



REPUBLIC OF KENYA



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**Ondieki v Njoroge & 2 others (Civil Suit 224 of 2014)
[2024] KEELC 6056 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CIVIL SUIT 224 OF 2014
FM NJOROGE, J
SEPTEMBER 23, 2024**

BETWEEN

HEBISIBAH MORAA ONDIEKI PLAINTIFF

AND

GACHOKA NJOROGE 1ST DEFENDANT

NAKURU WATER AND SANITATION SERVICES LIMITED . 2ND DEFENDANT

NAKURU COUNTY GOVERNMENT 3RD DEFENDANT

JUDGMENT

Introduction

1. This suit was filed on 30/7/2014. The pleading relied on by the plaintiff is the amended plaint dated 31/3/2016. In it the following prayers are sought: -
 - a. A permanent injunction restraining the defendants their servants and/or agents from interfering in any manner whatsoever with the plaintiff's peaceful and quiet enjoyment of plot use and development of plot Kabachia Estate House No 196;
 - b. A declaration that it is unnecessary and illegal for the defendants to pass a public sewerage line through the plaintiff's private property in Kabachia Estate House No 196;
 - c. The defendants be ordered to use rational, constructive and innovative means to reroute and/or establish an effective and efficient sewer line on their available service lines that do not interfere with the plaintiff's status quo;
 - d. The defendants be condemned to meet the costs of and incidental to this suit;
 - e. Kshs. 422,500.00 being the cost of the damaged perimeter wall fence;



- f. General damages;
- g. The court to provide any other relief that it deems fit to prevent the defeat of the ends of justice.

Pleadings

Plaint

2. The plaintiff avers in the amended plaintiff that the 2nd defendant is an agent of the 1st defendant who regulates its functions and purposes. On 9th April 2010 the plaintiff purchased a piece of land known as Kabachia Estate House No 196 (the suit land) from the National Housing Corporation. By the time of taking possession the house thereon was vacant but full of dangerous and poisonous sewerage filth that made the same totally inhabitable; that when her complaints to the authorities failed to yield any fruit, she cleaned up the house and made it habitable. In April 2013 the 1st defendant, a private developer, built apartments about one hundred metres away from the suit property without any sewerage services to cater for the same. He then developed a sewer line that led to the plaintiff's house. The plaintiff lodged a complaint against him to the 2nd and 3rd defendants for occasioning her a nuisance by causing stinking and poisonous sewerage material to overflow into her private house but no action was taken. She also notified the National Housing Corporation who visited the site and castigated the 1st defendant's actions as deleterious to public health. During a second visit by the National Housing Corporation officials the defendants insisted that there was a sewer line passing through the middle of the plaintiff's property. The defendants also intimated their intention to reroute the sewer line but settled on a short term solution to the effect that the 1st defendant be allowed to connect his sewer to the sewer that served the plaintiff, a move that the plaintiff considered as dangerous to her family's health and in violation of the Public Health Act. She accused the defendants of uttering false documents. On 27/8/2014 the defendants illegally brought down her wall to facilitate the connection and thus occasioned her a great loss. Consequently, she avers. There has been a constant overflow of sewer spilling all over the compound compelling the tenants to vacate therefrom thus occasioning the plaintiff loss of rental income for which she now claims damages.

1st Defendant's Defence

3. The 1st defendant filed his defence on 21/8/2014 denying the claim. He averred that the sewer line serving his plot was approved by the 2nd and 3rd defendant's predecessor, the Municipal Council of Nakuru. He pleaded that the plaintiff has blocked the lawful sewer line thus leading to overflow of raw sewerage to the detriment of the 1st defendant and other members of public.

2nd Defendant's Defence.

4. The 2nd defendant filed its defence on 15/9/2014 denying the claim. It accused the plaintiff of being the author of her own misfortune having persistently engaged herself in illegal activities of interfering with the sewer line by encroaching onto the road reserve and blocking the sewer line leading to the damage and overflow of the sewage into the environment and eventual spillage into her plot, and also resulting into complaints by members of the public; she also caused the 2nd defendant to undertake major repairs from time to time.

3rd Defendant's Defence

5. The 3rd defendant relied on its amended defence dated 19/5/2016 and filed through Rubua Ngure & Co Advocates on 23rd May 2016. The 3rd defendant denied that the 1st defendant is its agent. It



also denied that it had done nothing to mitigate the sewerage problem. It denied having allowed any illegal connection detrimental to the plaintiff and averred that it respected the constitutional rights of all persons equally; that it has not colluded with any of the defendants to defeat the plaintiff's constitutional rights; that it wrote to the plaintiff to allow access to the property to reroute the sewer line on 17/7/2013 but the plaintiff refused it such access; that at a meeting of the 3rd defendant's officers and all other involved parties on 11/7/2014 it was resolved that the 2nd defendant would assess the damage to the sewer line and repair it and the plaintiff would thus allow it access for that purpose; that it was further resolved that the plaintiff would not further interfere with the sewer lines and the 3rd and 2nd defendants would map the existing sewer lines in the estate and propose rerouting of the same. However, the plaintiff prematurely lodged the present suit and thus failed to afford the 3rd defendant a chance to perform the agreement by repairing the sewer line which it was willing to do.

Reply to 1st defendant's defence.

6. The plaintiff filed a reply to the 1st defendant's defence on 8/9/2014 reiterating the contents of her plaint and stating that there have never been any meetings to approve of the passing of the sewer line through her plot.

