



Chebii & 3 others v SBI International Holdings (AG) K & another (Environment & Land Case 19 of 2019) [2024] KEELC 3294 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 19 OF 2019**

YM ANGIMA, J

APRIL 11, 2024

BETWEEN

**ESTHER CHEPTANUI CHEBII 1ST PLAINTIFF
STEPHEN KIPROP CHEBII 2ND PLAINTIFF
HKC (SUING ON HIS BEHALF AND AS NEXT FRIEND OF BC -
MINOR) 3RD PLAINTIFF
JULIUS KIBET CHEBII 4TH PLAINTIFF**

AND

**SBI INTERNATIONAL HOLDINGS (AG) K 1ST DEFENDANT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
DEFENDANT**

JUDGMENT

A. Plaintiffs' Claim

1. By a plaint dated 10.04.2019 the Plaintiffs sued the 1st and 2nd Defendants seeking the following reliefs;
 - a. A declaration that the Plaintiffs' constitutional right to a safe and clean environment has been violated by the ongoing 269 Project Campsite.
 - b. An order for injunction do issue restraining the Defendants either by themselves, their agents, servants, employees and/or any other person acting on their behalf from continuing with and/or operating from 269 Project Campsite until the Plaintiffs are properly and fully relocated to a safer portion of L.R. No. Laikipia/Lariak/50.



- c. An order compelling the 1st Defendant to relocate the Plaintiffs from their current dwelling houses to a safer portion of L.R. No. Laikipia/Lariak/50 at the 1st Defendant's expense.
 - d. General and exemplary damages for trespass and/or nuisance.
 - e. General and exemplary damages for violation of the Plaintiffs' right to peaceful use of their land and right to a healthy and clean environment.
 - f. Costs of the suit and interest.
 - g. Any other or further relief that this Honourable court may deem fit and just to grant.
2. The 1st Plaintiff pleaded that he was the legal representative of the estate of the late John Kiplagat Chebii (the deceased) who was at all material times the proprietor of Title No. Laikipia/Lariak/50 (the suit property) and was suing on his own behalf and on behalf of the estate of the deceased whereas the 2nd, 3rd and 4th Plaintiffs were said to be children and beneficiaries of the estate of the deceased.
 3. The Plaintiffs pleaded that they were at all material times resident on the suit property where they had constructed permanent houses and that they resided thereon with their family members some of whom were very young. The Plaintiffs pleaded that sometime in September 2017 the 1st Defendant set up a campsite for the construction of Marigat – Muchongoi – Karandi – Ol Ng'arua – Muhotetu C77 and Muhotetu – Sipili Roads (the road projects) adjacent to the suit property. The said campsite was said to be barely 4 metres from the Plaintiffs' dwelling houses.
 4. The Plaintiffs further pleaded that the Defendants had failed to involve them in the environmental impact assessment process hence their right of public participation with regard to the road projects had been violated. It was further pleaded that the Defendants' actions amounted to a violation of their constitutional right to a healthy and clean environment and their right to peaceful use and enjoyment of the suit property. The Plaintiffs also contended that the 1st Defendant's actions in the campsite constituted trespass and a nuisance due to noise and dust pollution as well as exposure to toxic smoke and risky radiation from a high voltage electric transformer.
 5. The Plaintiffs pleaded that the 2nd Defendant was negligent in allowing the 1st Defendant to set up a campsite for the road projects in the manner aforesaid without regard to the Plaintiffs' safety and in failing to ensure that a proper environmental impact assessment and relevant audit processes were carried out. The Plaintiffs thus contended that as a result of the Defendants' said actions, omissions and negligence they had suffered loss and damage for which the Defendants were liable. The particulars of loss and damage were pleaded in paragraph 11 of the plaint as follows;
 - a. Severe health complications as the Plaintiffs are constantly in and out of hospital being diagnosed with neuropathy, hypertension and respiratory infections among others.
 - b. The Plaintiffs' constitutional right to a safe and clean environment has been severely infringed.
 - c. The Plaintiffs' right to the use and enjoyment of their land has been substantially violated and interfered with.
 - d. Dust, smoke and electricity sparks has rendered the Plaintiffs' dwelling houses inhabitable and lowered their crop production.



- e. Loss of Plaintiffs' source of income as the productivity of their domestic animals has been reduced and/or inhibited.
 - f. Monetary loss in the Plaintiffs' crop production has reduced.
6. It was the Plaintiffs' case that despite issuance of a demand and notice of intention to sue the Defendants had failed to make good the Plaintiffs' claim hence making the suit necessary.

