



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 580 OF 2011

MULTYTOUCH INTERNATIONAL.....PLAINTIFF

VERSUS

PROVINCIAL FOREST OFFICER, NAIROBI.....1ST DEFENDANT

CABINET SECRETARY MINISTRY OF ENVIRONMENT

WATER & NATURAL RESOURCES.....2ND DEFENDANT

KENYA FORESTRY SERVICE.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

JUDGMENT

1. By way of the Amended Plaint dated 13th March 2017, the Plaintiff **MULTITOUCH INTERNATIONAL** seeks the following Orders:-

“a. Kshs.45,071,250

b. Interest thereon at court rates

c. Cost of suit

d. Any other just and equitable relief this Honourable Court may deem fit to grant.”

2. The Defendants are **PROVINCIAL FOREST OFFICER, NAIROBI** (the 1st Defendant), **CABINET SECRETARY MINISTRY OF ENVIRONMENT WATER & NATURAL RESOURCES** (the 2nd Defendant), **DIRECTOR OF FORESTRY SERVICE** (the 3rd Defendant), **KENYA FORESTRY SERVICE** (the 4th Defendant), and **THE ATTORNEY GENERAL** (the 5th Defendant). The Defendants all opposed the suit through the Defence dated 9th May 2012.

3. The matter proceeded for hearing before this court on 29th November 2018. The Plaintiff called three (3) witnesses in support of their case whilst the Defendants called one (1) witness.

BACKGROUND

4. PW1 CHRISTINE WANGARI GACHEGE was the Plaintiffs first witness. She is the Executive officer of **Multy touch International** (the Plaintiff herein), a non-governmental organization which primarily advocates for pragmatic ecological conservation particularly through high value tree planting with a focus on water catchments, reclamation of viable semi-arid land with the object of mitigating deforestation.

5. PW1 relied entirely on her witness statement dated 13th March 2017. Her evidence was that sometime in **August 2006** the Plaintiff organization applied to be allocated a one (1) acre plot at Karura Forest in order to establish a tree nursery. The application was approved and from then until the year **2011** the Plaintiff undertook a successful tree seedlings propagation exercise by planting, distributing, selling

and donating tree seedlings to various schools, institutions and to the City Council of Nairobi (as it then was).

6. However, sometime in **January 2011** while **PW1** was away in the United Kingdom she received a call from her **supervisor** informing her that on **1st January 2011** the Defendants in total breach of their agreement and without notice and/or any justifiable cause blocked the Plaintiffs employees from entering or accessing the nursery to water or tend to their seedlings. **PW1** claims that as a result of this action of the Defendant 600,000 seedlings dried up causing the Plaintiff to suffer losses in the amount of **Kshs.45,071,250/=**. Despite demand and intention to sue being issued the Defendants failed to respond. The Plaintiff then filed the present suit.

7. **PW2 DOUGLAS MWAURA MATIRO** also sought to rely entirely on his written witness statement dated **23rd November 2018**. **PW2** told the court that he is a resident of Kiambu County and carries on business of planting tree nurseries at Karura forest. He stated that sometime in the year **2006** he met **PW1** who expressed her desire to purchase tree seedlings. At the time **PW2** had about **5000** assorted tree seedlings which he offered to sell to **PW1**. Since the Plaintiff required a big order of seedlings **PW2** also mobilized other traders to get as many tree seedlings as possible.

8. Later **PW1** informed **PW2** of her desire to establish a tree nursery in Nairobi. **PW2** introduced her to a **Mr Kivai** who was then the Provincial Forest Officer at Karura Forest. He later learnt that the Plaintiff had been allocated a one are plot next to **ICRAF** where she operated her tree nurseries for the next four (4) years.

9. **PW3 PAUL NJUGUNA** told the Court that he used to operate a tree nursery in Limuru. He too sought to rely entirely upon his written statement dated **29th November 2018**. **PW3** told the court that he has worked for the Plaintiff organization since the year **2004** as a supervisor engaging in tree planting activities in Nakuru Town, Bahati and Ndudori Forest Stations.

10. In **September 2006** **PW3** states that he helped the Plaintiff move about **500,000** assorted seedlings from Nakuru County to Karura Forest in Nairobi. He was subsequently made the supervisor of the Plaintiff's Karura Forest site where he helped raise over **600,000** assorted seedlings. He states that the organization had 10 permanent workers but would also hire casual workers as and when the need arose.

