



**Wambua v Kenya Power and Lighting Company Limited (Environment & Land Case 172 of 2016) [2023] KEELC 22403 (KLR) (13 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22403 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 172 OF 2016  
A NYUKURI, J  
DECEMBER 13, 2023**

**BETWEEN**

**ANTONY MWAU WAMBUA ..... PLAINTIFF**

**AND**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By an amended plaint dated 28<sup>th</sup> February 2020 and filed on 2<sup>nd</sup> March 2020, the Plaintiff sought from the defendant in this matter the following orders;
  - a. Special damages -Investment costs Ksh. 34,628,250
  - b. Special damages-additional costs Ksh. 1,748,100.
  - c. General damages for suffering and pained for denied use of the property.
  - d. Aggravated and exemplary damages
  - e. Other awards that the court may considers rightful.
  - f. Interests on above from the time the case was filed.
  - g. Court costs
  - h. An order that the defendant do remove the transformer, cable, and all electrical equipment and appliances passing through the Plaintiff's Ndeini farm ecosystem up and until that time both parties shall sit down, agree and sign a way leave agreement and the Defendant would have compensated the plaintiff for damages caused by fire breakout in full.



2. The plaintiff averred that he was the registered owner of land parcel known as Wamunyu/Kilembwa/273 while parcel Wamunyu/Kilembwa/253 is registered under the name of his late father Alphonse Wambua Ndivo who passed away on 13<sup>th</sup> April 1996. Further that the said parcels of land which are the suit properties herein are known as Ndeini farm which the plaintiff was using for commercial farming and forestry enterprises.
3. It was the plaintiff's case that while he was away in the United States of America, and after his father had died, the defendant through their employees and agents trespassed on and occupied the plaintiff's Ndeini farm ecosystem by erecting and installing electric power cables, poles and other appliances of three phase classification and power transformer on the suit property through route 2 without consent or wayleave agreement with the plaintiff.
4. The plaintiff further stated that before his father passed on, he had signed a leave way agreement with the defendant allowing the defendant to install electric wires phase two without a transformer through route one on parcel no. Wamunyu/ Kilembwa/84 into Wamunyu/kilembwa/253.
5. The plaintiff averred that on 18<sup>th</sup> August 2016, fire broke out on the suit properties due to an electric fault due to the defendant's gross negligence leading to an extensive fire on the suit properties leading to destruction of trees, herbs, pasture, fence and the environment. That at the material time the plaintiff had heavily invested on the suit properties by construction of terraces, sand dams, grown pasture and an array of traditional, natural and exotic trees. That he also had a dairy enterprise thereon, which activity had been on the farm for a long time before the fire broke out. It was his averment that the fire damaged 36 acres of the two suit properties.
6. The plaintiff alleged that he wrote to the defendant about the fire incident and he was asked by the defendant to fill the relevant forms whereof he sought services of various government departments including the sub county forestry office and the Ministry of Agriculture, Livestock Development and Fisheries whereof the damage on the suit properties was assessed at ksh. 31,040,380/=.
7. It was the plaintiff's case that the fire was caused by the defendant's negligence and that the defendant must be held liable for the damages. He averred that the defendants insurer accepted liability and offered settlement through a discharge voucher for ksh.368,700/- which the plaintiff disputed vide his letter of 17<sup>th</sup> November 2016.
8. The plaintiff averred that the damage on the suit property damaged the anthropogenic activities of the ecosystem on the suit properties thereby depleting organic matter, and biodiversity. He stated that his right to a safe environment under Articles 42 and 70 of *the Constitution* were violated, which he seeks to be compensated. According to the plaintiff, he obtained professional report from Planet Valuers and Properties Ltd which demonstrated that the damage on his real property was in the sum of Ksh.34,628,250/-. Further that the Mwala sub county forest office in the Ministry of forestry and Mwala office in the Ministry of Agriculture, livestock development and fisheries assessed the loss at ksh.31,040,380/-. The plaintiff also sought for special damages which he incurred for this dairy cattle for the cost of pasture in the sum of ksh.1,748,100/=.
9. The suit was opposed. On 15<sup>th</sup> December 2016, the defendant filed their statement of defence dated 13<sup>th</sup> December 2016. They denied the plaintiff's claim and stated that the plaintiff lacks locus standi to institute the suit herein in so far as the suit is founded on properties described as Wamunyu/Kilembwa/273 and Wamunyu/kilembwa/ 253. The defendant denied the allegation that the plaintiff was the registered proprietor of the suit property. They maintained that in all their installations they always comply with the law and stated that they had a wayleave agreement between themselves and the



owner of the suit properties who was not the plaintiff and that the plaintiffs had no capacity to give permission as purported.