Reply to 2nd defendant's amended defence.

7. The plaintiff filed a reply to the amended defence of the 2nd defendant on 26/5/2016 reiterating the contents of the amended plaint. She denied that she is the author of her own misfortune as alleged, or that she ever interfered with the sewer line in any way; that the defence of the 2nd defendant is a mere denial.

Evidence

Plaintiff's evidence.

8. PW1, the plaintiff, a former Nakuru Municipal Council worker, testified on 1/11/18. She stated as follows: she started living in the suit premises in 1986 as a tenant. She had ceased living in the suit premises in 1999 due to the sewage leakage which caused the fluid to flow into her compound. At the date of the hearing she was living in her sister's house at Kiamunyi. She found that while other plots in the area save the NHC plots are only served by septic tanks, the 1st defendant had connected his sewerage to hers despite the fact that his block of apartments is far from the suit premises and is separated from Kabachia Phase IV Estate by a road. She had written 4 letters of complaint dated 29/7/1999, 29/10/2000, 9/4/2011 and 29/10/2012. She had purchased the suit premises on 9/4/2011 through a tenant purchase agreement. The plaintiff wrote to the NHC in 2012. NHC wrote to the 1st defendant on 26/4/2013 asking for a rerouting of the sewer away from her property. The county government of Nakuru wrote to the plaintiff on 17/7/2013 and claimed that she had obstructed the sewer line. According to her she had not done so; she had constructed a perimeter fence within her property. The 1st defendant and officers of the 2nd and 3rd defendant came to the suit premises and in the presence of the plaintiff and her lawyer, they sought to be allowed to put a sewage pipe temporarily to allow sewage to pass. Her perimeter wall had however blocked the sewage pipe and she did not agree to the proposal. On 25/6/14 the NHC also wrote to her and stated that she had blocked the sewerage. Later, officers of the 2nd and 3rd defendants came to the suit premises during which visit officers of the 3rd defendant demolished part of her perimeter wall located on the side of the road where the sewage line was situated, claiming that she had obstructed the sewerage. She later reconstructed the wall two weeks before the hearing of this suit at a cost of Kshs. 700,000/=. She denied having encroached on the road; a joint survey commissioned by this court yielded a survey report dated 28/1/16 which stated that



the sewerage line was located inside her plot. She had her private surveyor during the survey exercise who signed the report. The sketch attached thereto shows that manholes were located inside the suit premises. The plaintiff referred to a consent order dated 3/3/2015 the terms of which according to her were that the sewerage line be rerouted. She stated that the sewerage line gets obstructed every two or three weeks when it rains and every month when it is not raining. Consequently, she stated, she has not been able to live on the suit property for years.

9. Under cross-examination by Mr. Juma the plaintiff stated that her complaint is that the 1st defendant connected his sewerage through her property; that in 1999 while the plaintiff was still a tenant, the 1st defendant constructed two manholes on the suit property outside her door and connected his sewer line to the two manholes, and then connected it to the county sewerage line. After she bought the house she built a 2-bedroom extension. She connected the extension to the sewerage pipe without seeking approval to do so. She suspected that the 1st defendant obtained approval to connect to her sewerage line corruptly. She knew the state of the house as at the date of purchase, and she purchased it as it was. She claimed that the NHC promised her that the sewerage line would be removed and it wrote to the 1st defendant in connection thereto. It also advised her to obstruct the sewerage line through construction of a fence. However, the county government came and demolished her fence and reconnected the sewerage line. It was NHC which showed the plaintiff the beacons to her plot and the house plan. At the time that the NHC sold the houses in the estate they were all built on land that had one title. Subdivision thereof occurred later. Her house was the last one abutting the road. She never erected the perimeter wall on the road reserve. There was no requirement in the NHC sale agreement that she must allow the sewerage to pass through the property. When she wrote to the NHC she sought the rerouting of the 1st defendant's sewerage line not that of any other house owner in the NHC estate; she admitted that the sewer line is owned by the 3rd defendant. Her plot is about a quarter of an acre in size. She has approved plans for her perimeter wall. After its demolition she erected an iron sheet fence in its place and then built a new wall. She admitted that the 3rd defendant had previously asked her in writing to remove the wall but she had not complied. The NHC also wrote to the plaintiff and informed her that she had blocked the sewer trunk line. She asserted that she had blocked the 1st defendant's sewer line and not that of the NHC estate. She insisted that the 1st defendant did not have any lawful access to the sewer line.
10. While under cross-examination by Mr. Gatonye the plaintiff further stated as follows: that her house is the first one in a group served by the sewer line and that the same proceeds to serve the 12 others. Before 1999 the estate belonged to the Nakuru Municipal Council, that the NHC took over the houses in 2010, that the 1st defendant laid a pipe through her plot and built a manhole on the premises to add to the existing manhole; it is that manhole which is leaking. The old manhole has no leakage. NEMA summoned her to their office at one time to ask her to explain why the sewage was leaking. She never received any communication from them as to what to do. There was considerable sewage that spilled on the road; she was not present while her wall was being demolished. The demolition took place at night. She never appealed to National Environment Tribunal; she never received any letter from the NHC and is not aware of NHC's desire for her to remove the obstruction on the sewerage line; the letter dated 25/6/14 may have been served by NHC on her lawyer.
11. Upon re-examination by Mr Ndubi she stated that the blockage and leakage were occasioned by the excess volume from the 1st defendant's apartments.
12. PW2 Charles Muigai Kariuki sworn stated that he is a registered property valuer and also a building surveyor holding a professional Diploma in Building Survey and another in valuation, practising under the business name of Applecross Surveyors. In September 2014 the plaintiff instructed him to do a building survey and he did so in respect of plot No. 196 Kabachia Estate. He signed the costings report



