction of the road.

14. PW1 informed the court that the Defendant moved away with his two tanks thus the claim of Kshs.506,000.

15. PW2, an expert in environmental matters, informed the court that a substantial amount of murram was extracted from three quarries and that there was no rehabilitation after the said extraction.

16. It was his evidence that once one excavates murram, he needs to refill it to ensure the growth of vegetation. The witness produced the pictures he took of the quarries that were crated by the Defendant and the sketch maps.

17. The Defence did not call any evidence.

Submissions:

18. The Plaintiff's counsel submitted that the failure to undertake any reclamation or restoration of the quarry has led to great loss and damage to the Plaintiff because the land in question is used as a dairy farm and it has not been possible for pasture to grow in the quarried areas.

19. In the circumstances, it was submitted, a sum of Kshs.5,000,000 as general damages would be a fair, just and an equitable remedy.

Analysis and findings:

20. The only issue for determination in this matter is whether the Plaintiff is entitled to special damages and general damages from the 1st Defendant for failure to honour the agreement it had with the Plaintiff.

21. It is not in dispute that the government acquired compulsorily 2.88 Ha of land known was M.9. The notice of taking possession of the said portion by the government dated 4th September 1995 was

registered against the title on 1st April 1996.

22. Although the evidence of PW1 was that the acquisition of the said land was for the construction of a road, the evidence before me shows that the said land was acquired as "a material site." and not for the construction of a road.

23. I say so because in the letter dated 20th January, 1997 by the Chief Resident Engineer and addressed to the Plaintiff, the Plaintiff was informed as follows:

> **"with reference to your letter dated 13th January, 1997, we wish to inform you that a Government Land Valuer from Department of Lands Ministry of Lands and Settlement has already visited and inspected the material site in your farm and taken necessary details and measurements for purposes of valuation of the affected area of your land. We are waiting for the valuation report so that arrangement for payment may be made".**

24. The Government therefore compensated the Plaintiff for the land that it acquired for purposes of excavating the murram.

25. However, it was for the Defendant to rehabilitate and restore the land after excavating the murram before moving from the site. Indeed, in their letter dated 16th April 1988, the Defendant informed the Plaintiff's advocate as follows:

> **" 1. It is true we have been quarrying murram from the above mentioned farm's land. Please be reminded that compensation has been paid to the owner of the land by the Government for acquisition, after that, we as contractors, shall be free to quarry and transport the material outside as requested by the road project.**
>
> **6. We as contractor shall execute the necessary rehabilitation works as per specification of the contract, but not more than that.".**

26. The specification of the contract that was produced by the Plaintiff shows that it is the responsibility of the contractor to neatly trim to a slip flatter than 1 inch after completion of work and where that is impracticable or where the working face is to be left exposed, the edge should be permanently fenced.

27. PW2 produced an environmental audit report for the quarries that were created on the suit property.

28. In the Report, PW2 noted that there are three quarries on the Southern part of the Plaintiff's farm.

29. It was the evidence of PW2 that the first quarry measures 130 M by 95 M with an average depth of 5 M. The estimated volume of material excavated from there was 61,750M^3.

30. As for the second quarry, it was the evidence of PW2 that the longest diameter measures about 105 M while the shortest diameter measures 95 M with an average depth of approximately 3M. He estimated the volume of material recovered from the quarry at 11,304M^3.

31. PW2 informed the court that the third quarry measures 150 M and 50M on the shortest side with the Western side having a height of around 10M above the quarry floor. The approximate volume of material recovered was estimated to be 75,000 M^3.

32. A sketch map of the three quarries was produced in court.

33. In the report, PW2 stated that the quarry faces were left untrimmed and hence vulnerable to slumping and rock falls especially during rainy season and the same have environmental impact.

34. The three quarries are massive. It was the responsibility of the Defendant to restore and rehabilitate

the suit property after excavating the murram, notwithstanding the fact that the land was compulsorily acquired by the government.

35. In view of the removal of the valuable mineral rich topsoil, it is impossible for pasture to thrive, the said quarries are pron to soil erosion and hazard to the Plaintiff's cows while grazing.

36. As was observed by PW2, attempts to reduce the level of damage to acceptable levels are expensive. Full restoration is impossible due to the chemical, physical and the biological composition of the soils.

37. Although it is NEMA which is supposed to issue Environmental Restriction Orders in terms of Section 108 of the Environmental Management and Cordination Act, 1995, this court has the jurisdiction to make such an order pursuant to Section 111 of the Act.

38. An environment restriction order is issued requiring a person on whom it is served to restore the environment as near as it may be to the state in which it was before the taking of the action the subject of the order. In addition, compensation may be paid by the person on whom the restriction order is directed to in favour to the persons whose environment or livelihood has been harmed by the action which is the subject of the order.

39. I am therefore in agreement with PW2 that for the protection of the environment, the three quarries must be restored at the Defendant's costs as suggested by PW2.

40. I shall however decline to order for the payment of Kshs.506,000 by the Plaintiff for renting the water tanks at a rate of 11,500 per month as pleaded in the Plaint.

41. In view of the fact that the tanks belonged to the Plaintiff, he was not under any obligation to rent them until a formal agreement could be signed by the parties. The Plaintiff is also not entitled to any monetary compensation for the excavation of its land because the land was compulsorily acquired by the government.

42. In the absence of an agreement in writing, I find and hold that the Plaintiff has not proved the claim for Kshs.506,000.

43. For those reasons I dismiss the defendant's counterclaim with costs and allow the Plaintiff's Plaint dated 25th August 2000 in the following terms:

(a) The 1st Defendant to restore the suit property, including the replacement of the soil, replanting of trees or in any other manner that shall be acceptable by the National Environmental Management Authority within 90 days from the date of service of this Judgment.

(b) The Defendant to pay the Plaintiff the costs of the suit.

Dated and delivered in Malindi this **8th** day of **May,** 2015.

O. A. Angote

Judge