10. The defendant denied negligence attributed to them by the plaintiff and averred that the accident was caused by the plaintiffs and or persons acting under the plaintiffs. They denied the plaintiff's claim in its entirety.
11. The defendant filed preliminary objection dated 7<sup>th</sup> February 2022. The grounds raised in the preliminary objection filed by the defendant seeking to have the suit struck out were stated as follows;
  - a. That the application and the entire suit is misconceived, incompetent and bad in law
  - b. That the plaint dated 28<sup>th</sup> February 2020 offends the mandatory provision of Order 4 Rule 1,3, and 6 of the Civil Procedure Rules, 2010.
  - c. That the application and plaint is incompetent and incapable of conveying any benefit to the plaintiff in its current form the issues raised by the applicant especially on interest is governed by the provisions of the law of contract Act and the Environment and Land Act.
  - d. That the defendant prays suit be struck out with costs.

### **Plaintiffs Evidence**

12. PW1 Antony Mwau Wambua, the plaintiff herein adopted his witness statement dated 27<sup>th</sup> October 2016 as his evidence in chief. In that statement, he stated that when he was away in the United States of America, the defendant installed a transformer and electric cables and appliances through the suit properties without his permission. It was his testimony that he was away in Nairobi when his area chief and farm manager informed him that the power from the defendant's electric installations on his land had caused a fire on the suit properties. That the fire continued up to 19<sup>th</sup> August 2016 at 4.30pm. That he asked the officers in the Ministry of forestry and livestock in Mwala area to quantify the damage for purposes of seeking compensation, whereof they visited the farm and prepared expert reports. He also informed court that the defendant sent an adjuster to the suit property and that his demand to be compensated was not responded to.
13. The plaintiff produced documents attached on his list of documents dated 2/3/2020. He produced official searches for the suit properties photographs of the defendants transformer and other electrical appliances installed on the suit property; photographs of the effects of the damage caused by fire; letters by the plaintiff; an assessment report from the ministry of Agriculture, Livestock development and fisheries, the defendant discharge voucher, an agreement for supply of pasture, a report by Planet Valuers and Properties Ltd and confirmation of grant.
14. On cross examination he stated that parcel Wamunyu/ Kilembwa/273 belonged to him while parcel Wamunyu/Kilembwa/253 belonged to his late father before successions and that after succession he was given 14.8ha from parcel Wamunyu/Kilembwa/253. He stated that he only produced searches for the two parcels and not their titles although the searches produced were done in 2014. He stated that he traded in the name of Ndeini farm. He stated that he declined the defendant's offer of Ksh.368,700/= by CIC Insurance. He stated that although the amended plaint did not have the breakdown for the damages sought of Ksh.34,628,250/=, the tabulation was in the report and also conceded that the breakdown of the sum claimed of Ksh.1,748,100/= was not in the amended plaint. He stated that the deliveries on his farm were received by his farm manager. He conceded that he did not file reply to defence.



