

27/10/11

IN THE HIGH COURT OF KIRIBATI 2015

CIVIL CASE NO. 159 OF 2010

[DR TERAIRA BANGAO
[TAEUEA BETERO
[TABUMAO BETERO
[TIIRA OBEN
[BORATA UAIA
[TARITA NUTAKE
[BAKAREWE MAMAEU
[MOTETE BUARIKI
[TEMANGO TAMARIA

PLAINTIFFS

BETWEEN [AND

[PUBLIC UTILITIES BOARD

DEFENDANT

Before: The Hon Chief Justice Sir John Muria

28 November 2014

Mr Banuera Berino for Plaintiffs
Ms Ateti Tekawa for Defendant

28/11/14
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JUDGMENT

Muria, CJ: The plaintiffs claim general and special damages for smell and inconvenience suffered as a result of overflow of contaminated seawater onto the plaintiffs' land. The plaintiffs are residents of Etanimakin in Bikenibeu, South Tarawa. The defendant is a Government Statutory Body responsible for the provision of public utilities and services, including maintenance of sewerage systems in South Tarawa.

Case for Plaintiffs

The plaintiffs' case is that in or about 2008, one of the manholes in Etanimakin overflowed resulting in seawater and human wastes flowing into the nearby homes of the plaintiffs. It is also alleged that the overflow caused damage to the plaintiffs' garden crops, babai (kind of taro) pits and wells in the area. It is further alleged that despite requests to the defendant to address the problem, the defendant failed to do so for two (2) years.

The plaintiffs claimed that because of the failure by the defendant to fix the problem of the overflow manholes, they had to endure the smell, for two (2) years, their wells were no longer usable, their crops destroyed, and their babai pits were contaminated.

Case for the Defendant

The defendant denies the plaintiffs' claim. The defendant contends that the said manhole was part of the many manholes constructed with help from Australia funding by Tarawa Sewerage Project before 2004. The defendant took control over them in 2004 after they were completed. The said manhole was built in a low area and, hence, prone to overflowing whenever there was a problem with the pump station or blockage in the manhole system. That was what happened in 2008 with the concerned manhole.

The defendant's contention is that the blockage in the pipeline and overflow of the said manhole were caused by the public dumping non-sewerage and non-sanitary items, such as cotton rags, wood, diapers and other things into the sewerage system. The defendant says that it

had attended to the problem of the overflowed manhole. It took further measures by pouring sand over the damp area to avoid the smell and the stench. However, it was beyond its control to stop people in the area from dumping non-sewage items into the sewerage system.

The defendant denies breaching any duty of care to the plaintiffs in this case. It also relies on section 34(3) of the *Public Utilities Ordinance*.

Evidence

The evidence for the plaintiffs is contained in both the oral and affidavit evidence of Taeuea Betero. In his affidavit sworn to on 23 August 2011 and filed on 28 September 2011 in support of the plaintiffs' claim, Mr Betero stated that all named plaintiffs lived around and near the concerned overflow manhole at Etanimakin in Bikenibeu in 2008. The overflow spread onto their land and surroundings, damaging their crops. He also stated that the stench from the overflow was overwhelming. Mr Betero also stated that it took the defendant two years to fix the problem.

Mr Teitaake Beia, on behalf of the defendant, deposed to in his affidavit that he was aware of the problems with regard to the manhole which the plaintiffs complained about. He further deposed to the fact that the manhole concerned overflowed due to blockages caused by non-sewage items, such as cotton rags, diapers, wood etc. being dumped in the sewerage system. The defendant had attended to the blocked manhole by pumping the sewage matters to the other relaying pumping stations. Unfortunately, that process did not work because of non-sewage items clogging the sewerage system.

Mr Beja further stated that they had to resort to the process of emptying the blocked manhole by employing a vacuum truck to suck matters out from the manhole and discharging them at a pump station. He further stated that after they emptied the manhole, the defendant filled the damp area with sand to stop the smell and the stench.

Issues

In the present case the main issue for the Court to determine is whether the defendant is liable for damages claimed by the plaintiffs. If the defendant is liable, the next issue is to determine the quantum of damages for the loss suffered by the plaintiffs.

Consideration and Determination

It is not disputed by the defendant that the concerned manhole complained of by the plaintiffs overflowed due to blockages in sewerage system. There is also no dispute that the defendant had taken steps to remedy the problems caused by the overflow of the manhole. The defendant had investigated and identified the causes of the overflow of the manhole. The main cause of the overflow was the blockage in the sewerage system due to dumping of non-sewage items, such as cotton rags, wood, diapers and other such items into the sewerage system. Paragraphs 5, 6, 7, 8 and 9 of the affidavit of Tietake Beja clearly set out the situation and what the defendant did to address the problem complained of:

"5. The said manhole had overflowed many times due to the fact that it is located in the low lying area. The major cause was

the failure of the pump station that used to convey sewage to the other relaying pumping stations. The failure is caused by the dumping of non-sewage items such as cotton rags, wood, diaper etc. When the pump failed it creates a backup problem in the pipeline and overflow to this manhole.

