



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL APPEAL NO. 86 OF 2013**

**(Being an appeal arising from Judgment delivered by Hon. A. Alego Principal Magistrate In Eldoret CMCC No. 912 of 20910 on 7/6/2013)**

**SOLUTION TELMEC LIMITED .....APPELLANT**

**VERSUS**

**JAMES MICHUKI.....RESPONDENT**

**J U D G M E N T**

1. The Respondent at the trial court successfully sued the appellant for a sum of Kshs 714,530 as well as loss of income and the cost of the suit together with the attendant interest. The trial court found that the appellant was responsible for destruction of the Respondent's seedlings among others and it proceeded to award him the same.
2. The genesis of the matter is that the Appellant had been granted the work of laying down cables within Eldoret town and part of the exercises included digging out trenches. The said communication cables were to be laid along Elgeyo road where the Respondent carried out his tree nursery business.
3. It was therefore his evidence that when the appellant carried out the exercise and without any notice, its officers or workers destroyed the tree seedlings the value enumerated in the plaint.
4. The Respondent called both a forest officer PW1 as well as an Agricultural extension officer who produced their reports indicating the estimated costs of the destroyed property.
5. DW1 did not deny the fact that the Appellant had won the tender to lay the said cables. He produced the relevant letter from the Ministry. His contention however was that the Respondent despite being granted the necessary notice did not remove his plants and thus the Appellant's workers removed them as they dug the trench. Later, they brought them back and that perhaps because of the rains that was there then some of them were destroyed. He said that it was the Respondent fault as he did not adhere to the verbal notice like the rest of his colleagues undertaking the same exercise.
6. Aggrieved therefore by the decision of the trial court the appellant has filed this appeal citing several grounds. The court has perused the submissions by the parties as well as the attached authorities.
7. The fundamental ground which I find germane in this whole case is whether the appellant really destroyed the seedlings as claimed by the Respondent. It is not disputed that the Respondent does the business of selling the tree seedlings on a public road reserve as evidence by the production of the licences from the Municipal Council. It is also not in dispute that the Appellant had been contracted to lay down the cables.
8. If this was the case how come the Respondent's seedlings alone were damaged and not the rest of his colleagues who carried the same trade? Granted, the notice given by the Appellant was just verbal and not written. It however appears to me that the Appellant knew or must have seen the Appellant carry out the exercise.
9. In his evidence in chief, the Respondent stated as follows;

**“ On this fateful day 16/12/2003 I was at home and I had left someone at my work premises she called me at 10.00 am and told me that all was not well at the nursery I rushed to the premises. I found people wanted to dig a pipe at my premises. They told me they wanted to lay cables where my trees were. I asked them to give me time I remove my items so that I give them time. They refused to allow me remove my seedlings. They threw them all over ----- I went and reported matter to the police station and thereafter told me to go and report to the D.F.O -----.”**

When cross-examined he stated that;

**“ ----- There are other colleagues along the same road. They have started from the road ahead.”**

10. I have deliberately reproduced the above line of evidence to show that the Respondent ought to have called other independent witnesses. It was not enough to simply call the professional witnesses who came after the act and prepared their reports.
11. As it were, it was the Respondent words against those of DW1. If the Respondent had someone looking after seedlings when the Appellant's workers came why was she not called. Infact that was a primary witness at the scene. That was the witness who ought to have explained and buttress the fact that the appellant did not even want to give time for the Respondent to remove the seedlings.
12. Even more significant is the fact that the Respondent did not call his colleagues who apparently were affected by the digging of the trenches. Why did they remove their seedlings and not the Respondent. Is it that they got a better notice that the Respondent. Did the Respodnent simply defy the notice? I find that the evidence of any of the Respondent's friends would have been necessary.
13. It is admitted that the digging of the trench was to be done by hand and not machine. If this was the case one wonders how long it will take to remove his seedings viz a viz the digging of the trench.
14. Having stated so, I do not find it necessary to consider the question of damages. I do not think the Respondent met the threshold envisaged by Section 107 and 108 of the Evidence Act.

Section 108 in particular states that;

***“ The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”***

15. The burden to show that the Appellant's workers destroyed the seedlings and flowers was upon the Respondent. As found above, his colleagues whom allegedly witnessed the incident were present as well as the lady who called him from home. Further it was alleged that there was heavy rain thereafter. Perhaps then the rains also caused more damage.
16. For the above reasons I am inclined to allow this appeal for the sole reason that there was no sufficient proof that the appellant agents destroyed the seedlings. Infact there was no third party evidence to suggest or deny the fact that the seedlings were carefully returned to the same position as suggested by the appellant. Needless to say, it was incumbent on the Respondent to deny or establish this .
17. This appeal is dismissed with no orders as to costs.

**Delivered, signed and dated at Eldoret in open court on this 19<sup>th</sup> day of October, 2018.**

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**H.K. CHEMITEI**

**JUDGE**

**19/10/18**