Amayi v Kuya (Environment & Land Case E045 of 2021)
[2023] KEELC 18836 (KLR) (19 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18836 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE E045 OF 2021

FO NYAGAKA, J

JULY 19, 2023

BETWEEN

DR. FRANCIS KISSINGER AMAYI ..... PLAINTIFF

AND

JAMES KUYA ..... DEFENDANT

JUDGMENT

1. The Plaintiff filed a sui generis suit before this court. By Plaint dated September 3, 2021 and filed on September 6, 2021, he prayed for the following reliefs against the Defendant:

    a. An order compelling the Defendant to remove the eucalyptus trees situated on common boundary adjacent to the Plaintiff's portion in a way to avoid regeneration.

    b. An order directing the Defendant to renovate defects caused by the trees on roofs and walls of the Plaintiff's houses to as good condition as it was before the damage caused by the eucalyptus trees.

    c. General and special damages of Kshs 7,000.00.

    d. The cost of this suit.

    e. Interest on (d) and (e) above.

    f. Any other relief which this Honorable Court may deem just and fit to grant.

2. The Defendant entered appearance on September 15, 2021. He filed his statement of Defence dated September 25, 2021 on September 30, 2021. He denied the claim in its entirety stating without prejudice as follows:

    i. He had planted his own trees on his own land for over twenty (20) years;

ii. The trees were not adjacent to the Plaintiff's land;

iii. If the Plaintiff had put up houses close to the Defendant's trees, then he was the author of his own misfortune;

iv. His trees had never shed leaves escaping to the Plaintiff's land or houses;

v. He had never planted eucalyptus trees to the common boundary;

vi. The Plaintiff's houses (if any) had never been affected in anyway;

vii. Consequently there was no probable cause of action as suit was frivolous, vexatious and an abuse of the process of the court.

The Plaintiff's Case

3. The Plaintiff testified as PW1. He adopted his statement dated September 3, 2021 as his evidence in chief. He stated in it that the Defendant was his neighbor. The evidence in the statement is here below restated.

4. He instituted the present suit as the beneficial proprietor of, by virtue of having purchased, all that parcel of land namely Kiminini/Matunda Block 7/Masaba 698 measuring approximately 0.0305 hectares. He stated in his oral testimony that on January 16, 2019 he was issued with a title deed which he produced and marked P. Exhibit 1, having bought the land from the Defendant's brother, one David Kuya.

5. PW1 testified further that the parcel of land shares a common boundary with the Defendant's. It was his case that he erected six (6) permanent rental houses in late 2018 for commercial use after obtaining the necessary approvals. During the process, the Plaintiff had been advised to approach the Defendant to remove the trees before construction.

6. PW1 informed the court that he did not live on the suit land. He added that the Defendant had placed a caution on the land that he resided on.

7. PW1 lamented that he had suffered damage because the Defendant's eucalyptus trees had pointed their leaves, twigs and branches to the Plaintiff's land thereby occasioning negligence, nuisance and trespass to his parcel of land.

8. The Plaintiff accused the Defendant of knowingly planting trees that would cause damage to his property thereby violating the Kenya Forest Guidelines 2009. That the Defendant had failed to take reasonable spacing measures such that the eucalyptus trees planted therein littered not into the Plaintiff's compound and roof, and causing corrosion on his iron sheet roof. That the eucalyptus trees had since blocked sunlight causing lower temperatures to the Plaintiff's compound and affecting his production yield. That the leaves, hanging on the Plaintiff's electricity power line, risked damage to the tenants and the property. That whilst the leaves littered into his parcel of land, the roots had penetrated into his compound. Finally, he particularized that the Defendant failed to prune or shape the trees for approximately over ten (10) years and as such the branches could fall into the Defendant's compound and cause damage.

9. For the above reasons, the Plaintiff decried that he suffered loss and incurred expenses in the building since no tenants occupied the suit premises, the corrosion of his iron sheet roof, the rotting of the permanent walls and destruction of his fence.

10. He particularized special damages in terms of the fuel costs towards reporting the matter to the Ministry of Water, Environment and Natural Resources Kitale Branch at Kshs 5,000.00 and the costs of taking photographs capped at Kshs 2,000.00. He produced and marked P. Exhibit 3 (a) - (j) a bundle of photographs of his parcel of land, said to be taken on September 3, 2021 by the Plaintiff and his learned Counsel.

11. The Plaintiff claimed that he sought several interventions to resolve the matter since 2019 but such efforts were an exercise in futility. That an inspection was conduct on September 20, 2019 which findings were captured in a report dated March 4, 2020. During this exercise, the Plaintiff's other neighbours, had planted trees in their parcels of land which were ultimately removed in 2022. However, a perusal of the report did not evince the fact that Plaintiff's other neighbours had trees creating nuisance to his parcel of land.