11. **PW3** testified that they operated peacefully at the Karura Forest site until **1st January 2011** when they were chased out of the forest by Forest Rangers employed by the 3rd Defendant and were warned never to return there. **PW3** phoned his boss **PW1** who was at the time in the United Kingdom to inform her of the turn of events.

12. The sole defence witness was **DW1 JOHN ORWA** a Forest Manager who was at the material time in charge of **Karura Forest Station**. **DW1** relied entirely on his written statement dated **26th November 2018**. His evidence was that sometime in **August 2006** the Plaintiff applied and was allocated on temporary basis a once acre plot within Karura Forest. According to **DW1** the agreement was that the plot was to be used by the Plaintiff to store tree seedlings as the organization needed to store the seedlings it was transporting from Nakuru for eventual sale to the Nairobi City Council. **DW1** explains that the standard procedures for allocation of Government land were not followed in this case, as the allocation was only on **temporary basis** for purpose of storing seedlings. He emphasizes that it was an implied term of their agreement that the Plaintiff would not raise more tree seedlings on the one acre plot.

13. **DW1** went on to make several allegations against the Plaintiff e.g that its workers were not being paid and so resorted to theft and cutting wood and hunting wildlife inside the forest, that some of the Plaintiffs employees had no National Identity cards implying that they were underage, that Plaintiff's employees were in conflict with visitors coming to the Karura Forest. **DW1** further states that although the Plaintiff had been told not to erect any structure within the Forest, they proceeded to put up a container and to dig a borehole at the site without the permission and/or authority of the **Kenya Forest Service**.

16. As a result of all these undesirable activities within the forest **DW1** directed the Plaintiffs employees who were residing in a container inside the Forest to leave.

16. **DW1** states that by a letter dated **25th October 2006**, the Plaintiff sought permission to put up perimeter fence around her allocated plot to keep away wild animals. This request was declined. On **29th November 2006** at a meeting held to deliberate on the Plaintiffs request it was agreed that the Plaintiff either formalize its arrangement with the Kenya Forest Service or vacate the site altogether.

16. On **1st March 2017** the Plaintiff was advised to vacate the site in Karura Forest. By a letter dated **27th March 2007** the Plaintiff appealed to the Chief Conservator of Forests. The appeal was rejected and the Plaintiff was ordered to vacate the site by **8th June 2007**. Due to the failure of the Plaintiff to vacate the site as directed the **Kenya Forest Service** moved in and removed their container. **DW1** stated that at no time did the **Kenya Forest Service** offer or agree to purchase tree seedlings from the Plaintiff.

17. At the close of the hearing both parties were invited to file their written submissions. Both parties duly filed their written submissions.

ANALYSIS AND DETERMINATION

18. I have given careful consideration to the evidence on record, as well as the written submissions of both parties. In law the burden of proof rests upon the party asserting the existence of a particular fact or set of facts. **Section 107** of the **Evidence Act** provides as follows:-

Burden of Proof

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

19. The issues which arise for determination in this case are as follows:-

- i. Whether the Plaintiff was allocated use of a Plot within Karura Forest and the terms of such allocation.
- ii. Whether the Plaintiff is entitled to the reliefs being sought in this suit.

i. ALLOCATION

20. The Plaintiffs case is that the 4th Defendant granted to the organization use of a one acre plot within Karura Forest. The letter which is 4th August 2006 and is annexed at Page 36 of the Plaintiff's bundle of documents filed on 10th November 2018 and was signed by **Mr H.N. Kivai the Provincial Forest Officer**, reads as follows:-

“RE: ALLOCATION OF A PLOT FOR TREE NURSERY ESTABLISHMENT

“This is to inform you that your request has been accepted, hence (1) one acre plot has been allocated in beat 2 next to ICRAF temporarily.

Note you will not be allowed to put up some structures and no fencing of trees of whatever nature.”

21. The process of allocation of forest land is governed by the **Forest Act 2005, Section 37(2)** of that Act provides as follows:-

“Where the Board is satisfied that all or part of the State Forest which is a plantation forest may be efficiently managed through a license, concession, joint agreement, it may place an advertisement on two Daily Newspapers of National circulation calling for applications from interested persons for the Management of the same.”