on 6/9/2014. He personally went to the ground so as to prepare the bill of quantities. The plaintiff told him that her front perimeter wall fence had been pulled down. He took measurements of length and height of the fence and then proceeded to his office to do his costing. The total cost of rebuilding the wall was Kshs.422, 500. He gave a detailed breakdown in his report. He charged Kshs.10, 000/= to prepare report and Kshs. 15,000/= to attend court to give evidence. The plaintiff paid him for court attendance. He produced the bill of quantities as PExh.5.

13. While under cross-examination by Mr. Juma he admitted that his report does not state the measurements and that the area or size of the destroyed wall is not stated in his report as he did not find it necessary to include them. He also admitted that without the measurements, it is not possible for the court to know the size of the plot. The bill of quantities was for a stone wall. His rates in the report were inclusive of labour. However, he stated that the estimated labour costs and unforeseen expenses are not separately stated in the report. His report contains estimates and if receipts were availed, they would have shown the actual cost. He did his report before the wall was repaired. The plaintiff took him to the site. He did not ask her to give him a copy of the title. He was not given any approved plan for the wall. The frontage of the wall is the one that was affected. The other sides of the fence were not affected. He never took photographs. He did not indicate in his report the number of bags of cement or number of lorries of stones or sand that would be needed.
14. Under cross-examination by Mr. Kibet, he stated that the bill of quantities was for a proposed wall. The wall had not been put up when he prepared the bill. He however stated that the repaired wall would have cost exactly the amount in his report.
15. While under re-examination by Mr. Ndubi, he stated that normally, valuers prepare bills of quantities before and not after construction. Normally for construction, there are figures usually prepared by Institute of Quantity Surveyors of Kenya which guide valuers in doing bills of quantities. There are also estimates prepared by the Cost Planning Unit of Public Works Ministry. These also guide valuers in their bills of quantities. When he went to the site, the front perimeter wall had been pulled down. His report was aimed at estimating the cost of reinstating the wall.
16. PW3 Joshua Odege Sanduk sworn stated as follows she is an employee of the National Housing Corporation, Nairobi, a Land Surveyor by profession and also a licensed Surveyor and a full member of the Institute of Surveyors of Kenya. In the present case an order of joint survey over the suit land issued in 2015 and he participated in the exercise. A report therefrom dated 14/12/2021 was filed in this matter on 16/2/2021 and three officers – himself, Robert Otiti and Paul Kihumba circulated the report amongst themselves. However, the County Government of Nakuru failed to sign it. The sewer line fell within plot 196. NHC took over the entire estate from the Municipality as a whole block. It verified the perimeter fence. The houses were built in 1970s. House 196 is the last house from the western side. The last manhole for collecting the cess water and draining it into the existing sewer line is on the eastern side. He pointed to a document attached to the report marked as Appendix A and stated that the circles seen outside the boundaries of House 196 are manholes. The sewer came from the westerly direction as per the arrow. At the time NHC took over the Estate and sold houses to people including the plaintiff the said sewer line facilities marked with an arrow were not there. After new blocks were constructed in the west, owned by other persons, Nakuru Water Company did a sewer line and connected it to the smaller line near House 196 to flow towards the larger sewer line in the East. The pipes used for the Kabachia Estate were not meant for future connections. The sewerage pipe cannot accommodate the deluge that comes from the bigger pipe. He produced the said report of joint survey findings as PExh.7.
17. Upon cross-examination by Mr. Ombui PW3 stated as follows: The sewer line serving the houses pre-existed the 2009 NHC's take-over of the houses from Municipal Council. A main sewer line serves the



entire Estate. He did not count any other houses outside the NHC Estate that are served by the sewer line. Plot 196 is to the west. The sewer line goes beyond plot 184 in Appendix A referred to herein above. The sewer line in contention was not initially there but was done when the houses were built. It falls under jurisdiction of Nakuru Water & Sewerage Co. In the year 2011 the houses were sold to the sitting tenants while they were all still under Title No. Nakuru Municipality Block 15/879. NHC followed all the procedures to the letter. There was a small sewer line. The sewer line was within the plots when the beaconing of individual plots was being done. The sewer line was meant for NHC's own use. NHC did not ask that it be relocated by the Municipal Council. The recommendation at page 5 of the joint report that the sewer line be rerouted is in reference to the new sewer line which was connected to the old sewer line serving the houses. The new line connects to the existing sewer line just behind House No. 196.

18. Upon re-examination by Mr. Ndubi regarding the sketch plan, PW3 pointed out that it is the sewer line marked with an arrow at the western side that was not there initially. The two manholes marked were also not there. These were later built to facilitate connection between the old and new sewer lines. The new sewer cuts across the road to Plot 196 then runs onwards through other plots. The recommendation is in respect of the new sewer line.
19. Upon cross-examination by Court, PW3 stated that the two manholes were constructed just before this case. The topography is a slope from Northern to Southern side. The new sewer line is on higher ground. Leakage was from the first manhole.
20. With the evidence of the three witnesses set out herein above the Plaintiff's case was marked closed.

