



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 21 OF 2013

FRANCIS WAHOME.....APPELLANT

VERSUS

GRACE NYACHOMBA.....RESPONDENT

(Appeal from judgment and decree in Nyeri Chief Magistrates' Court Civil Suit No, 197 of 2012,

Hon. C. Wekesa, Ag. Senior Resident Magistrate delivered on 27 February 2013)

JUDGMENT

The respondent sued the appellant for what I understand to be damages for a blue gum tree felled by the appellant on 27 March 2012. According to the plaint filed in the magistrates' court on 20 April 2012, the tree was at all times on the respondent's land referred to as Title No. Kabaru/Mathina/244 which is adjacent to the respondent's parcel known as Title No. Kabaru/Mathina/246. This latter parcel initially belonged to John Munuhe Gachau who sold it or was in the process of selling it to the appellant when he, the appellant, cut down the tree in issue.

The respondent averred further that the appellant encroached on her parcel of land and fenced it off as part of his land. She took up the matter with the area chief and a government surveyor who established that the tree belonged to her. A resurvey of the land, apparently to establish the boundaries of the adjacent parcels of land, was to be done; however, the appellant proceeded and cut down the tree before the envisaged resurvey. It was her case that she planted the tree in 1983.

As a result of the appellant's actions, the respondent contended that she had suffered loss and damage to the tune of Kshs. 80,000/=.

The appellant denied the appellant's claim and the statement of defence filed in this regard was fairly short. It read as follows:

“

- 1. Save as herein expressly admitted, I deny the entire contents of the plaint as though the same were herein set out and traversed seriatim.***
- 2. I admit the contents of paragraphs 1, 2, 5 and 6 save to add that the defendants (sic) address for service for purposes of this suit is P.O. Box 16 Kiganjo.***
- 3. That in respect of paragraphs 3,4,7,8,9,10,11,12,13 and 14 of the plaint it is not admitted and the plaintiff is put to strict proof.***
- 4. That the plaintiff has not come to court with clean hands nor has she conducted herself equitably in this matter.***
- 5. That for the aforesaid reasons, I the defendant avers that the plaintiff is not entitled to the prayers sought in the plaint.”***

He then asked the court to dismiss the respondent's suit with costs.

The court upheld the respondent's claim and entered judgment in her favour for the sum of Kshs. 86,000/= together with costs and interest. It is against this judgment that the appellant has now appealed. In his memorandum of appeal, the appellant has raised the following grounds:

1. The learned magistrate erred in law in failing to grasp two crucial issues of the boundary between the appellant's and the

respondent's parcels of land and, on whose parcel the tree in question stood.

2. The learned magistrate erred in law in failing to find that the burden of proof was not discharged by the respondent.
3. The learned magistrate erred in law in and in fact in concluding that the respondent's title deed proved ownership of the land where the tree stood.
4. The learned magistrate erred in law and in fact in finding for the respondent whereas the boundary dispute between the appellant and the respondent had not been conclusively determined by the district surveyor, and in any event, this issue was pending for determination before the High Court.
5. The learned magistrate erred in law in awarding the respondent more than what she prayed for in her plaint.
6. The learned magistrate erred in law in and in fact in failing to adequately and critically analyse the evidence tendered before her and thereby arrived at the wrong conclusion.

At the hearing, Sam Mwai Garhundu (PW1), a valuer, testified first.

He testified that he was instructed by the respondent to carry out a valuation of a felled tree. It was also his evidence that the tree, was of a blue gum type and that it grew on the respondent's parcel of land. He valued the tree at Kshs. 86,500/=. He produced a valuation report which was admitted by the court as part of the evidence in support of the respondent's case. In cross examination, he testified that the tree was on the boundary between the appellant's and the respondent's parcels of land though it was more on the respondent's side.

The respondent herself testified that she owned land parcel Title No. Kabaru/Mathina/244; she produced a copy of the title deed in proof of the fact of ownership. It was also her evidence that her parcel of land shared a common boundary with Parcels Nos. 245 and 246 and that the beacons demarcating them were erected way back in 1982. These beacons were, however, removed as a result of which there has been a longstanding boundary dispute between herself and the previous owners of land parcel Title No. Kabaru/Mathina/246. At some point in time, the dispute was, somehow, resolved and the owners of these adjacent parcels of land were asked to plant trees along their common boundary. It is at this time that she planted the tree in issue. Trouble re-emerged in 2004 when the appellant purchased Title No. Kabaru/Mathina/246 from its previous owner.

It was also the respondent's evidence that in 2007, a government surveyor established that the tree was on her land. She produced a report which, according to her, was the surveyor's report on his findings. She intimated, however, that the boundary dispute was in court in a case which is recorded in the proceedings as "No. 86/200". She also reported the matter at Kiganjo police station but she was told to settle it out with the appellant whom she learned later that he was a senior officer in the National Police Service. Later, the appellant called her and told her that she could take the tree. She urged the court to order the appellant to pay damages equivalent to the value of the tree.

Albert Ngure (PW3) testified that he was the respondent's land's caretaker. Like the respondent, he testified there were beacons between the appellant's and the respondent's parcels of land but that they were removed. He testified that the tree was on the respondent's side of her land and that problems arose when the appellant cut it.

On his part, the appellant testified that he was a civil servant and as at the time he testified, he was working as the deputy of the Officer Commanding Police Division in Teso District. In 2007 he purchased Title No. Kabaru/Mathina/246 from one John Gachau Muiruri. At the time he purchased the land there was a barbed wire fence separating his parcel from the respondent's parcel of land. However, there was a part that had not been fenced. He fenced this particular part because he wanted to cultivate his land. He was, however, warned by John Gachau that there was a boundary dispute between him and the respondent over the adjacent parcels of land.

Although the district land registrar and a surveyor visited the land to resolve the dispute, it was never resolved. He agreed that there were several trees on the boundary and among them was the tree that he cut down on 27 March 2012. This tree, according to him, was on his parcel of land. As soon as he cut down the tree, Ngure (PW3), came and told him that the tree belonged to the respondent. He called the respondent to confirm whether the tree was hers and indeed she confirmed that it was her tree. He asked the respondent to take the tree. He also informed her to make a report to the police station since he understood that whatever he had done was tantamount to a criminal offence. In cross-examination he admitted that he not only cut the tree but also that he had burned its stump.

The appellant's wife Grace Wahome (DW2) testified that at the time her husband purchased the land there were trees but that they were informed that there existed a boundary dispute between the owner of the land they were buying and the respondent. Despite having been alerted of this dispute, they went ahead and erected a fence and, in the process, also fence off the tree that the respondent claimed to be hers.

Gitau Munyu Gachau (PW3) testified that the appellant's land initially belonged to his father before it was sold to the appellant. He was aware of the longstanding boundary dispute between his father and the respondent. He testified that his father never planted a single tree on the boundary separating the two parcels of land. It was his evidence that it was the respondent who planted the trees. However, he testified that the tree in issue was on their side of the land.

The evidence on record strongly suggests that the dispute between the appellant and the respondent had more to do with the boundary between their respective parcel of land than with the cut tree. My appreciation of the felled tree and for which the respondent claimed damages was collateral or secondary to what is obviously a longstanding boundary dispute between the respondent and successive owners of a neighbouring land. It would have been easier to determine on whose land the tree in question stood if the boundary dispute had been resolved; however, there is every indication that at the time the tree was felled and even at the time of the trial, this dispute was still outstanding.

Although the respondent testified that a government surveyor had established the boundary and even made a report to that effect, what was produced as the surveyor's report was actually the proceedings before the District Land Registrar of Nyeri in Boundary Dispute Case No. 54 of 2004 between the appellant and the respondent; according to those proceedings, the boundary dispute was heard before the land registrar on 27 June 2007 and he delivered his judgment on 28 August 2007. As far as the boundary issue was concerned, the land registrar ruled, inter alia, as follows:

***“...this issue cannot be conclusively determined unless the whole parcel of Mama Grace from the water point to the disputed site is measured. When this is done, then I shall determine where the boundary should be.*”**

“I am asking the concerned parties to make arrangements a fresh (sic) for the Registrar and the surveyor to revisit the site and establish the boundary after making the measurements from the water point.”

No evidence was produced to show that the registrar and the surveyor ever went back to site to establish the boundary as was envisaged in the judgment.

What followed appears to have been suit that was pending in court over the boundary issue. Both parties were in agreement that there was such a suit. Though it was not that clear the proceedings, the respondent's counsel was clearer in the submissions filed on behalf of the respondent in the magistrates' court that the suit in question was Nyeri High Court Civil Case No. 166 of 2012. The respondent's submitted as follows with respect to this suit:

***“It is not disputed that the defendant is the one who cut the tree under dispute in this case. It is also not disputed that the plaintiff is the registered owner of land parcel No. Kabarú/Mathina/244 and the defendant is a purchaser of Kabarú/Mathina/246.*”**

It is also not disputed that parties have a long standing boundary dispute concerning both and parcels as they are adjacent and there is a court case to determine the boundary filed in Nyeri High Court Civil Case No.166/12.”

If there was a dispute in court to determine the boundary between the appellant's and the respondent's respective land parcels, it is only the determination of that case that would eventually tell where the tree in question would lie. As matter of fact, considering the issue the ownership of the tree in question is intertwined with the boundary dispute, the determination of the boundary dispute in High Court Civil Case No. 166 of 2012 would automatically resolve the question on whose land the tree was. This means that the question of ownership of the tree and whether the respondent was entitled to damages as a result of its destruction by the appellant would have been properly addressed in the existing suit in this Court. It is not clear who between the parties filed that suit; however, irrespective of whom, between them filed it, there is nothing that could have stopped the respondent from canvassing her claim in that suit either as the plaintiff or a defendant; in the latter case, she would have been entitled to raise a counterclaim.

The danger of filing a separate suit out of which this appeal arose is easy to see; if this Court was to come to the conclusion that the land on which the tree stood was the appellant's that decision will be in direct conflict with the decision reached by the learned magistrate which, effectively held that the parcel was the respondent's.

And if, for whatever reason, any other suit was necessary, a determination on the boundary dispute was crucial before a decision could be made on which side of the disputed boundary the tree lay.

That said, it is apparent that the respondent was seeking for special damages, at least to the extent that the damages were quantified to the last coin. It is trite that special damages must not only be pleaded but they must be proved as well. And when they are pleaded, they must be particularised.

Order 2 rule 10 of the **Civil Procedure Rules** appears to refer to such claims that must be specifically pleaded or particularised; it says: -

10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—

(a)...

(b)...

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.

In **Provincial Insurance Co East Africa Ltd versus Nandwa 1995-1998 2EA 288 at page 291** the Court of Appeal expressed the need to plead specifically a claim that is ascertainable and quantifiable and stated thus: -

“It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”

All that the respondent said in her plaint with respect to these damages was this:

“11. The plaintiff avers that the defendant has refused to wait for the resurvey of the boundary to be completed and on 27/3/12 he cut down the plaintiffble (sic) gum tree which the plaintiff planted in 1983 and has taken care of and which was adding aesthetic beauty to her land and she has suffered loss and damage and she claims Kshs. 80,000 as cost of the tree.”

This is certainly not enough. A pleading for special damages must not only be specific but the particulars must also be given as well. This was not done in the respondent's case.

The proof of the damages also fell short of the threshold. The valuation report that was produced as supporting the respondent's claim showed that the valuer visited the site to inspect the tree on 29 August 2012; he finally made his report on 3 September 2012. Yet according to court stamp on the respondent's plaint, the suit was filed on 20 April 2012, four months before the valuation was conducted and a valuation report made. The question whose answer I could not find on record is what was the basis of the respondent's claim if she did not have the evidence to support it when she filed her suit?

But even if it was to be assumed that the amount claimed was justified, there is a clear contrast between the amount claimed and the valuation figure; the valuation report spoke of Kshs. 86,500/= as the value of the tree while the amount which the respondent sought as damages was Kshs. 80,000/=. The court ended up awarding the respondent the sum of Kshs. 86,500/= yet this figure was not pleaded. I need not reiterate that special damages must first be pleaded and then proved. Here the learned magistrate awarded special damages that were not pleaded and whose proof was suspect, in any case.

I am therefore inclined to agree with the appellant that his appeal is merited; it is hereby allowed. However, I make no orders as to costs.

Signed, dated and delivered on 22 January 2021

Ngaah Jairus

JUDGE