Virani & another v Kenya Pipeline Company Limited (Environment and Land Case Civil Suit 357 of 2015) [2025] KEELC 2848 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2848 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND CASE CIVIL SUIT 357 OF 2015

SO OKONG'O, J

MARCH 25, 2025

BETWEEN

NIZAR HASHAM VIRANI ..... 1ST PLAINTIFF

SHAMSUDIN GULAMHUSSEIN NANJI ..... 2ND PLAINTIFF

AND

KENYA PIPELINE COMPANY LIMITED ..... DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiffs instituted this suit against the Defendant through a plaint dated 23rd December 2015. The Plaintiffs filed an amended plaint on 15th March 2019 and a further amended plaint on 27th September 2021. In their amended plaint, the Plaintiffs averred that at all material times to this suit, they were the registered proprietors of all that parcel of land known as Kisumu/Kogony/ 2642 measuring approximately 7.2 Hectares or thereabouts (hereinafter referred to as "the suit property"). The Plaintiffs averred that sometime in 1991, they were made to sign an easement agreement with respect to the suit property at the offices of the then Kisumu District Commissioner, a copy of which was not given to them. The Plaintiffs averred that their efforts to obtain a copy of the easement agreement were not successful.

2. The Plaintiffs averred that the Defendant had made arrangements for laying another pipeline on the suit property without any reference to them; hence, they were likely to be affected by the activities associated with that project. The Plaintiffs averred that they had noted that the Defendant's agent had been trespassing on the suit property with a view to surveying and marking out a plan for laying more pipes on the property, which acts were likely to diminish the value of the suit property. The Plaintiffs averred that this was being done without consulting the Plaintiffs regarding the issue of compensation and in complete disregard of the Plaintiffs' proprietary rights. The Plaintiffs averred

that the Defendant had trespassed on the suit property since then. The Plaintiffs averred that the suit property was developed with a model Beach Resort known as Kisumu Beach Resort Hotel, which was a renowned tourist destination of choice but which had otherwise been run down due to the Defendant's invasion and the damage occasioned by the pipeline laid by the Defendant. The Plaintiffs averred that the Defendant's activities on the suit property amounted to trespass.

3. The Plaintiffs averred that the Defendant's conduct smacked of malice, contempt for the law and impunity for which the Plaintiffs sought a prohibitive injunction and/or adequate compensation. The Plaintiffs averred that the Defendant had already dug up parcels of land belonging to other persons and was engaged in selective compensation exercise by giving compensation to other land owners and leaving out others such as the Plaintiffs. The Plaintiffs averred that the Defendants treated them casually and in a demeaning manner, unlike their neighbor, Nyanza Golf Club, which received compensation amounting to Kshs. 12,500,000/- for the easement that the Club granted the Defendant for the second pipeline. The Plaintiffs averred that by giving Nyanza Golf Club compensation of Kshs. 12,500,000/- for the land for the second pipeline while denying the Plaintiffs the same compensation for the loss to their business and destruction of the suit property amounted to discrimination. The Plaintiffs prayed for judgment against the Defendant for:

    1. A permanent injunction restraining the Defendant by itself, its agents, servants, employees, and assigns from howsoever interfering with the Plaintiffs' proprietary rights, peaceful enjoyment and possession of the suit property.

    2. An order for the removal of the second pipeline that was laid on the suit property without addressing the issue of compensation.

    3. A declaration that the Plaintiffs were legally entitled to appropriate compensation before any right of easement was created or acquired by the Defendant for laying or seeking to lay a pipeline or pipelines across the suit property worth Kshs. 300,000,000/-.

    4. An order for appropriate compensation for the damage occasioned at the time of laying the second pipeline across the suit property and general damages for trespass.

    5. An order for appropriate compensation for the damage occasioned/visited upon the Plaintiffs' property at the time of laying the second pipeline across the suit property and general damages for trespass, namely;

        (a) Two beacons installed by the land officers at a cost of Kshs. 20,000/-.