15. PW2 Michael Murimi Gathuku testified that he was a registered valuer and a member of the institute of surveyors of Kenya. He stated that he prepared the report in 2017 in favour of the plaintiff and his report was to advise on the financial loss occasioned by the fire in the suit properties which loss was in respect of vegetation, trees, fences and pasture which was quantified in the report. He stated that the loss was valued at Ksh.34,627,450.- and produced the report by planet valuers as the plaintiff's exhibit.
16. On cross examination he stated that he did not count all the 5100 aloevera shrubs and some were estimated in respect of the area. He stated that most of what was valued had been burnt down although trees did not burn down completely as stumps were left. He stated that he relied on the owner of the land to show him where each tree and vegetation was. He stated that he established that parcel Wamunyu/Kilembwa/253 belonged to Wambua Ndivo while Wamunyu/kilembwa/273 belonged to the plaintiff. He also stated that he did not do any independent survey and only checked the registry to confirm ownership. He stated that he did not do official search. He stated further that there was no need to consult an agro-economist or any one from the forestry department.
17. PW3, Joseph Kimenye testified that he supplied pasture to the plaintiff and prepared the agreement dated 20<sup>th</sup> August 2016 at page 67 of the plaintiffs bundle. On cross examination, he stated that in the agreement delivery dates are indicated. He also stated that there were no witnesses to the agreement and that payment was done on 10<sup>th</sup> January 2017. He further stated that he did not produce documents showing deliveries and that deliveries were made to Ndeini farm. That marked the close of the plaintiff's case.

#### **Defendant's case**

18. DW1 Kigo Kariuki testified that he worked for Safety Surveyors Limited as risk manager and had worked for 32 years. He also stated that he was a loss adjuster and a registered insurance practitioner. He also informed court that he was a specialist risk manager specialized in occupational health and safety. He stated that he was the one who prepared the report by safety surveyors Ltd dated 28<sup>th</sup> October 2016 after being instructed by the Cooperative Insurance Company and having visited that suit property on 26<sup>th</sup> September 2016.
19. According to the witness the fire was caused by a disconnected high tension cable that belonged to the defendant. He stated that he appointed other experts including the land surveyor to take measurements of the land, a forester to deal with vegetation and an agricultural economist to handle matters of price. That each expert prepared their reports and those reports were attached to his final report. He produced the report as the defendants exhibit. He stated that the tabulation showed that the damage was in the sum of Ksh.368,700/-
20. As regards the report produced by PW2, which is a report by Planet Valuers, he stated that a valuer is not competent to comment on the matters in issue as his training concerns land and buildings and that a forester and agro-economists are the ones that are competent to address the matter. His position was that most of the vegetation would regrow. He disputed the allegation that there was fencing on the suit property and stated that the only fencing was only the one running parallel to the road and there was no other fencing on the land. He confirmed there was aloevera shrubs on the farm but stated that he did not know where other photographs produced by the plaintiff were taken. He also stated that the eucalyptus trees planted along river Athi had not been exposed to the fire. He insisted that he indicated where the fire began and maintained that the fire did not cross a dry river bed to destroy the other parts of the land.
21. On cross examination he stated that he had a diploma in fire engineering from the United Kingdom which is the highest qualifications in that field. He also stated that he signed the report and that he



- was registered by the Ministry of labour. He stated that he visited the plaintiff's farm thrice in the plaintiff's company. He also stated that there were two pieces of land and that the fire reached the river bed. He maintained that page 7 of the valuation report by Planet Valuers showed that the valuation was done on January 10<sup>th</sup> 2017. He stated that although he saw eucalyptus trees, they were not affected. He confirmed seeing the items on figures 2(a),b,c) figure 3,4,5,6,7 of the report by Planet Valuers.
22. DW2 Kigo Maurice testified that he was a land surveyor working with a company called Plan Land. He stated that he was contracted by safety surveyors to go to Ndeini farm and confirm the area of the scotched site. According to him upon visiting the land, he confirmed that the affected area was 30.5 acres as shown by the sketch at page 15 of the defendant's report. He stated that there were two properties separated by a dry river bed and that one area was 27 acres while another was 3½ acres. He showed the court the affected areas which he had described as sections A and B.
  23. On cross examination he testified that the burnt area touched on the river bed. He confirmed that an agent of safety surveyor visited that land and that it is the said agent who took photograph evidence.
  24. DW3, Simon M Ileri stated that he was a forester by profession and an environmental expert having worked for 32 years. He stated that he was contracted by safety surveyors to access the area that had been razed down by fire. That he went on the land and that he used a survey method. He stated that he noted that there was a fire and that it was in two portions separated by a seasonal river and that what he found was sketched on page 4 of the defendants report.
  25. According to the witness, there were various types of trees including indigenous trees like acacias, camiphola africana, capris tomentosa and other types of trees as shown at page 16 of the report. He stated that they did not find cattle on the land although there were four beehives. That there were about 30 aloevera shrubs and that the trees were about 125 of a diameter of 18 centimeters , while trees with a less than 5 centimeter diameter were 1,200/-. He stated that there is a formulae for calculation by the forest service and that the value arrived at was ksh.168,700/=.
  26. On being referred to the plaintiff's tabulation, the witness stated that he did not find any eucalyptus trees on the land and that his was an estimate. He stated that grass is valued by the ministry of livestock and that his area was on environment.
  27. On cross examination, he stated that there is an official document used to value vegetation which is called forestry produce royalties for 2016 which he used in the assessment. He stated that he did not attach the document to his report. He also stated that he visited the farm once and met the plaintiff. He stated that he was a forestry specialist and belongs to the Kenya Forestry Society of Kenya. He stated further that he has a certificate from Moi University as a qualified forest officer. He stated further that he only saw one river bed and that there was a powerline going through the two parcels of land. He stated that although there were eucalyptus trees on the land, his concern was on the burnt area. He also stated that there were trees which looked like they had been felled before the fire. He also stated that there was a fence. He stated that he was not an expert in pastures and that he never saw any burnt eucalyptus trees. He stated that he visited the land on 7<sup>th</sup> October 2018. That marked the close of the defence case.

