



Auto Ancillaries Limited v Kenya Urban Roads Authority & 3 others (Environment & Land Case 667 of 2015) [2024] KEELC 1795 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 667 OF 2015**

**JE OMANGE, J
MARCH 21, 2024**

BETWEEN

AUTO ANCILLARIES LIMITED PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY 1ST DEFENDANT

CITY COUNTY OF NAIROBI 2ND DEFENDANT

REALES CONSTRUCTION COMPANY LIMITED 3RD DEFENDANT

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 4TH
DEFENDANT**

JUDGMENT

1. The Plaintiffs claim arose out of works that were carried out by the 3rd Defendant upon the instructions of the 1st Defendant on Enterprise Road on the Plaintiff premises that are situate in LR NO 209/9276. The Plaintiffs contend that the works which were carried out by the 3rd Defendant left the part of the road that was not completed in a dilapidated situation and it is now prone to flooding which hinders the workers of the Plaintiff from accessing the factory where they work. The Plaintiff avers that the 2nd Defendant and the 4th Defendant should be held liable for their failure to take any action in addressing the situation. The Defendants on their part deny any culpability.
2. The Plaintiff in their amended plaint sought the following orders;
 - a. An order of injunction to restrain the defendant jointly or severally whether acting by themselves or through their agents, servants or anybody acting for them or claiming right through them from redirecting all storm water, drainage and effluence from factories from the road upstream from flowing onto the Plaintiff’s premises on LR NO 209/9276.



- b. An order compelling the Defendants jointly and severally whether acting by themselves or through their agents and servants to permanently open up drainage points on enterprise road, adjoining factories and all factories on the upper part of enterprise road to different exit points and redirect all waters and effluence away from the Plaintiff's premises on LR 209/9276.
 - c. An order compelling the Defendants jointly and severally to construct a closed drainage system to contain and carry all sewerage and storm water from all adjoining release points of discharge to the river down past the Plaintiff's premises.
 - d. An order directing the 1st and 2nd defendants to reconstruct, rebuild and tarmac the access road connecting the Plaintiff's premises to outer road which has successively been destroyed by the storm water and effluence openly discharged upon it.
 - e. An order do issue for the defendants jointly and severally to pay the Plaintiff general damages for the environmental health hazards, risks and trauma afflicted upon the Plaintiff's, its employees and customers as a result of their continuous and long term exposure to open drainage containing dam sewerage, storm water and other effluence.
3. The Defendants filed Defences in which they denied the contents of the Plaint. The 1st Defendant averred that any flooding existed prior to the works complained of. On the other hand, the 3rd Defendant insisted that the suit premises is situate outside the project area and without prejudice to this argued that the works were not the cause of the flooding.
 4. The Plaintiff called a witness Aggrey Liyai who told the court that he had worked for the Plaintiff company for 33 years. He produced the witness statement of David Nderu who passed away in the year 2020. It was his evidence that when the 3rd Defendant under instructions of the 1st Defendant was constructing Enterprise road, they channeled all water to their factory and in spite of being requested to do so failed to build a channel that would take the water away from their factory. The Plaintiff contend that the employees of the Plaintiff have suffered from the actions of the defendants which have violated the Plaintiff employees right to a safe and proper environment and also denied the employees access to their place of work.
 5. Upon Cross examination by counsel for the 1st Defendant, the witness told the court that before the construction the water would use several channels but after the construction all the water was channeled into one drainage which causes flooding in the Plaintiff's property when it rains. Upon cross examination by counsel for the 2nd Defendant the witness told the court that the Plaintiff company is 50 meters away from the river. He admitted that he had not attached any evidence of lost earnings. On cross examination by the 3rd Defendants counsel he stated that he had a resolution dated 19th October, 2022 to file the case. He insisted that the cause of the flooding was that before the construction of the road, the water had many exits but after the construction there was only one. In respect of the 4th Defendant, NEMA it was his evidence that he is not aware if NEMA gave its approval and said the Environmental Impact Assessment is to be carried out.
 6. The 3rd Defendant called a witness who confirmed to the court that they were contracted by the 1st Defendant to construct the road. They carried out the works in accordance to the specifications given by the 1st Defendant. It was their case that if the Plaintiff had any issues with the design they should have complained to the 1st Defendant. On cross examination by the Plaintiff he said an Environmental Impact Assessment was done and a report availed to him. He was categorical that as a contractor he could not change the design. The 2nd Defence witness, testified on behalf on the 1st Defendant. He insisted that the 1st Defendant had taken all necessary precaution.