        (b) Billboard indicating the business name (Kisumu Resort Beach) valued at Kshs. 150,000/-.

        (c) Two metallic gates including wiring, lighting and labour all valued at a sum of Kshs. 80,000/-.

        (d) A small house made of cement blocks and iron sheets valued at Kshs. 200,000/-.

        (e) Fence comprised of 46 cement poles and 15 rolls of chain link valued at Kshs. 750,000/-.

        (f) 100 mature trees aged 25 years valued at Kshs. 1,000,000/-.

        (g) A portion of the land measuring an acre valued at Kshs. 20,000,000/-.

        That the total amount of loss and damage suffered by the Plaintiffs as at the time of filing suit stood at Kshs. 22,400,000/-.

6. Costs of the suit plus interest.

7. Any other relief the court may deem fit to grant.

4. The Defendant filed an amended statement of defence dated 24th June 2019 in which it denied the allegations in the amended plaint. The Defendant averred that it was a stranger to the documents purportedly executed by the Plaintiffs in the office of the then Kisumu District Commissioner. On a without prejudice basis, the Defendant averred that a pipeline was laid on the suit property sometime in 1991 after negotiations with the then registered proprietor of the property and adequate compensation being paid to him.

5. The Defendant averred that if there was any easement agreement in existence over the suit property, then under the doctrine of privity of contract, the Plaintiffs could not enforce the same. The Defendant averred that it had a right to dig across the suit property and to lay pipelines thereon under the easement agreement it entered into with the previous owners of the suit property in 1991. The Defendant averred that the Plaintiffs were not entitled to the reliefs sought in the amended plaint. The Defendant averred that the order for the removal of the pipeline sought by the Plaintiffs would be against public policy and would subject the public to great expense. The Defendant prayed that the Plaintiffs' suit be dismissed with costs.

The Evidence

6. At the trial, the 1st Plaintiff, Nizar Hasham Virani (PW1), told the court that he was the proprietor of Kisumu Beach Resort. He stated that he was retired and had rented out the premises. He adopted his witness statement and further witness statement dated 22nd December 2015 and 6th November 2018, respectively, as his evidence in chief. He produced the documents attached to the Plaintiffs' list of documents dated 23rd December 2015 as P.EXH. 1 to 6, respectively. PW1 stated that there were materials (murram) belonging to the Defendant still lying on the suit property. He stated that the said materials were on the disputed area of the suit property which was outside the easement area. He urged the court to grant the orders sought in the amended plaint dated 27th September 2021.

7. On cross-examination by the Defendant's advocate, PW1 admitted that he entered into an easement agreement with the Defendant. He stated that he had signed the same under duress. He admitted further that he was paid compensation by the Defendant after signing the said easement agreement. He stated that he could not refuse payment at gunpoint. He stated that he was paid Kshs. 495,000/-. He stated that they were given nominal compensation while some neighbouring landowners like the Nyanza Golf Club (the Club) were generously compensated. He told the court that in 1991, the Club was paid Kshs. 375,000/-. He stated that the Club's land was slightly bigger than the suit property.

8. PW1 stated that in 1991, he was paid more compensation than the Club. He stated that the compensation they were referring to in paragraph 5 of the amended plaint was the latest. He stated that the easement was for 99 years. He told the court that the pipelines were laid below the earth. He stated that there was a disturbance when the pipelines were being laid. He stated that the pipelines were still affecting them. He told the court that they were restricted in their use of the suit property. He stated that they could not even fence the property. He stated that he established a hotel on the suit property in 1997 but had been on the suit property since 1983. He stated that he had been running the hotel until the area got flooded. He stated that he had now rented out the hotel. He stated that the hotel had been renamed Loco Beach Hotel. He told the court that he deserved at least Kshs. 15,000,000/- as compensation, going by what was paid to Nyanza Golf Club(Club).