22. **Section 46 of the Forest Act, 2005** provides as follows:-

46. (1) A member of a forest community may, together with other members or person's resident in the same area, register a community forest association under the Societies Act 2005 275 Forests No.7

(2) An association registered under sub section (1) may apply to the Director for permission to participate in the conservation and management of a state forest or local authority forest in accordance with the provisions of this Act: Provided that no application under this subsection shall be made where there is an existing prior agreement or license.

(3) The application referred to in subsection (2) shall be in the prescribed form and shall contain-

- a. a list of the members of the association and its address;
- b. the Constitution of the association;
- c. the association's financial regulations;
- d. the area of forest for which the association purposes to undertake conservation and management;
- e. the association's proposal concerning –
 - i. use of forest resources;
 - ii. methods of conservation of biodiversity
 - iii. methods of monitoring and protecting wildlife and plant populations and enforcing such protection; and
- f. such other information as the Director may require.

(4) Where there is no management plan in respect of the area, or where the association proposes that there be a No.7 276 Forests 2005 Functions of a forest association, new management plan, the application shall be accompanied by a draft management plan.

(5) The provisions of this Act regarding management plans shall apply in respect of the draft management plan submitted under subsection (4).

(6) The Director shall cause to be kept an up to record of all associations participating in the conservation or management of

forests.

23. The Plaintiff claims that she was allocated the one acre plot for purposes of running a tree nursery. **DW1** insists that the allocation which was only on **temporary basis** was to allow the Plaintiff space to store their seedlings which were being transported from Nakuru and which were destined for sale to the then City Council of Nairobi. The letter dated **4th August 2006** authored by a **Mr Kivai** Provincial Forest Officer is headed:-

RE: ALLOCATION OF A PLOT FOR TREE NURSERY ESTABLISHMENT

It is therefore clear that the plot in Karura Forest was allocated to the Plaintiff to enable them set up a tree nursery and not merely for storage purposes as alleged by **DW1**.

24. **PW1** stated that her organization at all material times complied with the terms of the license granted to them by the Defendant. However, there is no evidence that the Plaintiff complied with **Section 46** of the **Forest Act** in applying for and securing allocation of the one (1) acre plot nor did the Plaintiff produce before the court any licence to show that the said allocation accorded with the law.

25. It would appear that the Plaintiff did not make a formal application to occupy Forest land. Neither did the Plaintiff make any payment for its 4 year occupation of said plot. The letter of **7th April 2008** cannot be deemed to be a licence to occupy Forest land. A letter dated **23rd July 2008** written to the Plaintiff by one **E.N. Mugo** for the **Director, Kenya Forest Service** states as follows:-

“You are advised to apply for an occupation of forest land license in Karura Forest Station so as to comply with the new conditions within the Forest Act, 2005.”

26. The Plaintiff ignored this advice and took no steps to formalize its engagement with Karura Forest and to legitimize its occupation of Forest land.

27. Therefore in the absence of a valid licence under the **Forest Act 2005**, I find that there existed no agreement or contract between the Plaintiff and the 4th Defendant and I do so hold. It is more likely that this was merely **“local arrangement”** between the Plaintiff and the Kenya Forest Service officers she found on the ground. I therefore find and hold that this allocation of the one acre plot of land in Karura Forest to the Plaintiffs for their use did not comply with and was not sanctioned by the law.

PLAINTIFF’S CLAIM

28. The Plaintiff told the Court that on **1st January 2011** they were crudely and unceremoniously evicted from the plot in Karura Forest. **PW2** who was present at the material time testified that Kenya forest Service rangers came and removed the Plaintiff’s container and chased away all its workers.

29. On the issue of the container although the Plaintiff claims that they were permitted to set up a container in the forest for her employees to sleep in, the documentary evidence does not support this. The letter dated **4th August 2006** written to the Plaintiff states clearly:-

“...Note you will not be allowed to put up some structures and no fencing of trees of whatever nature...”[own emphasis]

It is clear therefore that the Plaintiff had no authority or permission to put up a container on the site. They did so against the advice of the 4th Defendant.