1st Defendant's Evidence.

21. DW1, Johnson Gachoka Njoroge, 1st defendant, sworn testified orally and adopted his witness statement filed on 15/9/2022 as part of his evidence-in-chief. He also produced documents vide a list dated 15/9/2024 as DExh.1 – DExh.5 in the order in which they appear in that list. He stated that the plaintiff's complaint is about a sewer line that is not supposed to pass through her plot; DW1 and his neighbours put up that sewer line through Nawasco with authority from the County Government of Nakuru. Proper approval was given. The 2nd and 3rd defendants supervised, inspected and verified that it was in order. He and his neighbours never trespassed on private property as they had full authority of the Council. Nawasco's technical personnel under the supervision of a Mr. Kihumba, identified the line the sewer was to follow and gave authority to connect to the existing sewer line.
22. Under cross-examination by Mr. Ombui: DW1 stated that there is a road separating his apartment block and the plaintiff's house. 5 plots roughly with an occupation of about 250 people are served by the newly constructed sewer line. It was connected to an already existing sewer line constructed around the year 1975. While the new sewer line was being laid, the houses belonged to the Council. The old sewer line passes through the compound of the plaintiff.
23. Upon cross-examination by Ms. Kamau, DW1 reiterated that Nawasco officers did the survey and recommended the sewer line.
24. Upon cross-examination by Mr. Ndubi, DW1 stated that he and other developers pooled resources to construct a sewer line. He has never used a septic tank. After completing construction, he sought sewerage services. The 5 plots were not developed at the same time. They were built in 1998-1999. He completed building his apartments in 1999. He got approval on 1/1/1999. The plaintiff's house and the other 5 houses are separated by a road. The sewer line cut across the road. The diameter of the pipe was 6 inches. It crossed the road into the plaintiff's plot. The Kabachia houses were constructed in the 1970's. The last house is the plaintiff's. The sewer line ended there. He stated that it is not correct that



overflow of sewer began after he and his neighbours connected their plots to it. He does not know the diameter of the sewer lines. He does not know the diameter of the existing sewer line starting at the plaintiff's house. It is meant to feed into the main sewer beside the road. It is not correct that he and his neighbours sought a shortcut. The plaintiff's plot is habitable. There was an issue addressed by NEMA on waste spillage at the plaintiff's compound. The waste was spilling over as the plaintiff had blocked all the manholes and no one could access her premises as her plot was fenced. The fence was however built on a public road. The sewer line was going right into her premises. The sewer line was constructed under the fence but the Council gave authority for connection to it.

25. Upon re-examination by Mr. Ngure DW1 stated that waste flowed into her plot because the plaintiff blocked all the (3) concerned manholes and the Council could not have access to them. The sewer line DW1 and others built ended into an old sewer line. The plot was fenced when they put up a sewer line. They interfered with her fence but she never complained at that time. She gave them assistance by giving them access into her premises. The leakage of sewage began when she purchased the house and blocked the manholes so that waste could not get access into the old sewer line. DW1 and others reported to Nawasco. The plaintiff was in occupation as a tenant Nakuru County Council at the time of construction.
26. Upon cross-examination by court DW 1 stated that the other houses connected to the old sewer through the new sewer line were completed after his and that none of them ever used septic tanks. At that point the 1st defendant's case was marked as closed.

2nd Defendant's Evidence.

27. DW2, Paul Kihumba Ndungu, retired Sewerage Superintendent, Nawasco sworn gave oral evidence and adopted his witness statements dated 14/3/2016 and 15/9/2014 as his evidence-in-chief. He stated that he started working in the company when it was launched in 2004 and retired in 2020. Before then he had worked for the Municipal Council of Nakuru since 1980. Kabachia Ph V Estate where the plaintiff's house plot No. 196 is situate, was constructed between 1974 – 1975. The houses at that time belonged to the then Municipal Council. The National Housing Corporation financed their construction. In 2009 the National Housing Corporation agreed that since the Council had not paid they for the houses they would surrender them to the NHC. In 2010, the houses were surrendered to and then sold by NHC to the tenants including Ms. Moraa, the plaintiff, who bought Plot No. 196.
28. The houses were served by a common sewer which was constructed for 13 houses, amongst them the plaintiff's. The sewer fell under property owned then by the Municipal Council of Nakuru. The sewer drained to another bigger sewer constructed at the time of the construction of the houses. There was a land reserve provided for public utilities - water, sewer and power. Between 2009 and 2010, NHC completed beaconing of the plots. The sewer line was still there while that beaconing process was taking place. Nawasco is the sewerage service provider. NHC did not consult Nawasco for advice. The beacons NHC placed in the ground encroached on the system. NHC did not apply for the relocation of the sewer line. None of the tenants applied for the relocation. They took the houses just as they were with the sewer line. The procedure for making of a new sewer line is to do a survey, know the number of houses to be served and do a design that includes prospective numbers of people to be served and the amount of water to be used. The procedure was followed in this case. The 2nd defendant asked the 1st defendant to apply, and the number of people to be served was established. A design was done in 1999 and the new sewer line was connected to the main sewer ten years after Ms. Moraa took over the house as a tenant. There was no complaint by then. When the plaintiff came to court initially, there was only an open estate. When the NHC sold the plots tenants began putting up permanent fences and the plaintiff fenced 2 metres away from the beacons into the public road and her fence was subsequently