## Submissions

28. Parties filed written submissions. On records are the plaintiff's submission dated 18<sup>th</sup> March 2022 and the defendant's submissions dated 15<sup>th</sup> January 2023. In his submissions, the plaintiff regurgitated the contents of the amended plaint and his evidence and submitted that the defendant admitted liability vide their letter dated 10<sup>th</sup> November 2016. The plaintiff further submitted that the report produced by Mr. Michael Murimi Gathuku was credible and that this evidence was not shaken on



- cross examination. He faulted the defendant's report stating that it was not a professional report but a management report meant to advise management on the fire incident.
29. The plaintiff further stated that none of the defence witnesses produced a professional certificate during cross-examination and that they were therefore incompetent and their evidence misleading. He also stated that the defendant's witness was not able to avail evidence of the rates used in his calculation. He therefore contended that he deserves compensation as sought in the sum of ksh.36,375,550/= as well as general and aggravated damages plus costs and interest.
  30. On their part, counsel for the defendant submitted that the preliminary objection dated 7<sup>th</sup> February was merited. Counsel submitted that order 4 of the Civil Procedure Rules provided that a verifying affidavit must accompany every plaint filed in court and that therefore that court should strike out the plaint counsel stated that the supporting affidavit filed by the plaintiff could not cure the defect.
  31. Counsel submitted that Article 159 of *the Constitution* would not assist the plaintiff. Counsel relied on the case of Microsoft Corporation versus Mitusimis Computer Garage Ltd (2001) KLR460 for the proposition that a plaint without a verifying affidavit would greatly prejudice the defendant and should be struck out. Counsel further submitted that the supporting affidavit was defective and that the annexures thereto were not signed, dated or marked which was contrary to Section 5 of the Oaths and Statutory Declaration Act. To buttress this point counsel referred to the case of Charles Muturi Mwangi versus Invesco Assurance Company Ltd. (2014)eKLR.
  32. Further submissions were made that the plaintiff failed to file reply to defence which implied that he admitted particulars of negligence raised against him. Counsel relied on Order 2 Rule 12 of the Civil Procedure Rules and the case of Denmus Oigore O'onye versus Njuca Consolidated Ltd (2012)eKLR for the proposition that where there is no denial by the plaintiff of the allegations in the defence then he is deemed to have admitted those allegations.
  33. On whether the plaintiff had locus to institute the suit herein counsel submitted that in cross examination, the plaintiff stated that the two suit properties namely Wamunyu/kilembwa/273 and Wamunyu/kilembwa/253 were registered in his late father's name and that therefore he needed grant of letters of administration to file suit. Reference was made to the case of Daniel Njuguna Mbugua versus Peter Kiarie Njuguna and 2 others (2021)eKLR.
  34. It was further submitted for the defendant that the plaintiff's evidence was not corroborated. Counsel submitted that the plaintiff failed to plead particulars of his claim for loss of investment and additional costs which are special damages in breach of Order 2 Rule 10 of the Civil Procedure Rules. Counsel cited the case of Capital Fish Kenya Limited versus The Kenya Power & Lighting Company Ltd (2016)eKLR for the proposition that special damages need not only be pleaded but the same ought to be proved.
  35. Counsel contended that the valuation report from Planet Valuers and Properties limited which was relied upon by the plaintiff was mere hearsay as the witness visited the site one year after the incident and relied on photographs prepared by safety surveyors Limited and that he failed to explain how he arrived at the tabulated figure. Counsel further submitted that the report by DW1 showed that the fire was caused by electric sparks from a fallen overhead 11kv feeder conductor and that the costs was ksh.368,700/=.
  36. Counsel contended that there was no evidence on record to show that the fire affected the plaintiff's entire grass and that the site visit established the uneven distribution of the mixed pasture and assorted trees and that the area was 20 acres. Counsel cited Section 109 of the *evidence Act* to argue that the plaintiff failed to prove his allegations.