7. All the parties filed submissions which the court has considered. The following issues arise for the courts determination. Whether the Plaintiff has proved violation of any rights and the liability of the Defendants? Whether the Plaintiff is entitled to any orders?
8. On whether the Plaintiff has proved violation of any rights, the first question the court has to grapple with is whether the failure by the Plaintiff to produce a title renders their claim invalid. It was robustly argued by the 2nd Defendant that the Plaintiff should have produced a document to prove ownership of the land in question. Which brings to fore the question whether ownership of land is a prerequisite for one to enjoy the right to a clean and healthy environment which the Plaintiff's employees contend has been denied to them. I find not. Article 42 is unequivocal that every person has a right to a clean and healthy environment. Even more important is the fact that the effects of environmental degradation know no boundaries. Deforestation in one area can have an impact on another area several kilometers away. The question of ownership of land where the alleged breach occurs is neither here nor there.
9. Regarding the capacity of the Plaintiff there was an issue raised by the 3rd Defendant that there was no resolution authorizing filing of the case. This was adequately addressed by the Plaintiff witness who testified that there was a resolution dated 19th October, 2022. The Plaintiffs case is that before the construction of the road, the company and its employees never faced a challenge as there were several outlets which the storm water would use to escape hence no flooding would take place. However, after the construction of the drainage system, all the water was harnessed in one closed channel which opened up at the end of the road where the road to the Plaintiffs premises were. This had resulted in storm water and effluence being discharged on the Plaintiff's land. It was the testimony of the Plaintiffs witness that after heavy rain they could not access their place of work.
10. Apart from the flooding, the effluence or what the 3rd Defendant referred to as surface run offs no doubt affected the Plaintiff's employees rights to enjoy a clean and healthy environment as envisaged by Article 42 of *the Constitution*.
11. In response to the Plaintiff's case, the Defendants had various defences. In relation to the flooding, the 1st Defendant states that the flooding was not caused by the works, indeed the works were meant to remedy the flooding which existed before the works. In its Defence it indicates that the present works will channel runoff away from adjacent roads to the existing river.
12. The 3rd Defendant on their part admit that it has constructed closed drains along Enterprise road which collects storm water and surface run offs from Homa Bay, Isiolo and Jijore Road. The Defence is silent on where the drainage ends.
13. Having considered the evidence adduced by the Plaintiff and the Defences mounted by the Defendants, it is clear that the Plaintiffs premises is situate off enterprise road where the works took place. The said works had a noble purpose which was to ensure that Enterprise road had a good drainage system. As the 3rd Defendant avers, storm water and what it calls surface run offs were collected in a closed drainage. This corroborates the testimony of the Plaintiff who says that previously the water had several exits but after the works they were collected in one system. Up to that point there is no divergence in the accounts given by the Plaintiffs and the Defendants more specifically the 1st and 3rd Defendants.
14. Thereafter a conflict emerged as the Plaintiff states that the storm water collected in the single channel ends up on its land. This account is not seriously disputed by the Defence witnesses who testified. None of them contested that the closed drainage which had all the collected storm water was not sealed all the way to the river where it was supposed to be discharged. The report by the Deputy Registrar and the pictures attached thereto show an abrupt end to the drainage system from Enterprise Road.



I therefore find that I am satisfied that the storm water and the effluence ended up flooding the road to the Plaintiff's premises more particularly during heavy rainfall. The obvious consequence to this is that the Plaintiff's employees access to the premises was affected not to mention affecting the well-being of the employees who have to wade through water to access their place of work.

