

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 12 OF 2019

ALICHERAUS ZEPHRINE MWESIGA.....PLAINTIFF

Versus

TANZANIA PORTLAND CEMENT

COMPANY LTD.....DEFENDANT

Date of Last order: 22/11/2022

Date of judgment: 17/03/2023

JUDGMENT

MGONYA, J.

The plaintiff herein Alicheraus Zephrine Mwesiga a natural person sues the Defendant, the Company Limited (juridical person) for trespass and destruction of Plaintiff's residential premises as the result of the Defendant's released waste and rain water stored into her constructed water storage.

It is averred in his Complaint that, the Defendant maintains the cement plant at her plot of land situated at Wazo Hill, Boko Area Wazo Ward, Kinondoni District in Dar es Salaam Region. That the said cement plant is surrounded among others by the residential premises. The Defendant also maintains constructed water reservoirs /ponds to facilitate her business operations.

Sometimes in **2012**, the Defendant's stored water, escaped from the constructed waste and rain water reservoir/ponds trespassed and caused severe and serious erosion which proceeded to the Plaintiff's plot of land. That the erosion was a result of water storms which eroded large part of the land causing huge land gully. It is the Plaintiff's contention that, such incident left the Plaintiff in perplexity and state of tense and fear, destroying his gardens, banana plants and large part of his land.

The Plaintiff further claimed that, the destruction caused by the Defendants water has left him living in fear and tense, incurring costs cumulatively for temporary rectifying the premises to make them suitable for human habitation and use. The Plaintiff alleged further that, from **2012** to **2018** he incurred costs for continuous exercise of filling in the gully with sand filled bags, constructing temporary storm water drain, inserting crossing wooded bridge and regularly forced to remain and stay at home to look at his children and family from danger drowned to the gully.

It is for the foregoing the Plaintiff instituted this suit claiming the following reliefs against the Defendant:

- i) Payment of TZS 382,808,324.42 (Say Three Hundred Eight two Million Eight Hundred and Eight Thousand, Three hundred Twenty Four***

- shillings and forty Two cents) being special damages to be incurred in rectifying the premises and restore them as they were,*
- ii) An order for payment of TZS 40,000,000/= (Say forty Million) being amount for punitive damages;*
 - iii) An order for payment of general damages to the Plaintiff arising out of disturbances, interruption, mental torture, stress, anguish and pain as the court may asses;*
 - iv) Interest in (i), (ii) and (iii) above at the commercial rate of 12% per annum from the date of judgment till full payment;*
 - v) An order for perpetual injunction restraining Defendants their work men and agents or any other persons claiming under them from releasing their water and causing destruction to the Plaintiff premises;*
 - vi) The Defendant be condemned to pay costs of this suit; and*
 - vii) Any any other relief and or order the court shall deem fit to grant in the interest of justice.*

On the other hand, in her defence the Defendant denied the allegation by the Plaintiff and put him to strictly proof thereof.

In resolving parties dispute the following issues were framed and agreed by the Court and the parties:

- i) **Whether or not the Defendant's water trespassed into the Plaintiff's residential premises as a result cause destruction;**
- ii) **Whether there is negligently breach of duty on the part of the Defendant;**
- iii) **Whether the Plaintiff suffered any loss; and**
- iv) **To what reliefs are the parties entitled.**

At the hearing, the learned Advocate Robert Rutaihwa appeared for the Plaintiff whereas the Defendant was represented by the learned advocate **Lumamuzi Patrick Byabusha**. In a bid to prove his case, four witnesses testified for the Plaintiff while the Defendant paraded three witnesses.

In determining the parties' rights, this Court will be guided by the established principles in proving civil cases as well as consideration of the pleadings, adduced evidence and final submissions by both parties.

It is a trite law under **Section 110 and 111 of Evidence Act, [Cap. 6 R.E 2019]** that, he who alleges existence of a certain fact must prove its existence and that the onus of so

proving lies on the party who would fail if no evidence at all is given on either side. Likewise, it is the principle of law under **Section 3(2)(b) of the Evidence Act** (supra), that existence of certain fact is to be proved on preponderance of probability meaning should be on the balance of probabilities. See, the cases of ***ABDUL KARIM HAJI VS. RAYMOND NCHIMBI ALOIS AND ANOTHER, CIVIL APPEAL NO. 99 OF 2004, PAULINA SAMSON NDAWAVYA VS. THERESIA THOMASI MADAHA, CIVIL APPEAL NO. 53 OF 2017 AND BERELIA KARANGIRANGI VS. ASTERIA NYALWAMBWA, CIVIL APPEAL NO. 237 OF 2017*** (All CAT-unreported).