9. PW1 stated that he had no problem with the first pipeline. He told the court that his problem was with the second pipeline. He stated that he paid Kshs. 10,000/- for each beacon. He admitted that he had not produced a receipt or any evidence of payment. He stated that he believed he had evidence of the billboard. He admitted that had not produced any evidence of the cost he incurred on the gates, the small houses and fence. He stated that he had produced evidence of the damage to the trees. He told the court that he was seeking compensation of Kshs. 20,000,000/- for the land. He stated that he did a valuation for the land. He stated he had proof of Kshs. 22,400,000/- that they were claiming. On re-examination, PW1 stated that the first pipeline of 1991 did not interrupt his operation. He told the court that his claim was in respect of the second pipeline. He stated that the two pipes were about 10m apart. He told the court that the construction of the second pipeline disrupted his business.

10. The Defendant also called one witness, Wilfred Mengich (DW1). DW1 adopted his witness statement filed in court on 22nd February 2016 as his evidence in chief. He also produced the documents attached to the Defendant's list of documents filed in court on the same date as a bundle as D.EXH.1. DW1 was not cross-examined.

11. After the close of evidence, the court directed the parties to make closing submissions in writing. Both parties filed submissions as directed.

The Plaintiffs' submissions

12. The Plaintiffs filed submissions dated 30th October 2024. The Plaintiffs submitted that the main issue for determination in the suit was the rights and obligations arising out of the Grant of Easement dated 19th May 1993 between the parties. The Plaintiffs submitted that, an easement grants a specific right to a person to use the land of another person for a particular purpose such as access or utilities. The Plaintiffs submitted that the easement between the parties satisfied the ingredients and /or essential elements of an easement except for one major element. The Plaintiffs submitted that the easement in issue was not specific in nature making the same impossible to be defined clearly in legal terms thus impossible to enforce. The Plaintiffs submitted that the easement between the parties was void ab initio for lack of specificity. The Plaintiffs submitted that document number 8 in the Defendant's list of documents was the Defendant's payment sheet dated 19th May 1994. The Plaintiffs submitted that line 22 of the payment sheet referred to the suit property, the area, the recipients of the payment as well as the compensation amount of Kshs. 494,240/-.

13. The Plaintiffs submitted that the measurement outlined in the payment sheet is not mentioned in the Grant of Easement in issue and in the circumstances, the easement relied upon by the Defendant was bad in law and should be regarded as void ab initio. The Plaintiffs submitted that the drafters of the easement did not expressly indicate that the compensation of Kshs. 494,240/= was a one-off payment.

The Defendant's submissions

14. In its submissions dated 20th January 2025, the Defendant submitted that it had proved through the easement agreement that the Plaintiffs were paid compensation in 1994 for the pipeline to pass through the suit property. The Defendant submitted that the 1st Plaintiff confirmed on cross examination that he was paid Kshs. 495,000/- as compensation and that the easement was for 99 years. The Defendant submitted that the pipelines were buried underground and were not affecting the use of the suit property. The Defendant submitted that paragraph 1 of the easement agreement gave the Defendant the right to lay pipes on the suit property within the easement period of 99 years from the year 1993.

15. The Defendant submitted that parties are bound by the terms of their contract. In support of this submission, the Defendant cited, *National Bank of Kenya Ltd v. Pipe Plastic Samkolit (K) Ltd.* [2002]

2 E.A. 503, [2011] eKLR, *Pius Kimaiyo Langat v. Co-operative Bank of Kenya Ltd.* [2017] e KLR and *Housing Finance Co. of Kenya Limited v. Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999. On the issue of special damages, the Defendant submitted that special damages must be specifically pleaded and strictly proved. In support of this submission, the Defendant cited the Court of Appeal case of *Hahn v. Singh*, Civil Appeal No. 42 of 1983, [1985] KLR 716 at pages 717 and 721. The Defendant submitted that the Plaintiffs' claim for Kshs. 22,400,000/- was in the nature of special damages and ought to have been specifically proved failure to which the same must be disallowed. The Defendant submitted that the Plaintiff did not tender any evidence to prove these claims and urged the court to disallow same. On the issue of costs, the Defendant submitted that costs follow the event unless the court for good reason directs otherwise.