15. So who is culpable? The 1st Defendant commissioned the project which no doubt had very good intentions but failed to consider the impact on adjacent roads and road users and business on the roads. It was the responsibility of the 1st Defendant to ensure that as it sought to sort out one problem, it did not create other problems. They cannot escape liability.
16. Under Schedule 4, Section 11 of *the Constitution* of Kenya, the 2nd Defendant is responsible for storm water management systems in built up areas and water and sanitation services. The 2nd Defendant did not give evidence on any attempts it had made to address the concerns of the Plaintiff who runs a licensed business in the county. Not to mention that as public servants they had a responsibility to safeguard the Plaintiff's right to a clean and healthy environment.
17. The 3rd Defendant was on the ground carrying out the assignment on behalf of its principal. The attitude of the 3rd Defendant was that for as long as it was implementing the contract as designed by the 1st Defendant, it had no other responsibility. It was an agent who was simply carrying out instructions. An agent has a responsibility to ensure that he carries out his duties with care. More so in a case such as this where article 23.1 of the contract which he signed and which he himself has produced states ...on his own responsibilities and at his expense, the contractor shall take all precautions required by good construction practice and by the prevailing circumstances to safeguard adjacent properties and avoid causing any abnormal disturbance therein. The 3rd Defendant did not adduce any evidence to demonstrate any action it took to mitigate the effects of the works on the Plaintiff's premises neither did it make any attempt to advise the 1st Defendant on the effects of the works.
18. The 4th Defendant on its part claims it has no responsibility as firstly it did not issue an Environmental Impact Assessment Report a fact it says was admitted by the 3rd Defendant's witness. That the 4th Defendant is not involved in construction of the drainages and management of storm water which it correctly points out is a devolved function. Lastly the 4th Defendant argues that failure to provide a title deed was fatal to the Plaintiff's case.
19. I have already addressed the issue of the title deed. On the question of the Environmental Impact Assessment Report, none was produced by the 1st and 3rd Defendant who at first said that it was carried out but later changed the story to say that it was not necessary as the road was not a new road. It is therefore my finding that there was no Environmental Impact Assessment carried out contrary to the initial allegation of the 3rd Defendant. The foundation of the Plaintiff's claim against the 4th Defendant is on the basis that they had approved the designs, which the 4th Defendant strenuously deny and which I find was not proved. No evidence was adduced to prove that a complaint was made to the 4th Defendant's Complaints Committee by the Plaintiff. In these circumstances I find that the 4th Defendant cannot be held liable noting that at their current capacity given their nationwide mandate and limited reach they can only discharge their function if citizens also exercise their responsibilities as provided in section 2A of the Environment and Management Coordination Act. I therefore find that the claim against the 4th Defendant was not proved and is dismissed.
20. On the question of damages Article 70 of *the Constitution* provides....On application under clause (1) the court may make any order, or give any directions it considers appropriate;
 - a. To prevent, stop or discontinue any act or omission that is harmful to the environment;



- b. To compel any public officer to take measures to prevent or discontinue any act or omission that is harmful to the environment;
 - c. To provide compensation for any victim of a violation of the right to a clean and healthy environment.
21. Under clause 3 of Article 70, it is clear that an applicant does not have to demonstrate that any person has incurred loss or suffered injury. The Plaintiff is entitled to general damages. The Defendants did not submit on quantum. I find that an award of Kshs 10 million as sought by the Plaintiff is reasonable. The 1st and 3rd Defendants will bear liability at 90% while the 2nd Defendant bear liability of 10%.
22. In the end Judgement is entered for the Plaintiff against the 1st to 3rd Defendants as follows;
- a. An order compelling the 1st and 2nd Defendants jointly and severally whether acting by themselves or through their agents or services to permanently open up drainage points on Enterprise Road, all adjoining factories and all factories on the upper part of Enterprise Road to different exit points and redirect all waters and effluence from the Plaintiffs premises on LR 209/9276.
 - b. An order compelling the 1st and 2nd Defendants jointly and severally whether acting by themselves or through their agents and servants to construct a closed drainage system to contain and carry all sewerage and storm water from all adjoining release points, the main road and all points of discharge to the river down past the Plaintiffs premises.
 - c. That the Plaintiffs are awarded Kshs 10 million damages to be borne by the 1st, 2nd and 3rd Defendants in accordance to the apportioned liability.
 - d. The Plaintiff is to have the costs of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 21ST DAY OF MARCH 2024.

JUDY OMANGE

JUDGE

In the presence of: -

Ms Wanyonyi for the Plaintiff

No appearance by Defendants

Steve - Court Assistant