37. The defendant raised a preliminary objection dated 7<sup>th</sup> February 2022 seeking to strike out the amended plaint on the ground that it was not accompanied by a verifying affidavit. Vide a ruling delivered on 22<sup>nd</sup> March 2023, the court declined to uphold the preliminary objection and granted the plaintiff leave to file and serve a verifying affidavit to the amended plaint, which he did.

### **Analysis and determination**

38. The court has carefully considered the pleadings, evidence and the parties' submissions in their entirety. Therefore, the issues that arise for determination are;

- a. Who is to be blamed for the fire that broke out on the suit properties.
- b. Whether the plaintiff is entitled to orders sought and if he should be granted compensation, then what is the quantum.

39. It is not in dispute that there was fire on the suit properties. While the plaintiff blamed the defendant, the defendant blamed the plaintiff. I have considered the report produced by the defendant's witness at page 14 of the defendant's bundle and it is clear that the adjuster who was DW1 found that the fire was caused by poor maintenance practice by the defendant where one of the wooden electric poles was leaning due to poor workmanship or as a result of being rotten which caused the electric cable to sag to the point where it had direct contact with dry plantation leading to the fire. In view of this admission, I find and hold that the fire on the suit property was caused by the negligence of the defendant in this matter who failed to maintain its electrical installations in the suit property. Therefore the defendant is 100% liable.

40. On the question of quantum, I note that the defendant raised the issue of ownership of the two parcels of land. The plaintiff produced searches for the two parcels of land that were affected by fire. While the search for parcel No. Wamunyu/ Kilembwa/273 was in the plaintiff's name, parcel No. Wamunyu/ Kilembwa/253 is registered in the name of Wambua Ndivo, a person who the plaintiff claimed was his late father. Although the plaintiff produced certificate of confirmation dated 22<sup>nd</sup> February 2010 indicating that he was entitled to 18.92 Ha. of parcel Wamunyu/ Kilembwa/253 while four other persons were entitled to the remaining 22.58 Ha, there was no evidence produced by the plaintiff to show that the exact area that was affected by the fire on the suit property was the plaintiff's share and not the share of the other heirs. In the premises, I am not persuaded that the plaintiff is entitled to be compensated in respect of parcel No. Wamunyu/Kilembwa/ 253.

41. The area for parcel No. Wamunyu/Kilembwa/273 is 10.8 Hectares or 27 acres. Both the plaintiff and the defendant produced expert reports on computation of damages for the loss suffered. The plaintiff's report done by Planet valuers, estimated the plaintiff's loss due to damage on real property at Kshs. 34, 628, 250/= while the defendant's report stated that the loss suffered was computed at Kshs. 368, 700/= . It is clear that the disparity between the two reports is wide.

42. The role of an expert witness is to assist the court with objective and impartial opinion, which duty overrides the expert's obligation to the instructing party.

43. In the case of Christopher Ndaru Kagina v Esther Mbandi Kagina & Another [2016] e KLR, the court cited with approval the decision in the case of R V Harris & Others [2005] EWCA crim. 1980, where it was held that the duty of an expert witness is to provide independent assistance to the court by way of objective and unbiased opinion in relation to matters within their expertise. That this is a duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.