demolished by the County Government. She interfered with the manholes and uprooted 15 metres of sewer line. The fence was later brought down. NEMA arranged for a meeting which was held at the Public Health Department offices. The issue was not resolved. Nawasco officers were taken to court by NEMA when the sewer overflowed. Nawasco then repaired the sewer. After that there was no other complaint. To relocate the sewer, any applicant needs to go to the NHC. When the Municipal Council gave out the houses, Nawasco was not involved. The sewer serves 5 premises nearby including the 1st defendants', and then the 13 houses in Kabachia Ph.4. He stated that Nawasco can advise on relocation of the sewer line, that NHC can write to Nawasco and the two bodies can discuss the technical details with NHC and a Bill of quantities can be made and relocation can be done. However, the cost has to be worked out and borne by the applicant. Regarding the joint survey report, the witness stated that Nawasco was not consulted and for that reason he never signed the said report. The sewer is below the ground and there is a 3 phase power line above it. The applicant for relocation meets the costs. Initially the whole of Kabachia Estate PH.4 had only one title. All the sewers were encroached upon and as at today NAWASCO cannot service the sewer and the National Housing Corporation should be held responsible for that mess.

29. Upon cross-examination by Ms. Kamau, DW2 stated that Nawasco is a company owned by the County Government to run water and sewerage services on behalf of the County and it is therefore not independent; according to him, it is a mere department.
30. Upon cross-examination by Mr. Ndubi DW2 stated that he is not a Surveyor. An order was made for 3 surveyors. His office uses the County Surveyor as it does not have a Surveyor, and that the County Surveyor signed the Report. He was aware that part of the sewage line which is a feeder sewer is inside plot No. 196; the site is at one end of Kabachia Ph.IV Estate. The area was initially open and owned by the Municipal and there was nothing unusual about the location of the sewer. The new houses of the 1st defendant and his neighbours were constructed between 1998 – 2002 as more development in the area continued; applicants (individual plot owners) filled application forms if they needed to connect to the sewer line. Sewage volume was increasing. The sewage problem began in 2013. He admitted that the alternative route that could be followed to connect to the main sewer without passing through the plaintiff's plot is about 400 metres. He however denied that the new sewer was built merely as a shortcut. When shown Appendix A in the plaintiff's bundle filed on 18/2/2002, DW2 stated that the line with an arrow shows the route taken by the 1999 sewer and noted that the manholes are outside the premises. When shown Appendix B he stated that the place marked "manhole" is where the sewer line started. He admitted that the manholes outside the premises were done by the 1st defendant and other persons but a provision was made for joint construction whereby whoever connected later compensated the original builders. The new sewer was same size as the old. A feasibility study was done and he supervised the construction of the new sewer.
31. Upon re-examination by Mr. Ombui: DW1 stated that there was no objection by National Housing Corporation or plaintiff and that the problem of leakage only occurred when the plot boundaries were extended and the line subsequently tampered with. At that point the 2nd defendant's case was marked as closed. The 3rd defendant elected not to call any witnesses and closed its case.

Submissions

32. The plaintiff filed submissions on 27/3/2024, the 3rd defendant on 26/2/24 and the 1st defendant on 7/6/2024.



Disposition.

33. Having considered the pleadings, the evidence and the submissions, this court is of the view that the following are the issues arising for determination:
- a. Did the defendants force the plaintiff to allow a sewer line to pass through her property?
 - b. Was it against the *Public Health Act* and or against the plaintiff's right to non-discrimination or the 2nd and 3rd defendant's by-laws to have a sewer line pass through the plaintiff's property?
 - c. Is it the plaintiff or the 1st defendant who caused a public nuisance by illegally interfering with the sewerage line running through the plaintiff's premises and thus caused noxious sewerage material to flow into her house?
 - d. Who was responsible for the demolition of the plaintiff's perimeter wall and was it illegal?
 - e. Was the plaintiff occasioned any loss and damage owing to the demolition of her wall and if so, how much and who is liable to compensate her?
 - f. Has the plaintiff lost rental income and if so how much and who is liable to compensate her?
 - g. Who ought to bear the costs of these proceedings?
34. The issues are discussed as herein under.

a. Did the defendants force the plaintiff to allow a sewer line to pass through her property?

35. There is no dispute that the plaintiff is the owner of the suit premises. Evidence adduced by parties in this case show that the 3rd defendant's predecessor, the Municipal Council of Nakuru, initially owned all the land known as Plot No. Nakuru Municipality Block 15/879 that had not yet been subdivided by the time the houses in Kabachia Phase IV estate were built. The plaintiff's house is situate in that estate.
36. This court has considered the County surveyor's report dated 9/10/2015 (first report) and the Joint surveyors' report dated 14/12/2021(second report). From the first report, it is clear that by 2014 the purported owner, the NHC had no approved subdivision scheme for the property known as plot no. Nakuru Municipality Block 15/879 and it had not yet been demarcated or surveyed by the date of the report. The tenant purchase agreement dated 9/4/2011 produced by the plaintiff in evidence specifies that the sale was in respect of a building and improvements erected on a parcel whose land reference number is unspecified. That brings into question what land the plaintiff claims to have purchased from NHC in 2011 or the exact location of its boundaries and indeed whether she has locus standi in this matter. Owing to the purely private nature of prayers in the amended plaint I find that the plaintiff lacks locus standi to bring the action since she has not established the full extent of the land she claims or that it is indeed affected by the sewerage line.
37. Notwithstanding the above finding it is noteworthy that from the first report, the plaintiff had already fenced off what she considered to be her land parcel, and a sewer line was already running across the perimeter wall into what she considered to be her premises by the time she erected her fence. That by the time she fenced off the land she claims Plot No. Nakuru Municipality Block 15/879 had not been subdivided is further buttressed by the second report which discloses that provisional approval for the subdivision was granted only on 14/11/2018 and final approval was granted on 15/11/2021, just recently. The plaintiff had therefore blindly fenced off some portion of plot no. Nakuru Municipality Block 15/879 believing it to be hers. That was a great error as the plot had not