12. The Plaintiff stated in evidence that he was not aware that as by the law he was supposed to leave a three (3) meter space between a structure and the adjacent land. In light of the above, he urged this court to grant the reliefs sought.

The Defendant's Case

13. The Defendant testifying as DW1 first of all adopted his testimony which was in the written witness statement dated November 9, 2021. In the statement, together with his oral testimony, DW1 stated that he farmed several crops and trees, including his twenty (20) year old eucalyptus trees, on his parcel of land namely Kiminini/Matunda Block 7/732 whose title deed he produced and marked as D.Exhibit 1. He denied that he had planted eucalyptus onto or adjacent to the Plaintiff's parcel of land. He stated that the Plaintiff moved onto his land in 2018.

14. DW1 testified that trees complained of had been planted ten (10) metres away from the common boundary. That if the Plaintiff complained that the trees shed leaves which escaped to his compound, then he was the author of his own misfortune since he constructed houses very close to the common boundary without a proper building plan.

15. DW1 denied that the Plaintiff consulted him before construction. He testified that he could not be compelled to cut down trees when the Plaintiff failed to establish the negative impacts the tress had on his land. He further denied that his trees were inspected and found to cause havoc to the Plaintiff.

16. The Defendant accused the Plaintiff of instigating the suit actuated by malice for several reasons. He gave that as, firstly, the Defendant refused to sell his trees to the Plaintiff. Secondly, the Defendant had refused to provide the Plaintiff with an easterly or permission to use his parcel of land to cement his (Plaintiff's) house. Thirdly, he had raised an objection as to the sale of plot No. 323 by his brother David Kuya to the Plaintiff since it was unlawful but the brother nevertheless sold it. Finally, the Plaintiff was unbothered as to determine the boundary of the suit land and that of the Defendant's parcel of land.

17. DW1 denied that the photographs produced by the Plaintiff showed his eucalyptus trees. His evidence was that he could not recognize the area where they were taken for that matter. For the reasons stated and testified in his defence at trial, the Defendant urged this court to dismiss the Plaintiff's suit with costs as it had no basis in fact or in law.

Submissions

18. At the close of hearing, parties filed and exchanged respective rival written submissions. The Plaintiff's submissions dated May 9, 2023 and filed on May 11, 2023 urged that since the parties were neighbours and that the Defendant had planted eucalyptus trees that fell on the common boundary and trespassed

on the Plaintiff's property, he was liable to the Plaintiff. Citing Section 108 (1), 108 (4) (a), (b), (c) and (d) of the *Environmental Management And Co-Ordination Act*, Article 42 and 47 of the *Constitution*, the Kenya Forest Guidelines 2009, the restoration order of March 4, 2020 and the rule in *Rylands vs. Fletcher*, the Plaintiff urged this court to allow the suit.

19. The Defendant on the other hand filed his submissions dated April 3, 2023 on April 18, 2023. He urged that the restoration order of March 4, 2020 was not produced in evidence and could not be relied upon to obtain orders. He denied that his eucalyptus trees interfered with the Plaintiff's suit land. Furthermore, no report was produced and relied upon in support of the Plaintiff's claims. He further submitted that the photographs produced in court offended Section 106B of the *Evidence Act* and thus could not be relied upon. He opined that the Plaintiff ought to have raised his complaint to NEMA, the body vested with jurisdiction to determine the dispute pursuant to Section 108 and 109 of the *Environmental Management and Coordination Act, 1999*. That the trees were in any event planted way before the Plaintiff constructed his houses. The Defendant submitted that the Plaintiff had not established his case on a balance of probabilities. He asked this court to dismiss the same with costs.

Analysis and Disposition

20. I have carefully considered the pleadings, scrutinized the evidence and considered the law applicable. I have also analyzed the parties' submissions and compared them with the pleadings, evidence and the law.

21. The Plaintiff's claim is anchored on the rule in *Rylands vs Fletcher* [1861-73] All ER, 1. It places strict liability on the proprietor of a parcel of land for liability on account of damage caused by substance on his land onto his neighbour's land. The rule was incorporated from that *locus classicus* case of *Rylands vs. Fletcher* (*supra*).

22. The brief facts of the case were that the Defendant hired contractors to erect a reservoir on his land. During the course of construction, the contractors discovered a series of old coal shafts and passages under the land filled loosely with soil and debris, joining up with the Plaintiff's adjoining mine. The contractor left them instead of blocking them. Resultantly, the Defendant's reservoir burst and flooded the Plaintiff's mine causing damage. The court held:

> "We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his own peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the Plaintiff's own default, or, perhaps that the escape was a consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief would have accrued, and it seems just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences."