44. While assessing the weight to be given to expert evidence, the court ought to be cautious and consider that evidence in the context of all other evidence given in the case and the circumstances of the case, including the possibility of such evidence being biased in favour of the instructing party or the same being objective despite the instructing party being only one of the parties. Therefore expert evidence should not trump all other evidence, it should not be considered in a vacuum but should be considered together with other evidence, the court ought to consider all evidence including expert evidence before making any findings, the quality of reasoning of the expert should be considered and where there is conflicting expert opinions, the same ought to be tested against the background of all other evidence in the case which the court accepts for the court to decide which expert opinion is to be preferred.
45. In the case of *Stephen Wangóndu v The Ark Limited* High Court Civil Appeal No. 2 of 2014, the court discussed the place of expert evidence as follows;
- Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
- Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
- Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
- Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones
46. In the instant matter, the plaintiff’s expert was one Mr. Michael Murimi Gathuku, a registered, licenced and practising valuer, his qualifications being a Bachelor of Arts in Land Economics. His assessment was for the current replacement cost of the damage occasioned by the fire on the damaged area of 9 acres on parcel wamunyu/Kilembwe/253 and 27 acres of wamunyu/kilembwe/273, making a total of 36 acres. The report shows that pasture, eucalyptus, assorted indigenous trees, aloevera shrubs and soil were damaged by the fire. This piece of evidence was demonstrated in the photographs produced by witnesses on both sides and admitted by defence witnesses, although it is the extend of the damage that is disputed by the defence. In the premises, I find and hold that the fire that razed the plaintiff’s farm did damage pasture, Eucalyptus trees, assorted indigenous trees, aloevera shrubs and soil.
47. From the Plaintiff’s report, what was damaged were 36 acres of pasture; 10, 000 eucalyptus trees at a cost of Kshs. 1, 800/= per a tree; 750 meters of fences at Kshs. 35/= per a meter; 36 acres of soil; loss of windbreak leading to accelerated soil erosion; loss of shade leading to soil evaporation; loss of micro flora and fauna hence broken ecosystem balance; 5200 assorted indigenous trees valued at Kshs.2, 500 for each tree and 5, 100 aloevera shrubs valued at Kshs. 500 each.
48. Having considered the plaintiff’s expert report, my assessment is that the same did not disclose the basis of how each unit cost was arrived at. The report does not for instance disclose why each eucalyptus tree was valued at Kshs.1, 800/=, or why indigenous trees were each valued at Kshs. 2, 500/= or why aloevera



shrubs were each valued at Kshs. 500. The report does not disclose the age of the trees or diameter to show the probable basis of the costing. I do not think that the unit cost provided by the plaintiff can reasonably be placed on the trees shown in the photographs by the plaintiff. My assessment is that the unit cost is exaggerated in the plaintiff's expert report. In addition, no evidence was tendered to show how the figure of 10, 000 eucalyptus trees, or 5,200 indigenous trees or 5100 aloevera shrubs were arrived at. The expert witness testified that he relied on the information given to him by the plaintiff. The basis for that information has not been given anywhere in the plaintiff's evidence. The plaintiff produced closeup photographs that in my view did not demonstrate the true picture of what happened on the ground. For instance, the plaintiff's closeup photograph of seven aloevera shrubs cannot show the probable hypothesis that there were 5,100 damaged shrubs as claimed by the plaintiff. Comparing the plaintiff's photographs with the defendant's long shot photographs, it is clear that the plaintiff's hypothesis that there were 5,100 aloevera shrubs could not be supported, as the latter showed vast areas of land exclusively with pasture and not with aloevera shrubs.