been formally demarcated. Consequently, she ended up fencing off the end part of a sewer line that served not just her house but many others.

38. Even if the plaintiff were assumed to have purchased a particular demarcated plot, the houses and the sewerage infrastructure in the estate were the property of the 3rd defendant's predecessor. NHC having built the houses and not having been paid for its work, the houses devolved to it under a debt settlement arrangement scheme with the Municipal Council of Nakuru and NHC promptly sold them, giving preference to the existing Nakuru Municipal Council tenants whom it assumed as its own when it took up the houses. The sewerage infrastructure was already in place by the time the NHC sold the houses. In particular, the sewerage line that runs through the plaintiff's plot was still in place by the time she purchased the suit plot. The plaintiff never constructed the sewerage line in question, and even if her seller the NHC had constructed it, the construction was on behalf of the then owner, the Municipal Council of Nakuru. At no time then was the sewerage system ever owned by the NHC or any private individual or entity from inception of the development. The sewerage line was a public utility under the administration of the 3rd defendant; indeed, as proof of the foregoing statement, the plaintiff has not demonstrated that the purchase from NHC included the sewerage line or that the sewerage line was converted into exclusive private property upon purchase. In fact, it can not ever be private property since it serves the public. The tenant purchase agreement the plaintiff relies on expressly stated at Clause 7(c)(ii) that the premises would provide for the passage of water and sewer among other public utilities. Clauses 7(d) and (e) of the same agreement provides inter alia that the owner of the listed utility services is entitled to the benefit of the easements as are appropriate to the proper provision of the service and that the tenant acknowledges all ancillary rights and obligations reasonably necessary to make the said easements effectively apply.
39. It is the finding of this court that by the time of the plaintiff's purchase, demarcation and subdivision had not been conducted and the sewer line had already passed through property she now claims, the answer to the above issue is that none of the defendants forced the plaintiff to have a sewer line pass through her private property.
- b. Was it against the *Public Health Act* and or against the plaintiff's right to non-discrimination or the 2nd and 3rd defendant's by-laws to have a sewer line pass through the plaintiff's property?

Discrimination.

40. The answer to the 1st issue for determination earlier discussed partially answers this second issue in that discrimination against the plaintiff through the construction of the sewer line can not be deemed to have occurred if the plot that she purchased was demarcated long after the sewerage line was built.
41. Discrimination has to be proved by way of evidence to show that a person has been given differential and disadvantageous treatment on the basis of some illegal consideration in comparison with other persons in her class, category or environment. Black's Law Dictionary 10th Edition defines it as:

“...the effect of a law or established practice that confers privileges on a certain class that denies privileges to a certain class because of race, age, sex, nationality, religion or disability.”

One thing that is noteworthy is that the plaintiff has not specified the basis of the alleged discriminatory conduct of the 2nd and 3rd defendants and on that ground per se the inquiry into the alleged discriminatory conduct of the defendants should come to a halt. Besides failing to plead the basis of discrimination, the plaintiff never adduced evidence of discrimination.

However, notwithstanding the foregoing, it is also noteworthy that the Kabachia Ph. IV estate comprised one large plot owned by the 3rd defendant. What this court has gathered is that while the



property was under ownership of the 3rd defendant, much of the land on which houses had not been constructed was open space not owned by individuals. When the sale occurred and buyers including the plaintiff purported to take possession before actual demarcation, they took up all the open space including ground beneath which a sewerage system had been built. For that reason, I find that the plaintiff has not established that she was discriminated against in any way by any of the defendants.

Conflict with the Public Health Act and by laws of the 3rd defendant.

42. The plaintiff's evidence and submissions never addressed this issue. I therefore find that she has not established that the running of a sewer line through her property was against the Act and the By-laws.

c. Is it the plaintiff or the 1st defendant who caused a public nuisance by illegally interfering with the sewerage line running through the plaintiff's premises and thus caused noxious sewerage material to flow into her house?