In ***Berelia Karangirangi*** (supra) when considering the onus of proof and the standard to be applied in civil matter, the Court of Appeal had the following to say:

"We think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, he who alleges must prove....it is similar that in civil proceedings, the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities."

In this matter the Plaintiff alleged trespass, and destruction of his land by the water from the Defendant reservoirs/ponds

and that out of that trespass he suffered damages as expressed in the reliefs sought. Therefore, the onus of so proving on the required standard lies on him.

In determining the right of the parties in this judgment, I am not intending to reproduce the whole evidence as adduced by witnesses from both parties, rather I will be referring to it in the course of determination of the framed issues as some of the facts are not in dispute.

To start with the **first issue** which is **whether or not the Defendant's water trespassed into the Plaintiff's residential premise as a result cause destruction**, gleaned from the pleadings and evidence presented. The Plaintiff ***Alicheraus Zephrrine Mwesiga*** who testified as **PW1** testified that, he is residing in Boko street CCM at the Catholic Church down the way, at Bunju Ward Kinondoni District in Dar es Salaam while the Defendant who is dealing with eruption of rocks to get raw materials for cement production, her factory is situated in a way to Bagamoyo, at Tegeta Kibaoni. He said, in the year **2012** from January to February, there were so much water from Portland Cement dams which came to his plot in front of his house. The water cut across and went to Nyakasanga River. He wrote a letter to Managing Director of Portland Cement to inform the problem the same was not replied. He wrote other letters to

Director General **NEMC-DSM**, Kinondoni Executive Director **(Exhibit. P2)**. However, all the said letters were not replied. Final he opted to consult Legal Environmental team (LIT) as they can institute the Environment case against the Factory, NEMC Director and DED Kinondoni. It was Civil **Case No. 175 of 2013**.

The ruling of the same was delivered on **12/08/2018 (Exhibit. P3)** where the suit was struck out. PW1 did not end there, as in 2015 he wrote another letter to Vice President Office-Environment Minister **(Exhibit. P4)** and then he decided to go to State House in **14/06/2016** by writing another letter **(Exhibit. P5)** vide Vice President complaining that he has been offended by the Factory. The Minister was directed to visit the Plaintiff where he was then promised to be compensated although after the long process when the matter reached to the Court of Appeal, where it was realised that there was nothing for compensation.

After all that, PW1 testified that he sought for an order of extension of period of limitation from the Minister and the same was issued **(Exhibit. P6)**. Explaining on the nature of destruction PW1 stated that, what destroyed his residence is water from the Portland Cement dams. The factory is on the top. The point of being far from the factory is not concerned. He

tendered 22 photography demonstrating the construction and destruction, of the suit property and certificate regarding the accuracy of camera which was admitted as **Exhibit. P7.**

When he was cross examined PW1 stated that, when he bought his plot the same was not built nor surveyed and that. The Defendant's factory is about 1.8 Kilometres from his plot. Further that Nyakasanga River is with water during the rain season only. PW further informed the court that occurs when it is raining and sometimes when it is not raining. Further that, when it is not raining the water comes from the dams there is no destruction. The factory is working all the time.

PW1 further testified that, he started construction of his house in 2008-2009 and that the Factory was the 1st to exist for so many years. He doesn't know if the production of cement needs water. The damage started from 2012 January onwards. When asked about the parties to the previous suit they PW1 said that were five but his neighbours did not proceed with the case. He is the one who wrote the letters to different entities.

While under re-examination PW1 stated that, when the destruction occurring it was raining.

Another Plaintiff's witness was one **Tito Gregory Salanga (PW2)** testified that, he lives near the Plaintiff. In 2007 churches

walls were fallen down and people were saying that the water comes from the factory.

During cross examination PW2 stated that, the Plaintiff's is living after him. The water always follows the stream. He doesn't know the Plaintiff's claim.

PW3 Joseph Hamisi Mabwati is another Plaintiff's witness. He spent most of the time narrating on what happened to his shop and premise, how the Plaintiff assisted him to calculate the damages and writing a letter to the Minister. He had nothing strong to assist the court towards the determination of the Plaintiff's claims. While under cross examination, PW3 stated that, the Plaintiff is his friend. From his home to the Plaintiff's house is about 1.5 Kilometres. In 2014 there was a rain, which made erosion. Despite the rain, the water from the Factory dams contributed the problem.

The fourth Plaintiff's witness one **Adelhard Kweyamba** who testified as **PW4**, a quantity surveyor by profession.

In his testimony he had nothing to tell the court on how the Defendant trespassed rather he stated that, he was just engaged by the Defendant in 2018 to prepare Bills of quantity in consideration of the agreed fee. He prepared the document which is the costs estimates for filling gully at the Plaintiff's premise which was admitted as **Exhibit. P11**.

While PW4 was cross examined he stated that, he was told that the water was from the factory. The gully from Mwesiga's home goes and join the river which is near his place.

On the Defendant's side vide **DW1, Richard Leonard Magoda**, the **Defendant's Environmental Manager** testified that, the Company started production since 1959. The factory further is about 4 kilometres all the way to the Plaintiff's home. He also testified to the effect that, he doesn't remember if there are dams at the mentioned place. What he knows there are holes and forming a rough surface. He said, in digging raw materials, they are governed by National Environment Management Council (NEMC). Further, in their functions, there is Environmental Audit for all matters concerning Environment, to prove that their function does not affect environment he tendered the Environment Audit Certificate with Registration **No. EC/EA/6801** which was admitted for evidence as **Exhibit. D1.**

Defending the claims against the Factory, he stated that, the Deputy Minister went to their site after receiving the Plaintiff's complaints. After the tour he informed him that he didn't see any issue in this respect. He went on to state that, their production does not concern water at all. He went on to testify that the Plaintiff's allegations that his home was destroyed by water from their factory is his outlook. According to him, it is

not possible that, out of many people residing in that place it is only Mr. Mwesiga and one citizen from Boko who were affected. He denied that, they are the ones who caused destruction of the Plaintiff's house. Finally, he argued this court to dismiss the Plaintiff's claim.

While he was under cross examination, DW1 stated that the Environment Audit is done every year. He stated that, the rain is what disturbs them. They are not producing when it rains as the land becomes soft and mud is created. Due to rain water, they built streams for the rain water passage. Before the streams there were natural passages to Chasimba, Dawasco and to the sea. However, the water does not pass Boko. He said that the Plaintiff's claim has no any reality. There is no one whom they paid in respect of any destruction. The water which goes to the queries are rain water, However, the person they gave money was an assistance (SSR) social responsibility like others and that was not compensation as it is alleged.

DW1's evidence was corroborated by one **Said Fonda** a **Human Resources Officers** of the Defendant, who testified as DW2. He testified that, cement producers do not use water in their production. Therefore, there is no connection between their production and the complaint Plaintiffs.

DW3 **Geofrey Mtimbange**, the **Defendants Manager** on his side like DW2 also stated that, there is no any use of water in cement production. After taking away the limestone they usually return the soil and plant trees. During rain season they are not harvesting limestone as the rocks becomes wet.

Having summarised and analysed both parties' evidence in regard to the contested issue; It is the rule of evidence that, Court will sustain evidence of the party which is more credible than the other. This position of the law was made clear in the case of **PAULINA SAMSON NDAWAVYA** (supra) where the Court of Appeal had this to state:

"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case, the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible than the other..."

In the instant case, as far as the first issue is concern, I find it apt to refer to the famous case of **RAYLAND V FLETCHER (1868)LR 3 HL 330** ,though persuasive but I subscribe to the established principle which in my view is equally applicable in the

instant case. In order to prove that it is the water from the Defendant which cause damage to the Plaintiff, the Plaintiff must prove that; **One**, it is the Defendant who accumulated or brought water in his land for his own purpose: **Two** the said water real escaped and **Three** the said water caused mischief to the neighbours place. Four witnesses testified for the Plaintiff's, premises but having thoroughly going through their evidence this court found that neither proved the existence of the principle stated above.