49. In addition, having considered the evidence on record, the plaintiff's expert report stated that the fire destroyed 36 acres in total, which included 36 acres of pasture, 15, 200 trees comprised of eucalyptus and indigenous trees and 5,100 aloevera shrubs. The court has considered the other evidence besides the expert report and there is nothing to show that the entire 36 acres was covered in pasture, and if that were the case, it would not be possible to have 36 acres of pasture, 10, 000 eucalyptus, 5, 200 indigenous trees, and 5, 100 aloevera shrubs all growing at the same time within 36 acres of land. That hypothesis is irrational because any space taken up by a tree or aloevera shrub would definitely not be available for pasture. The photographs produced by the parties showed that there was a reasonable amount of pasture that was not affected by the fire and pasture did not cover every inch of the land in dispute. The photographs produced by the plaintiff also show that not all the vegetation was burnt as seen in the photographs presented by the plaintiff from pages 17 to 48 of the plaintiff's bundle.
50. For those reasons I find and hold that the plaintiff's expert opinion is not based on proved facts, it has internal inconsistency as it is contradictory to the other evidence given by the parties and the report has not provided the court with the avenue to test the validity of the process by which the expert opinion was formed. On those grounds, I reject the report made by the plaintiff's expert Mr. Michael Murimi Gathuku.
51. On the other hand, the defendant's report confirmed that the fire affected the two parcels of land herein but the extend of the fire on parcel no. 253 was not on the entire parcel. The report of DW1 referred to and contained reports by a land surveyor; range scientist and agricultural economist; and an expert from the forest department. From the surveyor's report, the affected area on parcel 273 was 27 acres. The findings of the forester were that the predominant vegetation was grass, and the affected trees were *Comiphola Africana*, *Capris Tomentosa*, *Balanities Aegyptiaca* and other acacia species. According to the expert, no eucalyptus trees were burnt and that affected trees are usually fire resistant and are expected to regrow. He stated that the trees of about 18 centimeters were about 125 in number and 1000 trees had a diameter of less than 5 centimeters. The forester calculated the loss of the trees and aloevera shrubs to be a total cost of Kshs. 168, 700/=. On the pasture, the range scientist agreed with the calculations made by the plaintiff's witness and stated that one acre would produce hay of Kshs. 10, 000/=, after taking into account the cost of harvesting. The witness stated that not all the land affected by the fire could be assumed to be under pasture production as some was used for production of forest products. The estimation of the witness on the land under pasture was 20 acres, which would lead to a sum of Kshs. 200, 000/=. At the end, the expert report computed Kshs. 114, 700 for assorted trees, nil for eucalyptus, Ksh.24,000/= for stacks; Kshs. 30,000/= for aloevera shrub, nil for fence; nil for environmental damage; and Kshs. 200,000/= for burnt grass; making a total of Kshs. 368, 700/=. DW3, the forester stated that the method used in arriving at the conclusions he made was a survey. He



also stated that he calculated the value of the trees using a formula applied by the forestry service. He stated that in assessing the loss of the forest produce he used the official document being the forestry produce royalties of 2016. He maintained that he made estimates.