43. The plaintiff's house was built earlier than the 1st defendant's apartment block. It was built between 1975-1976. The 1st defendant's structure was completed in 1999. Evidence adduced in the trial has persuaded this court to believe that when the subdivision of plot no. Nakuru Municipality Block 15/879 was conducted, the boundaries were made to make the plots larger than they ought to have been. The consequence was that some the lands covered by the then existing sewerage works were included in the area of the resultant subdivisions. The plaintiff's plot is one such property that was demarcated so as to include the existing sewer line within the boundaries marked by its beacons. Naturally, when the plaintiff assumed possession of what she believed had been sold to her by NHC, she believed that the sewerage line running through the premises and which was a feeder line, was for the use of herself and her neighbours within the Kabachia IV Estate to the exclusion of any other person from outside the Kabachia IV Estate including the 1st defendant; to her, they had right to connect their sewer line to it. Also, it mattered not to her that such connection was authorized by the 2nd and 3rd defendant. I have already partially addressed this issue hereinabove where I stated that the sewerage line remained a public utility under the administration of the 3rd defendant and that the plaintiff has not demonstrated that the purchase from NHC included the sewerage line or that that public utility was ever effectively converted into private property. Also, in this court's view, the 1st defendant connected his premises to the sewerage line long ago in 1999. The plaintiff's evidence is that she took action by writing 4 letters of complaint dated 29/7/1999, 29/10/2000, 9/4/2011 and 29/10/2012. The original list of documents she filed with the plaint has no letters dated 29/7/1999 and 29/10/2000. Neither are they listed in her supplementary list dated 25/4/2016 and I am inclined to believe that these documents were made much later than those dates to support her claims in the present dispute. I am vindicated in stating that because I find the plaintiff has dissembled facts in this case to portray the defendants as the aggressors while indeed evidence points to some egregious actions on her part which gave rise to a needless dispute as will be seen herein below.

44. DW2's evidence was that the sewage leakage problem began in 2013. According to the plaintiff's evidence the sewerage overflow problem began in 2011 after the plaintiff purchased the house. I am inclined to believe the evidence of DW2. It is quite evident that an idyllic hiatus of about 13 years lapsed before from the time the 1st defendant completed his block of flats to the time when the plaintiff lodged a complaint about the leaking sewer. That interregnum answers the question as to whether the 1st defendant's connection to the existing sewerage line was the cause of the leakage. This court does not find it plausible that the 1st defendant's act of connecting to the existing sewerage problem in 1999 occasioned the alleged sewerage leakage in and around the plaintiff's premises much later in the year 2013. There had to be some other cause. Though the Municipality was still growing and further



connections were made to the existing sewer line that served the plaintiff's premises, the plaintiff has also not established that it is charged to overcapacity with effluent to the point of being subjected with natural blockage therefrom. The evidence of DW2 was that feasibility studies were done before the connection by the 1st defendant and others and that connections were done with the authority of the 2nd and 3rd defendants. Indeed, there is no specific expert evidence from the plaintiff to prove that the subject sewerage line was overstretched by the 6 additional authorized connections effected by the 1st defendant and his neighbours. Consequently, this court is unable to find that those connections occasioned the blockage of the sewer line.

45. Further evidence from the defendants is that the plaintiff attempted to block the 1st defendant and his neighbours from further using the sewerage line running through her property by blocking the manholes built for the connection. In her evidence the plaintiff claimed that it was NHC which showed her the beacons to her plot and the house plan. She further claimed that the NHC promised her that the existing sewerage line would be removed and it wrote to the 1st defendant in connection thereto. According to the plaintiff, NHC also advised her to obstruct the sewerage line through construction of a fence. She apparently implemented that advice. However, the county government later came and demolished her fence and reconnected the sewage line. The foregoing bit of evidence is crucial in that it portrays the plaintiff as very dissatisfied with the sewer line that was running through her newly acquired property to the extent of fencing the sewer line connection made by the 1st defendant into what she considered her property. DW2 testified that 3 phase electric line ran above the sewer line and it is therefore not difficult to deduce that the plaintiff fenced off a road reserve on which these kinds of utilities are built. Further, a letter dated 19/7/2013 from the NHC to the 3rd defendant's Medical Officer of Health revealed the plaintiff's real ambitions when it stated as follows:

“The [plaintiff] intends to put up a flat in the near future this (sic) will affect the line as it runs in the middle of her plot. Water, electricity and sewer lines are supposed to pass through common areas.”

46. The same subject of the plaintiff's intent to construct a flat on the suit premises in the immediate future had earlier on been stated in a letter dated 26/4/2013 written by the NHC to the 1st defendant.
47. Considering the contents of the said letters, it is clear that while the land hosting the estate was still not demarcated, the land on which the sewerage was laid was a common area. Later it somehow was annexed or alienated to the plaintiff's plot boundaries upon demarcation. Owing to her disclosed plans for developing a flat as revealed in the cited NHC letters, it is persuasive that in the circumstances, she may have been inclined to take action to stop the 1st defendant and others from using the sewer line. There is convincing evidence that the NHC wrote to the plaintiff a letter dated 25/6/2014 stating that it had received complaints from the 2nd defendant and NEMA and the Public Health Department that she had encroached on the road reserve and built a wall hence obstructing the 2nd defendant from servicing the sewer line passing through the Kabachia Ph IV Estate. That letter requested her to ensure that there was no obstruction to enable the 2nd defendant service the sewer line to avoid a health hazard that may be occasioned by the overflow of raw sewage.
48. In addition, the plaintiff produced as P. Exh 4 a copy of a notice requiring abatement of nuisance issued by the Nakuru County Government dated 17/7/2013 issued to her by the 3rd defendant. The notice stated as follows:

“Take notice that, under the provisions of the *Public Health Act*, I being satisfied of the existence of a nuisance at: - Plot No Kabachia IV Door No 196 in Nakuru Municipality.