Analysis and Determination

16. I have considered the pleadings, the evidence tendered by the parties and the submissions of counsel. The only issues arising for determination in this suit are, whether the Plaintiffs are entitled to compensation from the Defendant for the use of their land and if so, what is the quantum of the compensation payable, and who is liable for the costs of the suit.

17 Section 2 of the *Land Act* 2012 defines an easement as:

> a non-possessory interest in another's land that allows the holder to use the land to particular extent to require the proprietor to undertake an act relating to the land or to restrict the proprietor's use to a particular extent and shall not include a profit."

18. Section 138 of the *Land Act* 2012 provides as follows on the nature of easement:

(1) Subject to any other written law applicable to the use of land, the rights capable of being created by an easement are—

(a) any rights to do something over, under or upon the servient land; or

(b) any right that something should not be so done;

(c) any right to require the owner of servient land to do something over, under or upon that land;

(d) any right to graze stock on the servient land.

(2) The rights capable of being created by an easement do not include—

(a) any right to take and carry away anything from the servient land;

(b) any right to the exclusive possession of any land.

(3) Unless an easement has been created for specific period of time which will terminate at a fixed date in the future or on the happening of a specific event in the future or on the death of the grantor, the grantee or some other person named in the grant, an easement burdens the servient land and runs with the land for the same period of time as the land or lease held by the grantor who created that easement.

(4) Subject to the provisions of this part an easement shall be capable of existing only during the subsistence of the land or lease out of which it was created.

19. In *Kamau v. Kamau* [1984] eKLR the Court of Appeal stated as follows:

> "An easement is a convenience to be exercised by one land owner over the land of a neighbor without participation in the profit of that other land. The tenement to which it is attached it the dominant and the other on which it is imposed is the servient tenement. Once an easement is validly created, it is annexed to the land so that the benefit of it passes with the servient tenement to every person into whose occupation these tenements respectively come."

20. It is common ground that the Plaintiffs and the Defendant entered into a Grant of Easement agreement dated 19th May 1993, clause 1 of which provided as follows:

> "In pursuance of the said agreement and in consideration of the sum of Kenya Shillings 494,240/=(Shillings Four Hundred and Ninety Four Thousand and Two Hundred and Forty) only now paid to the Grantor by the Company (the receipt whereof the Grantor hereby acknowledges) and of the Company's covenants hereinafter contained, the Grantor as beneficial owner (and to the intent that the easements hereby granted shall be appurtenant to the whole and every part of the undertaking of the company) Hereby Grants unto the company to hold the same unto the Company for the term of Ninety-nine (99) years from the date hereof (or for all the residue now unexpired of the term of years of lease already granted in respect of the plot) the easements and rights to lay, construct, use inspect, maintain, repair, replace, remove, or render unusable mains pipes or equipment and for the transportation and storage of materials connected with the exercise and performance of the functions of the Company and all necessary apparatus ancillary thereto in upon and over a strip of land thirty (30) metres in width at any time of the day or night with or without vehicles, machinery apparatus, appliances and equipment and with or through its consultants, contractors and other invitees and licenses as well as its officers and servants."

21. It is clear from the easement agreement between the parties that the Defendant was granted a right by the Plaintiffs to lay, construct, inspect, maintain, repair, replace, remove or render unusable main pipes on the area of the suit property measuring 30 meters in width for 99 years from 1993. The easement was granted by the Plaintiffs at a consideration of Kshs. 494,240/- that was paid by the Defendant to the Plaintiffs receipt of which the Plaintiffs did not dispute. The easement did not limit the Defendant on the number of pipes the Defendant could lay on the suit property. The limitation was on the area which was limited to 30 meters in width. I am of the view that the easement agreement between the parties granted the Defendant a right to lay the second pipeline on the suit property. The Plaintiffs' claim is based on this second pipeline. The Plaintiffs told the court that the two pipelines were 10 meters apart. That means that they were within the easement limit of 30 meters.

22. The Plaintiffs submitted that the easement agreement dated 19th May 1993 was null and void. Parties are bound by their pleadings. The Plaintiffs did not challenge the said easement agreement in its plaint or reply to the Defendant's amended defence. The Plaintiffs cannot therefore be allowed to challenge the easement agreement in their submissions as the Defendant would have no opportunity to defend itself against the same.

23. Order 2 Rule 4 of the *Civil Procedure Rules* provides as follows:

4.

(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient."

(emphasis added)

24. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled "*The present importance of pleadings*" published in 1960 Current Legal problems, at P.174 where the author stated as follows:

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

25. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

26. Since the Plaintiffs did plead that the easement agreement between them and the Defendant was null and void, it is not open to them to raise the issue in support of their claim against the Defendant.

27. The Plaintiffs had also based their claim on the fact that some of their neighbours were given compensation for the land that was used to lay the second pipeline by the Defendant. The Plaintiffs mentioned as an example, Nyanza Golf Club (the Club). Easements are specific to the parties and the land the subject thereof. The court was not furnished with a copy of the easement agreement that the Club entered into with the Defendant in 1991/1992. It is, therefore, not clear whether it was on the same terms as the easement between the Plaintiffs and the Defendant to justify the Plaintiffs' allegation of discrimination against the Defendant. In other words, the court is not aware of the circumstances

under which the Club was awarded compensation for the second pipeline while the Plaintiffs herein did not get the same. This court cannot, therefore, just order compensation in favour of the Plaintiffs because the Club was given compensation.

28. Even if the Plaintiffs had established that they were entitled to compensation, I would still not have awarded the sum of Kshs. 22,400,000/- claimed by the Plaintiffs. I agree with the Defendant that the claim is in the nature of special damages which must be specifically pleaded and strictly proved. In *Zacharia Waweru Thumbi v. Samuel Njoroge Thuku* [2006] eKLR, the court stated that:

29. The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts, are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

> "Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

30. In *Kenya Power & Lightning Company Limited v. Philip A. M. Kimondiu* [2018] eKLR , the Court of Appeal stated as follows:

> "In the case of Storms Bruks Aktie Bolag vs Hutchison (1905) AC 5515 Lord MacNaughten sought to distinguish between the nature of special and general damages and explained that:- ...'Special damages' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character and, therefore must be claimed specifically and proved strictly. In other words...while in the case of special damages, the respondent would be required to show proof of actual loss on matter that cannot be said to be a natural or direct consequence of the Appellant's trespass."

31. In *Fredrick Mukiri Kingatia v. John Njiru & 2 others* [2019] eKLR the court stated that:

> ...The court is of the opinion that damages for loss of user are in the nature of special damages. The claimant must plead specific particulars of such loss, including the rate at which the damages are sought and period of time for which they are sought. The Plaintiff did not plead the claim with particularity and no evidence was led at the trial to justify an award for loss of user."

32. The Plaintiffs placed no evidence before the court in proof of the special damages claimed. Although specifically pleaded, special damages were not proved and cannot, therefore, be awarded.

Conclusion

33. In the final analysis and for the foregoing reasons, I find no merit in the Plaintiffs' claim. The suit is accordingly dismissed with costs to the Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 25TH DAY OF MARCH 2025

S. OKONG'O

JUDGE

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Indimuli for the Plaintiffs

Mr. Othuro for the Defendant

Ms. J. Omondi-Court Assistant