B. 1ST DEFENDANTS' RESPONSE

7. The 1st Defendant filed a defence dated 14.05.2019 denying liability for the Plaintiffs' claim. The 1st Defendant conceded undertaking the road projects but pleaded that it had acquired all the necessary approvals and licences from the relevant authorities prior to the commencement of works. It was pleaded that the Plaintiffs were aware of the project and they were involved in all required processes including public participation.
8. The 1st Defendant denied that it had violated the Plaintiffs' right to a healthy and clean environment or interfered with their use or enjoyment of the suit property and put them to strict proof thereof. It also denied all allegations of trespass, nuisance or negligence pleaded against it. It further denied the particulars of loss and damage as pleaded by the Plaintiffs and put them to strict proof thereof.
9. The 1st Defendant further pleaded that the campsite and the road projects had met all the required environmental and health standards and that the matters complained of had been brought to the attention of the 2nd Defendant which found that the road projects were being properly carried out within the acceptable standards hence the Plaintiffs had no valid cause of action against it. The 1st Defendant consequently prayed for dismissal of the Plaintiffs' suit with costs.

C. PLAINTIFFS' REPLY TO DEFENCE

10. The Plaintiffs filed a reply dated 07.06.2019 to the 1st Defendant's defence. The Plaintiffs joined issue with the 1st Defendant upon its defence and reiterated the contents of the plaint. It was pleaded that the alleged public participation did not relieve the 1st Defendant of its obligation to mitigate the negative effects of the campsite it had set up next to the suit property. The Plaintiffs further denied that the 1st Defendant had complied with all the necessary safety and environmental requirements in setting up and operating the campsite and put the 1st Defendant to strict proof of its allegation.

D. 2ND DEFENDANT'S RESPONSE

11. The 2nd Defendant filed a statement of defence dated 27.05.2019 in response to the suit. The 2nd Defendant denied the Plaintiffs' claim in its entirety and pleaded that it was the Plaintiffs' obligation to submit their views on the road projects during the environmental impact assessment stage and during public participation but had failed to do so.
12. The 2nd Defendant denied that it had a duty to undertake an environmental impact assessment and pleaded that its statutory mandate was restricted to reviewing and approving environmental impact assessment reports presented to it by project proponents. It further pleaded that the Plaintiffs had never raised any objection to the road projects which had been approved more than a year prior to the filing of the suit.
13. The 2nd Defendant denied that the Plaintiffs' right to a clean and healthy environment had been violated. It denied all the allegations of trespass, negligence and nuisance pleaded in the plaint. It also



denied the allegations and particulars of the loss and damage and put the Plaintiffs to strict proof thereof.

14. Service of a demand and notice of intention to sue was denied and the Plaintiffs were put to strict proof thereof. As a result, the 2nd Defendant prayed for dismissal of the Plaintiffs' claim with costs.

E. PLAINTIFFS' REPLY TO DEFENCE

15. The Plaintiffs filed a reply to defence dated 21.06.2019 in response to the 2nd Defendant's defence. The Plaintiffs joined issue with the 2nd Defendant upon its defence and reiterated the contents of the plaint. It was pleaded that a public participation process could not diminish the 2nd Defendant's statutory duty to ensure that the road projects did not infringe upon the Plaintiffs' rights.
16. The Plaintiffs pleaded that the 2nd Defendant had a duty to safeguard public interest and that it should only approve environmental impact assessment reports and grant licences where the proposed project would not have adverse environmental impact or infringe other people's rights. It was thus contended that the 2nd Defendant was joined in the suit as a necessary party for abdicating its statutory duty.

F. TRIAL OF THE SUIT

17. At the trial hereof, the Plaintiffs called a total of 7 witnesses in support of their claim. Apart from the evidence of the 4 Plaintiffs they also called a public health officer, a clinical officer and a photographer videographer as witnesses. They produced the documents contained in their trial bundle as exhibits. Among these exhibits were medical reports which indicated that the Plaintiffs had been treated, inter alia, for some respiratory conditions and advised to avoid a dusty environment.
18. The 2nd Defendant called one witness who was the County Director of Environment based in Laikipia County. He adopted his witness statement dated 22.07.2021 as his evidence in chief and produced the documents in the 2nd Defendant's trial bundle as exhibits. His evidence was to the effect that he was not stationed in Laikipia at the time the road projects were being undertaken and that he had never visited the campsite nor interacted with the Plaintiffs. He further stated that he was not aware of any periodical assessments by the 2nd Defendant nor of any quarterly environmental monitoring and progress reports on the road projects.
19. On its part, the 1st Defendant did not call any evidence at the trial despite being accorded an opportunity to do so. Its application for adjournment on 01.02.2024 was rejected by the court for reasons which were recorded. Consequently, the 1st Defendant had to close its case without tendering any evidence.