Due to: -

1. Obstructing a public sewer line by blocking a manhole causing overflowing of raw sewage into a public street being a nuisance construct (sic) to section 115 as read with section 118 (1) (c) of the public health act Cap 242 Laws of Kenya.

Do hereby require you within three (3) days from the date of this notice to abate (sic) the same and for the purpose to: -

1. To unblock and restore back the manhole to a functional state.”

49. The plaintiff also included to her list of documents a letter from NEMA dated 27/6/2014 which addressed her as follows:

“Re: environmental restoration order for destruction and blockage of a sewer line at Kachachia (sic) estate, Nakuru.

The national environment management authority hereby informs that it has information that

1. You have blocked access to manholes located on house no 196 within Kachachia IV estate Nakuru county.
2. You have encroached on a road reserve through construction of a wall on a road reserve;
3. You have destroyed a sewer trunk located on the above plot on which you are occupying;
4. You have obstructed a government agency, namely the Nakuru water and sewerage company from undertaking its legal mandate.

The above actions have resulted on (sic) spillage of raw sewage on a public road and led to eventual flow of the sewage to the fragile lake Nakuru national park.”

50. NEMA’s letter required the plaintiff to remove all obstructions to manholes of the trunk sewer line located in her compound and restore the manholes and sewer lines immediately. She was also warned of the risk of criminal proceedings being commenced against her, and of her right to appeal to the National Environment Tribunal.
51. The foregoing letters form part of the plaintiff’s own evidence. This court would hardly imagine that the two offices that wrote to the plaintiff did so idly. There must have been sufficient cause. In any event, I do not find any strong denial by the plaintiff that she had obstructed the sewerage line and the manholes and that she thus occasioned the public nuisance and drew the attention of the two concerned public watchdogs, NAWASCO and NEMA which bodies addressed her in writing requiring abatement of the nuisance. Also, she has implicitly admitted that she committed the act of obstruction at the advice of the NHC which organization did not in this court’s view have the authority to advise her to break the law, and which never came to her aid at her time of need after she had blindly done their bidding. I thus find that it is the plaintiff who, dissatisfied with other people’s reliance on the public utility, caused a public nuisance by illegally interfering with the connection to the sewerage line running through her premises and thus caused noxious sewerage material to flow into her house.



d. Who was responsible for the demolition of the plaintiff's perimeter wall and was it illegal?

52. The plaintiff's case is that it was the personnel of the 2nd defendant who forcefully brought down a part of her perimeter fence. However, in her oral evidence, she stated that though the officers of the 2nd and 3rd defendants came to the suit premises, it is the officers of the 3rd defendant who demolished part of her perimeter wall obstructing the sewage line. Whereas it was the evidence of the parties that the 2nd defendant is owned by the 3rd defendant and it is not entirely independent, where a limited liability company is involved, pleadings against it should be precise since it is a separate entity with a legal personality that can sue and be sued on its own behalf without reference to its mother organization. Therefore, in the circumstances of this case, I find the plaintiff's evidence to be inconsistent with her pleading. She has thus not established that it is the 2nd defendant's officers who demolished her wall and her claim regarding the demolished fence fails.

e. Was the plaintiff occasioned any loss and damage owing to the demolition of her wall and if so, how much and is any of the defendants liable to compensate her?

53. In her prayers the plaintiff claimed as follows:

“Kshs. 422,500.00 being the cost of the damaged perimeter wall fence.”

54. In view of the fact that she has not stated clearly whom she is claiming this sum from in her prayers, it must be presumed that it is from the 2nd defendant as found in the issue no (d) herein above. However, I have found that she has failed to establish that it was the 2nd defendant who demolished part of her fence and the latter cannot therefore be held liable. Also since it was her own express admission that she had already rebuilt the wall, I find that the sum of Kshs 422,500.00 is a special damage claim which the plaintiff ought to have proved by tendering receipts in evidence.

55. In the light of the evidence produced this court is not satisfied that the plaintiff had built her wall in the right position in the beginning. She had committed an illegality by encroaching on the sewage line and the road reserve as she constructed the original wall. There was a good reason for the demolition of the said wall. The plaintiff had no answer to the claim by the defendants that she had built the affected portion of her perimeter fence on land meant for public utilities including the sewerage system. A major indicator is that NHC who sold her the plot addressed her, stating that she had encroached on the road and built a wall hence obstructing the 2nd defendant from servicing the sewer line. Another indicator of even consequence that she had committed an illegality was the fact that she never asserted in her evidence, oral or written, that she had rebuilt the wall exactly in the same position that the original wall had stood before the 3rd defendant demolished it. This court is of the considered view that the Latin maxim *ex turpi causa non oritur actio* applies to the plaintiff's claim herein. She can not thus be allowed to benefit from her own wrongdoing by foisting upon any of the defendants the burthen of meeting the cost of rebuilding the wall.

f. Has the plaintiff lost rental income and if so how much and who is liable to compensate her?

56. At the hearing, the plaintiff never adduced any evidence of the quantum of rent lost. Besides that, for the reason that this court has found that the plaintiff was the author of her own misfortunes both in obstructing the sewage flow and thus occasioning the public nuisance, this court finds that no one among the defendants is liable for her loss of income (if any) in the form of lost rent from the suit premises.



Conclusion.

57. In the end, this court finds that the plaintiff has not established her claim against any of the defendants. Consequently, her suit is hereby dismissed with costs awarded to all the defendants.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF SEPTEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