52. I have considered the defence expert opinions. While I agree with the defendant's expert report that grass would not cover the entire area when there were other forestry products like assorted trees and aloevera shrubs, having noted that they concede that the damaged area was 27 acres of parcel 273, it means that if 20 acres was under pasture there was at least 7 acres which ought to be accounted for. The photographs produced by the defence expert show that it is not the entire parcel owned by the plaintiff that was affected by the fire, and pasture did not cover all the land. I note that the fire did not just burn the vegetation, it also burnt the soil and therefore the environment was affected hence the defendant's failure to account for environmental damage, by apportioning nil thereto is unreasonable. The photographs also show that the plaintiff's fence was destroyed, which fence was acknowledged by the defence witnesses, hence apportioning nil under the claim for the fence is also unreasonable. In addition, the plaintiff's evidence at pages 43 and 44 of his trial bundle shows that fire affected some eucalyptus trees, yet no provision was made for the same in the defence report.
53. In view of the foregoing I find and hold that the defence expert report addressed some matters and failed to address others and therefore the same lacks objectivity and is not a true reflection of the extent of the damage done by the fire. The same was done without regard to the evidence on the ground. In the premises, my assessment of the defendant's expert report is that it has a low probative value.
54. Having said that, it is clear from the evidence on record that some eucalyptus trees and assorted indigenous trees were damaged together with aloevera shrubs and a substantial amount of pasture. In my view, the pasture damaged was about 22 acres while the aloevera shrubs are approximated to be about 300. As there was no evidence by the plaintiff on the number of Eucalyptus trees damaged, the court will rely on the photographs at pages 43 and 44 of the plaintiff's bundle and estimate the number of damaged Eucalyptus to be 2000 trees. The court relies on the photographs presented by the parties in regard to assorted indigenous trees of less than 5-centimetre diameter and estimates the same to be about 3000. There is no basis to interfere with the defendant's estimate of 125 assorted indigenous trees of 18-centimetre diameter. The court further finds that there was environmental damage caused on the flora and fauna and the exposure of the soil to soil erosion due to the fire on the soil of the plaintiff's land. In regard to the fence, the court finds that the plaintiff is entitled to compensation of 300 meters as no evidence was produced to show that the entire land was fenced.
55. I have considered the provisions in the first schedule to the Forests (fees and charges) Rules, 2012, and I find and hold that the forester who was an expert witness of the defendant properly applied the values attached to the forest produce as provided therein. Therefore, this court will also apply the same.
56. In the premises I find and hold that the loss incurred by the plaintiff is computed as follows;
- a. 125 indigenous trees of about 18 cm diameter @ 4588....Kshs. 114, 700/=
  - b.  $3m^3$  3000/50 stacks of indigenous trees of less than 5 centimetre diameter at @ Kshs. 1200/ = .....Kshs. 72,000/=
  - c. Aloevera shrubs 300 @ Kshs. 1000 /=.....Kshs. 300, 000/=
  - d. Fence 300meters @ Kshs. 30/=..... Ksh.9000/=
  - e. Environmental damage ..... Kshs.300, 000/=
  - f. Burned grass on 22 acres.....Kshs.220, 000/=



g. Eucalyptus trees 2000/50 @ Kshs. 1,975/=...Kshs. 79,000/=

Total Kshs. 1, 094, 700/=

57. As the plaintiff has been awarded loss of pasture, the claim for special damages for purchase of hay, cannot be granted as that would be double compensation for the same loss. The loss is what was lost on the plaintiff's land and not what was purchased, because there is a possibility of purchasing more or less than what was in reality lost through the fire. Therefore, the claim for Kshs. 1, 748, 100/= for purchase of hay fails.

58. The plaintiff also sought for general damages for denied use of the property. In my view, that claim was not proved and cannot be granted as the actual loss has been computed and awarded in this case. As for aggravated and exemplary damages, the same are awarded where a defendant acts out of improper motive like malice and where there is evidence of oppressive, arbitrary or unconstitutional action by the defendant, respectively. (See *Miguna Miguna v The Standard Group Limited & 4 Others* [2017] e KLR). In the case of *Obonyo & Another v Municipal Council of Kisumu* [1971] EA 91, the court held as follows;

...exemplary damages are appropriate in two classes of case: oppressive, arbitrary and unconstitutional action by the servants of government, and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff, and these classes should not be extended. This raises the question whether the expression „government" should be read as meaning the central government only, and whether it should be interpreted as including a local government ...

59. In this case, no evidence was presented by the plaintiff to show that the fire was caused because of the arbitrary, oppressive and unconstitutional acts of the defendant or that there was malice on their part. Therefore the plaintiff's claim for aggravated and exemplary damages is not proved and is rejected. On the prayer for ordering the defendant to remove their transformer, the plaintiff did not give evidence to show on which property the transformer is situated, whether it is parcel on 253 or 273; when it was installed thereon and whether at the time the transformer was installed, he was the owner of the suit property. I therefore find and hold that that claim was not proved.

60. In the end, the court finds and holds that the plaintiff has proved his case on the required standard that the defendant was wholly to blame for the fire that razed his parcel of land. I therefore enter judgment for the plaintiff against the defendant on liability at 100%. On quantum I order the defendant to pay the plaintiff Kshs. 1,094, 700/= as damages for the loss suffered by the plaintiff. Interest thereon at court rates shall run from the date of this judgment till payment in full. The costs of the suit are awarded to the plaintiff.

61. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13<sup>TH</sup> DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

Mr. Mugure for defendant

Mr. Antony Wambua