G. ISSUES FOR DETERMINATION

20. The court has noted that the parties did not file an agreed statement of issues for determination. As such, the court shall frame the issues for determination as provided for under Order 15 Rule 2 of the [Civil Procedure Rules](#), 2010. Under the said rule, the court may frame issues from any of the following:
 - a. The allegations contained in the pleadings.
 - b. The allegations contained in statements sworn by or on behalf of the parties.
 - c. The contents of documents produced by the parties.



21. The court has considered the pleadings, the evidence and documents on record in this matter. The court is of the opinion that the following issues arise for determination herein;
- a. Whether the Plaintiffs have proved their claim against the Defendants to the required standard.
 - b. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

H. ANALYSIS AND DETERMINATION

Whether the Plaintiffs have proved their claim against the Defendants to the required standard

22. The court has considered the material and submissions on record in this matter. There is no doubt that the 1st Defendant's campsite was set up adjacent to the suit property. There is also no doubt that the 1st Defendant obtained the necessary approvals and licences to undertake the road projects and for that purpose had to set up a campsite to facilitate execution of the projects. The court has considered the oral evidence tendered by the Plaintiffs and the video recording which was produced by PW7 at the trial. There is no doubt that there was a lot of dust and noise pollution generated from the 1st Defendant's campsite. The material on record shows that the campsite was just a few meters away from the Plaintiffs' dwelling houses.
23. The court believes the evidence of the Plaintiffs that they suffered from various respiratory diseases and other medical conditions during the execution of the road projects as a result of pollution generated that the 1st Defendant's campsite. The court also believes the Plaintiffs' evidence that their medical condition greatly improved upon completion of the road projects in 2019 hence it can be inferred that their recovery was attributable to stoppage of pollution by the 1st Defendant.
24. The court has noted that the Plaintiffs' medical reports do not directly relate to cause of their medical conditions to the pollution which emanated from the 1st Defendant's campsite. However, the medical reports should not be considered in isolation. They should be considered alongside the evidence of the public health officer, the Clinical Officer, and the videographer. The totality of the evidence on record reveals that the Plaintiffs were living in deplorable conditions between 2017 and 2019 as a result of dust, noise and fumes emanating from the 1st Defendant's campsite. The Plaintiffs' right to a clean and healthy environment under Article 42 of the *the Constitution* of Kenya was thus violated.
25. The court agrees with the Plaintiffs' contention that the mere fact of approval or licencing of the road projects did not relieve the 1st Defendant of its duty of care towards them. In particular, the 1st Defendant was not relieved of the duty of mitigating environmental pollution arising from the execution of the road projects. In other words, the licences issued to the 1st Defendant to undertake the road projects were not in the nature of blank cheques which entitled them to pollute the environment at will and cause unmitigated harm to its neighbours.
26. The court has noted from the material on record that during the environmental impact assessment process, the 1st Defendant appears to have selectively interviewed only those persons who were resident far away from the campsite and left out the Plaintiffs who were their next-door neighbours. The material on record shows that some of the Respondents interviewed resided about 100 meters away from the campsite. The court was not informed why the Plaintiffs who were barely 4 metres away from the campsite were not interviewed.