The Plaintiff in a bid to prove his claim testified that he traced the source of water where he found that it is the Defendant's ponds and reservoir which caused the floods. While on the Defendant's side, they denied the existence of the said ponds and reservoir in their place. Apart from his oral testimony there were Photographs (**Exhibit. P7**) tendered by the Plaintiff but there was no picture of the said ponds or reservoir as alleged by the Plaintiff.

Much of that, during the trial, the Plaintiff testified that it is about **1.8 Kilometres** from his premise and the factory although he kept changing the distance whenever he was asked about it. It is the said contradiction which touches the root of this case, forced the court to visit a locus in quo. Being there this court found that **what was testified before the court were**

distinct from the reality. First of all, it was observed that the distance from the Plaintiff to the Defendant is more than 3 Kilometres and not 1.8 or ½ Kilometres as testified by the Plaintiff. Also the location of the factory and the Plaintiffs premise did not support what was alleged by the Plaintiffs. While the factory is on the left side of the main road from the Dar es salaam to Bagamoyo at Tegeta area, the Plaintiff resides the right side of the main road at Boko. The geographical position does not support the assertion of neighbour places as there are many residential premises nearer than the Plaintiff premise who did not allege any damage from the Factory. Hence, the Plaintiff allegation is far from reality.

Therefore, from the Plaintiff's witnesses this court finds that the important elements to prove that it the Defendant's water which cause damage lacks evidential support hence not proved.

In addition to that, I subscribe to the Defendant's final submission that, although the Plaintiff sued on his capacity but since his claims originated from environmental issues, the officer from National Environmental Management Council (NEMC) was material witness. As it is revealed that, all the Plaintiff witnesses their testimony relied on speculation and hearsay. Taking from the Plaintiff himself when cross examined he stated that, the industry works all the time but during dry season there is no

destruction. He also stated that, he doesn't know if the production of cement needs water and also the damage started from 2012 January onwards while he admits that the factory existed many years before his premises. Not only that, but he also contends that distance from the factory does not concern him. In my view, if the Environmental Officer was to be summoned, he could be in a good position to answer pertinent legal issues in support of the Plaintiff's allegation. However, the Plaintiff did not see the use of calling such officer. It is settled principle that failure to call a material witness for unclosed reasons entitled the court to draw adverse inference, that if the said witness was called he could have given evidence contrary to the party's interest. See. ***SAMWEL JAPHET KAHAYA VERSUS REPUBLIC, CRIMINAL APPEAL No.40 of 2017 (unreported) and AZIZ ABDALLA V.R (1991) TLR 71.***

On the premise of what I have discussed above, this court responds to the first issue in ***negative.***

I now move to the ***second issue*** as to ***whether there is negligently breach of duty on the part of the Defendant.*** As it has been discussed in the prior issue that there was no material evidence to prove that, it was the water from the defendant which caused mischief, this court finds that second issue also attracts ***negative response.*** The reason for the

finding is; there was no proof that the Defendant brought or accumulated water into his factory which due to negligence escaped and harmed the Plaintiff's property. Therefore, there is no any breach of duty on the Defendant's side.

Turning to the **third issue** as to **whether the Plaintiff suffered any loss**. Having perused the exhibits tendered before the court especially **Exhibit. P7**, it is shown that, near the Plaintiff's premise there is a valley/gully. Therefore, it is open that the Plaintiff suffered loss as he is struggling to overcome it. However, this issue should not detain this court much as there is no material evidence which connects the loss with the Defendant in this case.

The last issue as **to what reliefs are the parties entitled to**. It is settled that an injured party due to one's negligence is entitled to compensation. **In this case as ruled in the first issue that, the allegation that it is the Defendant's water which destructed the Plaintiff property is not proved. This court finds that, the Plaintiff's allegations were not proved to the balance of probabilities as required by the law.**

In view of the above, the Plaintiff deserves nothing than dismissal of his claims for want of merit. That said and done, this suit is hereby dismissed with costs.

It is so ordered.

Right of appeal explained.



L. E. MGONYA

JUDGE

17/03/2023