- 6. With regards to the problem at hand we investigate the manhole however we worked from the other manholes to drain out the blockage. Normally we do not work on the blocked manhole but worked our way from the pump station by removing non-sewage items that clogged the pump. Once the pump functions again it will take time to empty the manholes or to stop the overflow.*
- 7. The immediate solution we used to speed up emptying the manhole is by employing a vacuum truck to suck the manhole and then discharge to a pump station which we also used in this case.*
- 8. We also pour sand or filled up the damp area with sand to avoid the smell and stench.*
- 9. As mentioned earlier the major cause of the problem is the pump failure to empty the manhole contents as it could not suck solid waste (non-sewage and non-sanitary items) that were dump in the system. The dumping of non-sewage items is beyond PUB control and therefore the problem of overflow*

is repeated to most manholes and which has happened to this particular manhole several times".

The evidence shows that the defendant had not turned a 'blind eye' to the problem of the overflowing manhole complained of by the plaintiffs. The question perhaps is, could they (defendant) have done more to prevent the 'harm' which the plaintiffs have alleged to have suffered with?

I think it is also fair to say that as a result of the overflow of the manhole, contaminated seawater seeped into the soil in and around the plaintiffs' surroundings, as well as producing overwhelming stench. One of the consequences of the overflowing contaminated sea water seeping into the soil in the plaintiff's land was the damage done to their crops, for which they claim compensation.

Whilst accepting that the overflow of the concerned manhole did occur and the contaminated seawater seeped into the sandy soil in the plaintiffs' area, the plaintiffs have to establish that the defendant was responsible for failing to take the necessary action to prevent the overflow of contaminated waste water onto the plaintiffs' land. The plaintiffs would also have to establish that the damage to their properties (crops) was a direct consequence of the defendant's failure to perform its duties as the authority responsible for the maintenance of the concerned manhole.

The cause of the overflow of the manhole resulting in the contaminated soil in the plaintiffs' land and damage to their crops was the blockage in

the sewerage system. Evidence is, therefore, needed to establish that the defendant had failed in carrying out its duties and responsibilities, statutory or under common law, to prevent the blockage of the sewerage system, so as not to cause the overflow of the manhole in question. The plaintiffs bear the burden of establishing that failure on the part of the defendant.

The evidence from the plaintiffs, simply, do not point to any failure on the part of the defendant to prevent the blockage of the sewerage or to prevent the overflow of the manhole. The evidence from the plaintiffs seems to suggest that the manhole had already overflowed and contaminated waste water had already overflowed onto the plaintiffs' area with overwhelming stench. It was then that the problem was reported to the defendant. The plaintiffs' evidence also shows that their main complaint was that the defendant was not prompt in fixing the problem caused by the overflow and which caused damage to their crops. This is clearly reflected in their Statement of Claim.

The defendant's evidence, on the other hand, clearly shows that the main cause of the overflow of the manhole was a blockage in the sewerage system. That blockage was caused by non-sewage items dumped into the sewerage system. The non-sewage items included cotton rags, wood, diapers and other like items. Such items are not normal to be found in a sewerage system. Unfortunately they were, in the present case.

Having been alerted of the overflow in this case, the defendant investigated the cause of the overflow of the manhole in the plaintiffs' area. The defendant found that the overflow was caused by blockage in

the sewerage system due to non-sewage items clogging the sewerage system. The uncontroverted evidence of the defendant confirmed that after having identified the cause of the overflow of the manhole, the defendant took actions to resolve the sewerage problem. The actions taken by the defendant were those set out in paragraphs 5-9 of Mr Beia's affidavit already referred to earlier in this judgment.

In my judgment unless the plaintiffs, by evidence, establish that the defendant had failed in its duty to prevent the blockage in the sewerage system which resulted in the overflow of the manhole in question, any damage to them or their crops as a result of the overflow cannot succeed.

There is no evidence to suggest that the sewerage system in the area concerned was otherwise than normally functioning. Thus had it not been for the dumping of non-sewage items by people into the sewerage system causing the blockage of the sewerage system, the overflow of the manhole concerned which seeped into the plaintiffs' land area and causing damage to their crops would not have occurred. The damage to the plaintiffs' crops in this case, in my view, was not attributable to the defendant's action or the lack of it. The unreasonable conduct of others or third party in dumping non-sewage items into the sewerage system, in my view, constituted a *novus actus* which was directly linked to the harm suffered by the plaintiffs in this case. The intervening act of dumping non-sewage items into the sewerage system which caused the blockage was too remote to ground any liability for the damage to the plaintiffs' crops on the defendant. Lord Dunedin had said in *Dominion Natural Gas Ltd -v- Collins and Perkins* [1970] A.C. 640 at 646, that the defendant will not be liable:


"if the proximate cause of the accident is not the negligence of the defendant but the conscious act of another's volition".

Conclusion

In the present case, the evidence does not support the plaintiff's claim that the defendant is liable for the damage done to their crops or any general damages arising out from the waste water or stench complained of.

The plaintiffs' claim is dismissed with costs to be taxed if not agreed.

Dated the 20th day of May 2015


SIR JOHN MURIA
Chief Justice