27. The court is further of the opinion that conducting an environmental impact assessment or undertaking public participation cannot legally relieve a project proponent of its duty to maintain a clean and health environment. That cannot legally relieve a project proponent of its duty to mitigate any adverse effects of environmental pollution. It cannot also relieve the project proponent of its duty to take steps for the safety of its neighbours and other persons who may be affected by the project.
28. Although the 2nd Defendant as a regulatory and licencing authority was obligated to investigate and deal with complaints on environmental pollution and, if need be, conduct some form of monitoring and audit it does not appear to have done much apart from visiting the campsite. The Plaintiffs were thus left at the mercy of the 1st Defendant and obtained the much needed relief only when the road projects were completed in 2019.
29. The court is thus satisfied that the Plaintiffs have demonstrated on a balance of probabilities that their right to a clean and healthy environment was violated by the actions of the 1st Defendant as a result of their operations at the campsite between 2017 and 2019. The court shall accordingly hold the 1st Defendant liable as the principal tortfeasor. The court is, however, not inclined to hold the 2nd Defendant liable since its role was that of a regulator but the primary duty of mitigating the adverse effects of environmental pollution lay with the 1st Defendant. The court is not satisfied that the 1st Defendant should be held liable for “trespass” as contended by the Plaintiffs since what the evidence on record reveals is just environmental pollution and not trespass in the traditional sense. The court also finds no evidence on record to demonstrate that the Plaintiffs were prevented from peaceful use and enjoyment of the suit property. There was no evidence on record to demonstrate what activities the Plaintiffs, or the estate of the deceased, intended to carry on and how they were prevented from doing so as a result of the 1st Defendant’s actions at the campsite

Whether the Plaintiffs are entitled to the reliefs sought in the suit

30. The court has found and held that the 1st Defendant was guilty of generating massive noise and dust pollution as well as fumes from bitumen. The court is thus of the view that the Plaintiffs are entitled to some but not all the reliefs sought in the plaint. The material on record shows that the road projects were either stopped or completed in 2019 hence there are no on-going activities at the campsite. In the event, it shall not be necessary to grant the restraining injunction sought by the Plaintiffs or to grant an order compelling the 1st Defendant to relocate them to a safe place pending completion of the road projects.
31. The court also finds that no basis has been laid for the award of exemplary damages against the 1st Defendant in the circumstances of this suit. The 1st Defendant’s actions may well have been negligent, or even reckless, but there is no evidence on record to demonstrate that the 1st Defendant was acting in a malicious or oppressive manner. The court is thus not inclined to award any exemplary damages in the circumstances.
32. The court is thus of the opinion that the Plaintiffs are only entitled to general damages for the medical conditions they suffered as a result of the pollution generated by the 1st Defendant and for violation of their right to a clean and healthy environment. By the time of preparation of the judgment none of the parties had filed submissions on the quantum of damages.
33. The court, therefore, did not have the advantage of considering the parties’ arguments on quantum of damages. The court has noted from the medical reports and the evidence of the Plaintiffs that they recovered reasonably well after completion of the road projects in 2019 and have not had any major medical issues since then. The court is of the opinion that a modest sum of Kshs.300,000/- shall be



adequate compensation to each of the 4 Plaintiffs for the violation of their right to a clean, safe and healthy environment and for the medical conditions they suffered.

Who shall bear costs of the suit

34. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Plaintiffs shall be awarded costs of the suit as against the 1st Defendant only. However, the 2nd Defendant shall not be awarded any costs but shall bear its own costs of the suit due to its failure to live up to its statutory mandate in handling the issue of environmental pollution by the 1st Defendant.

I. CONCLUSION AND DISPOSAL ORDER

35. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have proved that their right to a clean, safe and healthy environment was violated by the 1st Defendant. The court also finds and holds that the Plaintiffs are entitled only to general damages for the medical conditions they suffered and for violation of their right to a clean, safe and healthy environment. As a consequence, the court makes the following orders for disposal of the suit;
- a. A declaration be and is hereby made that the Plaintiffs' constitutional right to a clean, safe and healthy environment has been violated by the 1st Defendant.
 - b. The 1st – 4th Plaintiffs are hereby each awarded Kshs.300,000/- as general damages for the violation of their right to a clean, safe and healthy environment as against the 1st Defendant only.
 - c. The Plaintiffs' claim against the 2nd Defendant is hereby disallowed but the 2nd Defendant shall bear its own costs of the suit.
 - d. The Plaintiffs are hereby awarded costs of the suit to be borne by the 1st Defendant only.
 - e. For the avoidance of doubt, any prayer sought in the plaint which has not been expressly granted is deemed to have been denied.

It is so decided.

Judgment dated and signed at Nyahururu and delivered this 11th day of April, 2024.

.....

Y.M. ANGIMA

JUDGE

In the presence of:

No appearance for the for the Plaintiffs

No appearance for the 1st Defendant

No appearance or the 2nd Defendant

C/Assistant: Vanessa

Page 5 of 5