30. The Plaintiff alleges that its staff was thereafter denied access to water the seedlings leading to massive loss of tree seedlings as tabulated at **clause 10** of the Amended Plaint dated **13th March 2017**.

31. The Plaintiff is aggrieved by its eviction from the forest which it claims was done without any prior notice to themselves. They cite and rely on the case of **CALTEX OIL (KENYA) LIMITED –VS EVANSON NJIRI WANJIHIA**, where the court held as follows:-

“This in our view would therefore mean that the contract expired by effluxion of time and from 23rd July 1993, there was no binding contract between the parties which was capable of being breached. This would mean that what remained between the parties was a nebulous working relationship with no termination clause. The party wishing to end the said relationship would be required to give the other reasonable notice. Reasonable notice depends on the circumstances of each case.”

32. However the Plaintiff’s claim that they received no notice to vacate the plot is not entirely correct. The 4th Defendant wrote severally to the Plaintiff asking them to relocate from the Karura Forest site. The Court notes that the Defendant sent out letters to the Plaintiff on **1st March 2007** and **2nd May 2007** respectively informing the Plaintiff that she was expected to leave the site on or before **8th June 2007**. The letter dated **1st March 2007** to the Plaintiff, reads as follows:-

“Your conservation efforts are very much noted and appreciated. However, the official authority to carry out any activity in the forest as spelt out in the Forest Act, 2005 was not given.

You are requested to do the following:-

1. You officially apply to the Kenya Forest Service so that your request can be considered under the provisions of the forest Act, 2005.

2. The service will consider a more suitable site for your kind of activity to avoid further loss of seedlings to wild animals or theft if the authority is given.

3. You locate your seedlings from the site until the above (1) and (2) are done.

Signed

Mrs Charity Munyasya

Provincial Forest Officer, Nairobi”

33. Again on 2nd May 2007, the Defendant sends out another letter to the Plaintiff stating as follows:-

“....Our previous letter Ref.No.PFO 9/3/38 of 1st March 2007 still holds. You are expected to leave the site on or before 8th June 2007.

Please co-operate.

Mrs Charity Munyasya

Provincial Forest Officer, Nairobi”

34. Further in a letter dated 23rd July 2008 to the Plaintiff, the Defendant expressly states as follows:

“You are advised to apply for an occupation of forest land license in Karura Forest Station so as to comply with the new conditions within the Forest Act 2005.”

35. Having failed to formalize its engagement with the 3rd Defendant, and having failed to heed the letters advising them to leave the forest the Plaintiff cannot now cry foul. The Plaintiff had ample time and could have mitigated its losses if they had relocated from the Forest on or before 8th June 2007 as directed by the 3rd Defendant.

36. The primary purpose of damages is to place the injured party in the position he/she would have been in had the contract been performed. The Plaintiff is under a duty to mitigate its losses and take reasonable steps to reduce its harm. For Plaintiff to succeed in a claim where special damages are sought, the same must be specifically pleaded and strictly proved. In the case of **Consolata Anyango Ouma V South Nyanza sugar Co. Ltd (2015) eKLR, J. Majanja** observed:-

“...As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been in if the breach complained of had not occurred. This principle is encapsulated in the latin phrase restitution in *integrum* such damages are not damages at large or general damaged but are in the nature of special damages and they must be pleaded and proved...”[own emphasis]

37. In **African Highland Produce Ltd Vs John Kisono CA 264/99 [2001] eKLR**, the Court of Appeal held that:-

“It was the duty of the Plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim damages of any sum which is due to his own neglect.”[own emphasis]

38. In this case the Plaintiff was warned severally to leave the Forest but did not heed that warning. The Plaintiffs also ignored the deadline of 8th June 2007 given by the 3rd Defendants. I find that the Plaintiff failed to take reasonable steps to mitigate the eventual loss it suffered.

39. In conclusion having found that the Plaintiff did not have an official license to occupy land within Karura Forest and having found that the Plaintiff failed to act to mitigate its losses, the upshot is that the Plaintiff have failed to prove its case on a balance of probability. Accordingly, I find no merit in the present suit and the same is hereby dismissed in its entirety with costs to the 3rd Defendant.

Dated in Nairobi this 19th day of June 2020.

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Justice Maureen A. Odera