> "If it does escape and cause damage, he is responsible, however careful he may have taken to prevent the damage. In considering whether a defendant is liable to a Plaintiff for the damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."

23. It was not disputed that the Plaintiff and Defendant were adjacent neighbours, residing within Matunda locality in Kiminini Constituency. The Plaintiff accuses the Defendant of planting eucalyptus trees that had a conglomerate effect of causing him harm. He stated that in 2018, he erected six (6) permanent rental houses over his parcel of land. As construction continued, the Plaintiff was advised to approach the Defendant urging him to remove some eucalyptus trees planted on their common boundary.

24. Whether or not the Defendant was approached, which fact was denied by the Defendant, it is apparent that the trees were never removed. It is for this reason that the Plaintiff purported to have suffered damage because the Defendant's eucalyptus trees had pointed their leaves, twigs and branches to the Plaintiff's land thereby occasioning negligence, nuisance and trespass to his parcel of land. He particularized damage as follows:

    a. Failing take reasonable spacing measures such that the eucalyptus trees planted therein littered not into the Plaintiff's compound and roof;

    b. Causing corrosion on his iron sheet roof;

    c. Occasioning lower temperatures into the Plaintiff's compound since the eucalyptus trees had since blocked sunlight. As a results, this affected his production yield;

    d. Contingent damage to the electrical power lines as a result of the hanging leaves;

    e. Root penetration;

    f. Failing to prune or shape the trees for over ten (10) years such that the branches could fall into the Defendant's compound and cause damage.

25. For the above reasons, the Plaintiff complained that he suffered loss and incurred expenses in his building since no tenants occupied the suit premises, there was corrosion of his iron sheet roof, rotting of the permanent walls and destruction of his fence. He accused the Defendant of violating Article 42 and 47 of the *Constitution*, Section 108 (1), 108 (4) (a), (b), (c) and (d) of the *Environmental Management and Coordination Act* and the Kenya Forest Guidelines 2009.

26. The Defendant put up a spirited fight. His testimony was that upon acquisition of his property over twenty (20) years ago, he planted eucalyptus trees during which the Plaintiff was not in occupation and/or possession until 2018. The Plaintiff did not oppose or challenge this evidence. It is my considered view thus that indeed the Defendant had planted the said eucalyptus trees way before the Plaintiff became his neighbour. As such, during construction of his permanent structures, he was well aware of the existence and location of the trees.

27. Be that as it may, it was the Defendant's further evidence that the trees complained of had been planted ten (10) metres away from the common boundary. In his cross examination, the Plaintiff testified that he was not aware that he was supposed to leave space of about three (3) meters between his construction and the common boundary. He admitted in cross-examination that his house wall was the one that formed the fence with the neighbour's land and that one could not plater it without being on the Defendant's land. It means that the house was too close to the boundary as to not afford any working space. It also means that it was built too close to the fence as to be close to the Defendant's trees

which were already growing by the time it was built. I, thus, agree with the Defendant and hold that the Plaintiff was the author of his own misfortune when he elected to set up the structures in close proximity to the boundary, if at all that was the truth of the matter.

28. The Plaintiff attempted to rely on a report dated March 4, 2020, marked as PMFI 2, emanating from an inspection conducted on September 20, 2019 to contrive that the Defendant had failed to heed to the call of removing his trees yet other neighbours had complied. The report was never adduced in evidence. Thus, any evidence that was adduced orally thereon did not amount to any proof thereof. As was stated in *Lwangu v Ndote* (Environment & Land Case 79 of 2010) [2021] KEELC 2 (KLR) (10 November 2021) (Ruling). In it this Court stated:

> "It is worth explaining here the four stages of the production of secondary evidence (for example the photocopy in this case). Before a document is produced to show its contents, its existence or state/physical appearance (whichever is relevant to the proceedings before the court), it passes through three stages if it is the original or four if it is the secondary thereof that is available. (i) First, the document is filed in court (according to the rules or legal requirements. In civil cases, refer to order 3 rule 2 and order 11 of the Civil Procedure Rules and rule 28 of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (herein referred to as the "Mutunga Rules"). Worth noting here is that if the party has not complied with the rules of filing the documents, he has to seek leave of the court to be permitted to file them out of time. The court has to be satisfied on the reasons why the party failed to comply with the rules In Mansukhalal Jesang Maru v Frank Wafula [2021] EKLR, this court held as follows "Essentially, I am saying here that the bar at which the court gets convinced that there is need of filing and relying on an additional document or witness statement should be very high, higher than the fifty-fifty chance. This is because by the time the parties are having the pre-trial conference, they shall have weighed their case and become satisfied that all is ready for the ship of trial to unhook from the anchor and sail. "This means that it is not a walk in the park for a party who fails to comply with the timelines set by law or an order of the Court. Even Article 159(2) (d) that parties often rely on does not come to the aid of all parties in all situations. Each case has to be treated on its own merits. Even so, the bar for convincing the court to exercise its discretion to permit documents to be filed out of time is higher than the usual standard. (ii) Second, if the document is not the original, that is to say, it is secondary evidence, the party has to show the copy to the other parties and the court first. Then he will proceed to lay the basis for the production of the copy and not the original. This has to fall within the usual standard of satisfaction of the requirements of reliance on secondary evidence. (iii) Third, one the Court is satisfied that the party has laid a proper basis for producing secondary evidence of the document, it then permits the party to lay further basis for production of the document. This has to be in according with the rules of relevance and admissibility in the law of evidence. (iv) Once, the above is complete, then the party has to prove the contents, state or physical appearance of the document."

29. For this reason, the contents of PMFI2 contents were merely inadmissible in evidence and any oral explanations thereof hearsay which was inadmissible because the information captured did not belong to the Plaintiff who was the sole witness to his case.

30. Looking at the claim for damage, in my humble view, the Plaintiff failed to firstly demonstrate that damage had, by real or apparent observation, occurred. He only produced photographs of leaves strewn all over the ground and on roofs. For the most part, the Plaintiff was apprehensive that the trees

were likely to cause damage as particularized. Secondly, the alleged occurrences of damage was not established. For instance, the Plaintiff failed to establish that indeed he lost income on account of the fact that tenants refused to occupy the premises by virtue of the existence of the trees. He also failed to furnish evidence demonstrating corrosion of his iron roofs, rotting of the permanent walls and destruction of his fence. I am thus persuaded by the Defendant's exposition to conclude that the Plaintiff failed to establish the negative impacts the tress had on his land. Even if he could have proved damage, I have found above that the Plaintiff intentionally built his houses close to the trees in another's compound.

31. And even if the houses were far but damaged, the Plaintiff needed to adduce evidence that he had sought expert advise on the impact of the neighbour's trees, known what it was before beginning to build his houses, and put in measures to mitigate on the loses given that it was clear from the evidence on record that his actions of erecting the building allegedly destroyed or threatened with destruction was preceded by the existence of the trees. The alteration of the environment by way of human activity of development should first be preceded with an environmental impact assessment being carried out first and then commencing with the exercise. It is not vice versa. In this era of climate change, the protection of the environment should be given priority and any variation thereof should be preceded with scientific proof that pros of the intended change outweighs the cons thereof.

32. Suffice to add that the Plaintiff failed to establish how the provisions set out in Article 42 and 47 of the *Constitution*, Section 108 (1), 108 (4) (a), (b), (c) and (d) of the *Environmental Management and Coordination Act* and the Kenya Forest Guidelines 2009 were violated by virtue of the existence of the said eucalyptus trees.

33. The Defendant denied that the photographs produced by the Plaintiff captured a true representation of the facts on the ground. Withal, the photographs breached the provisions of Section 106B of the *Evidence Act*. It provides that photographic evidence is admissible as documentary evidence as generated from a computer device. However, certain parameters must be established for its admissibility into evidence. In particular, Section 106B (4) of the *Act* provides as follows:

> " In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following -
>
> (a) identifying the electronic record containing the Statement and describing the manner in which it was produced
>
> (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
>
> (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
>
> (d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it."

34. The absence of compliance in terms of furnishing a certificate, as contemplated above herein, placed the Plaintiff in breach of the mandatory provision set out above herein. For that reason, he could not purport to rely on the photographs as forming part of his evidence.

35. The Defendant accused the Plaintiff of instigating the suit actuated by malice for several reasons, being, firstly, the Defendant refused to sell his trees to the Plaintiff, secondly, the Defendant had refused to provide the Plaintiff with an easterly to cement his house, thirdly, he had raised an objection as to the sale of plot No. 323 by his brother David Kuya to the Plaintiff since it was unlawful, and finally, the Plaintiff was unbothered as to determine the boundary of the suit land and that of the Defendant's parcel of land. This evidence was not controverted. I am satisfied to hold and I find that on a preponderance of the evidence adduced, that was the case since the Plaintiff's case has no basis in fact or law.

36. For the above reasons, I find that the Plaintiff has failed to establish his case on a balance of probabilities. Consequently, his claim is hereby dismissed with costs to the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC EMAIL THIS 19TH DAY OF JULY 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE