



Sambu & another v County Government of Kericho & another; Land Registrar (Interested Party) (Environment & Land Case 59 of 2015) [2022] KEELC 13770 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13770 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 59 OF 2015
MC OUNDO, J
OCTOBER 13, 2022**

BETWEEN

THOMAS KIMAGUT ARAP SAMBU 1ST PLAINTIFF

MICHAEL NAL KIPKIRUI 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF KERICHO 1ST DEFENDANT

BEST CONTRACTORS 2ND DEFENDANT

AND

LAND REGISTRAR INTERESTED PARTY

JUDGMENT

1. Vide a Complaint dated the November 27, 2015, filed on an equal date, and later amended on the August 28, 2019 joining the Land Registrar as a necessary party, for the purpose of introducing the Registry Index Map and the mutation forms for the suit lands, the Plaintiffs herein seek orders that judgment be entered jointly and severally against the Defendants and in particular for the following orders;
 - i. A declaration that the Plaintiffs have been compulsorily and permanently deprived of their lands measuring 0.405 acres and 0.1092 of a hectare respectively.
 - ii. That the Plaintiffs are entitled to compensation for lands so lost together with improvements having been thereon valued at Ksh 45,436,240.50/=
 - iii. Costs of the suit and interest in (a) and (b) at court rates.
2. The suit was opposed by the 2nd Defendant's defence dated the February 12, 2016, filed on February 15, 2016 and amended on the October 22, 2019, in which the 2nd Defendant denied the contents of



the Plaintiff save for the descriptive part of it. The 1st Defendant filed their defence dated the January 18, 2016 on an equal date and amended the same on the October 16, 2019 also denying the contents of the Plaintiff save for the descriptive part of it.

3. After parties had complied with the provisions of Order 11 of the *Civil Procedure Rules*, the matter was set down for hearing wherein the Plaintiff Thomas Sambu testified as PW 1 to the effect that he was a businessman in Kericho and lived in Motobo area within Kericho County. That on November 27, 2015, he had recorded a statement which he wished to adopt as his evidence in chief.
4. He proceeded to state that sometime in February 2014 he got wind that the Kisumu-Kericho road at the Chepkolon turn off was to be expanded from 6 meters to 9 meters. That the said expansion was going to affect his land parcels No Kericho/Kipchimchim/607, 608, 614, 621, 2684, 618, 630 and 631. He produced the copies of the certificates of official search as Pf exh 1 (a-i) and proceeded to testify that after the 2nd Plaintiff had informed the county surveyor that the proposed expansion was irregular as the width of the road ought to be 6 meters, they had received a letter dated February 6, 2014 from the surveyor, showing the width of the road, which letter he produced as Pf exhibit 2.
5. His evidence was that after he had obtained the court orders of February 11, 2014, herein produced as Pf exhibit 3, which orders had restrained the Defendants from trespassing on his land, he had served the same upon the Defendants who had disrespected the same whereby they had gone ahead to expand the road to 9 meters. That the said expansion therefore amounted to a compulsory acquisition of his land.
6. It was his evidence that before the expansion of the road, he had not received any notice from either the Defendants or the National Land Commission. That the Defendants had used a bulldozer to expand the road as evidenced in a digital photograph which he marked as PMFI 4. That in the process, the bulldozer had destroyed his land wherein he procured the services of Prime Land Valuer to assess the damage. He marked the valuation report as PMFI 5. His evidence was that the estimated damage caused was Kshs 4,700,000/=. That the value of damage caused to the trees which included Cyprus trees, assorted indigenous trees and fence was Kshs 7,960,412.50/=. That the grand total of loss amounted to Kshs 21,966,730.50/=. That he had also procured a valuation report from the Forestry department. He thus sought for the court to enter judgment in his favour in the said sum as damages suffered as a consequence of the compulsory acquisition/trespass to his land. He also sought for costs of the suit.
7. His evidence was that he was surprised to note that after the two Defendants had been served with a court order, they still went ahead and destroyed his property which included a live fence, trees and vegetables. That he is good name in village was also tainted because the road was marked as “from Kipchimchim to Sambu’s home.”
8. During his cross examination by Counsel for the 1st Defendant, the Plaintiff responded that the road, which was a public road, passed by his home and went beyond. That the same had been in existence for a long time and had been demarcated in 1969 wherein it was supposed to measure only 6 meters wide and that although he was not an expert in land survey, yet the measurement of 6 meters was depicted in the Registry Index Map which he did not have with him.
9. That the court order dated February 11, 2014 had been for a temporary injunction and had been issued by the Chief Magistrate Court, Kericho. That he was not aware of either the existence of another order dated February 24, 2014 that had asked them to resolve the matter out of court nor the fact that the said order had not been extended. That Civil Suit No 39/2014 in respect of which the order was issued had been withdrawn for lack of jurisdiction. That by the time he had withdrawn the case, his property had already been destroyed. He was categorical that the road passed on the boundary of his land and that his neighbor’s land was not affected.



10. He also confirmed that up to date, he had not received any notice that his land would be acquired compulsorily and that the road had been expanded from 6 meters to 9 meters which had affected his land by 3 meters. He denied having encroached on Government land and proceeded to confirm that he had photographs that had been taken before and after the land had been damaged.
11. When cross examined by Counsel for the 2nd Defendant, the Plaintiff confirmed that the road touched on several other people's property apart from his. That the same, which measured 6 meters, had been in existence since 1969. He also confirmed that he had written a demand letter to the Defendants and that the subordinate court suit was CMCC No 39/2015. That he had sued the 2nd Defendant – Best Contractors Ltd although he had not conducted a search to confirm that it was the right party to be sued.
12. That the demand letter was to Bernard Chepkwony, the Director Best Contractors. He confirmed that although the Defendants had used bulldozers on his land, he had not ascertained ownership of the same.
13. He further confirmed that although the suit property was within Kericho County, it was agricultural land which was not within the town. That the forest officer who had conducted the valuation was from the neighboring county because he could not trace and/or get one from Kericho County. He further confirmed yet again that the suit in the lower court had been withdrawn and that he did not file any contempt of court proceedings.
14. When the witness was examined by the court, he had responded that the manner in which his property had been destroyed had caused his reputation in the village to be questioned.
15. Upon being re-examined, the Plaintiff reiterated that the court order at paragraph 3 were specific to the effect that;

“That the matter be mentioned on March 17, 2014. The interim orders are extended”.
16. That the orders given were to be respected but they had been disobeyed. That he had withdrawn the suit in the subordinate court so as to file suit to the Environment and Land Court but that before withdrawing the suit, the damage had already been caused. That they had conducted a search on the 2nd Defendant and that even in his defence, the 2nd Defendant had admitted his description where it did not dispute that he was the right party to be sued.
17. That the expansion of the road had affected other people too but he had sued because his land had been affected. That he knew that other people had complained about the expansion although they did not file suit. He also reiterated that he had issued the Defendants with a demand notice before filing of the suit.
18. The 2nd Plaintiff Michael Nal Kipkirui testified as PW2 to the effect that he lived in Motobo village within Kericho County and that he was a lecturer at Kabianga University. That on the November 27, 2015 he had recorded a witness statement with regard to the case to which he wished to adopt as his evidence. That he had sued the 1st and 2nd Defendants because their actions had affected his land parcel No Kericho/Kipchimchim/2510 measuring 0.40 hectares. He produced the certificate of official search as Pf exhibit 1.(sic)
19. He also produced the proceedings in Kericho CMCC No 39/2014 as Pf exhibit 2 (sic) and marked a valuation report from the Kenya Forest Services, dated March 4, 2014, which put the value of his land at Ksh 3,000,000/=, as Pf MFI 3 before he proceeded to testify that the total amount of the damage



- caused to his land had been Kshs 23,469,510/= He marked the surveyor's report dated March 8, 2014 as PMFI 4.(sic)
20. That his complaint was based on the fact that he had lost 0.1092 hectares of his land or about 27.3% of the total land area to the public road reserve due to the action of the Defendants following the acquisition of his land. He thus sought for judgment be entered in his favour as prayed in the Plaint.
 21. On cross examination by Counsel for the 1st Defendant, his response was that he had acquired his land on January 20, 1993 after purchasing the same from one Alice Chepkemoy Mitey. That at the time of purchase, there had been two roads serving the land, one to East measuring 6 meters and another to the South also measuring 6 meters. That the road to the south lead to Kisumu road and went past his land towards Motopo Primary School. That it was a public road that also bordered one Daniel Rono's land whom he did not know whether he had also filed suit to complain. He was categorical that he had not received any documents from the Ministry of Lands informing him that his land was to be compulsorily acquired.
 22. In cross examination by Counsel for the 2nd Defendant, the witness confirmed that he had bought the land in 1993 when there had been an earth road in existence. That although he had made inquiries as to whether his land was a road reserve, yet he had no documents to confirm the same. That at the time of purchase, the road had measured 6 meters but that at the moment the eastern border measured 13 meters while the western side measured 11 meters. That the road stretched through the entire length of his land which was 94 meters. He confirmed that the contractor of the road was Best contractors who had been contracted by the County Government of Kericho (1st Defendant). That his forest of trees covering 8 meters had been brought down by bulldozers in his absence.
 23. In re-examination, the witness reiterated that he had not been informed or given notice by the Defendants that the road was going to be expanded, but was only been notified of the expansion by his Chief. That the property that had been damaged consisted of trees and a natural hedge along the southern border.
 24. PW3, one David Alao Augo Stephen testified that he resided in Nyando where he worked as a sub-county officer. That sometime in February, 2014 Mr Sambu and Mr Chepkirui (1st and 2nd Plaintiffs) had approached him to evaluate some trees that had been damaged on their respective land parcels No Kericho/Kipchimchim/607, 608, 615, 618, 621, 630 and 630 belonging to the 1st Plaintiff and Kericho/Kipchimchim/2510 belonging to the 2nd Plaintiff. That both parcels of land were situate in Motopo village within Kericho County. That he had done the evaluation and valuation of all the damaged trees which had been felled. That the value of the 1st Plaintiff's trees was Ksh 7,960,412/= whereas the 2nd Plaintiff's trees had been valued at Ksh 13,923,775/=. That he had subsequently prepared reports in respect of the trees which valuation reports he produced as Pf exhibit 3(a-b.)
 25. On cross examination, the witness confirmed that he was a Forest Officer although he had no identification. That he had not been paid to prepare the reports save for the Ksh 3,000/= he had been given as transport for the trip. He also confirmed that he was aware that there was a forest office in Kericho County, then proceeded to testify that as a Forest Officer he had jurisdiction but that overlaps were common. That as at February 19, 2014 when he conducted the valuation he did not visit the Kericho Forest Officer and had never met him/her. That when he visited the site, the trees were on the ground. His evidence was that the unit cost was based on the Kenya Forest Service General Order which showed the value of the trees, although he had not attached it to his report and therefore he could not confirm the value without the order.



26. On being cross examined by Counsel for the 2nd Defendant, the witness confirmed that at the time he conducted the evaluation, he was a sub county Forest Officer. That the Nyando boundary was 12 km away from Motobo. That he had been a Forest Officer since 1981 and clients from Kericho used to go to Nyando because it was convenient. That he possessed a Diploma in forestry and valuations was part of his duties. That he had received a verbal complaint from the Plaintiffs and therefore had no document to show that the complaint had been reported to him. That the Plaintiffs had gone to him with copies of their title deeds wherein after he had visited the land about two days after the trees were felled. His evidence was that the trees had been knocked down by a bulldozer and some of their roots were still attached to the ground where the expansion of the road was going on.
27. In re-examination, the witness confirmed that he had studied at Egerton College where he had obtained a Diploma in Forestry. That he was currently based at Homa Bay as a Forester and that his 1st postings had been to Turkana, Homa Bay, Kisumu and Nyando. He confirmed that he could offer his services anywhere in the Republic of Kenya.
28. The witness had sought for time to produce his certificate to prove that he was a forester wherein he was stood down. When the matter came up for further hearing, the witness was recalled wherein he had confirmed that he now had his certificate which was a Diploma in Forestry obtained in 1985 from Egerton College. That thereafter, he had been employed as a Forester in the Ministry of Environment Forestry Department as per his letter of appointment. That when the Forestry Department became a parastatal, he had been transferred to the Kenya Forest Services where he was still employed. He produced his Diploma Certificate and letter of appointment as Pf exhibits 3 (a & b), before he proceeded to state that his qualifications had enabled him to assess and value trees.
29. Simeon Kipkirui Rono testified as PW4 to the effect that he was a valuer based in Nairobi. That on the March 3, 2016 he had recorded a witness statement in connection with the case. That he had qualified as a valuer in 1983 from the University of Nairobi, where he had done his professional exams in 1985 and was now a registered valuer. That he had conducted a valuation for the 1st Plaintiff with regard to land parcel No Kericho/Kipchimchim/607 & 608, 614, 615, 618, 621, 630, 631 and 2684 as well as for the 2nd Plaintiff in respect of parcel no Kericho/Kipchimchim/2510. That whereas the 1st Plaintiff's properties were valued at Kshs 4.7 million, the 2nd Plaintiff's property was valued at Kshs 3 million. He sought to produce the valuation reports as Pf exhibit 4 (a - b).
30. On cross examination by Counsel for the 1st Defendant, the witness refuted having written any witness statement. He further confirmed that he did not prepare the valuation report as the same had been prepared by his colleague Mr. Sang. He also confirmed that he never visited the Plaintiff's parcels of land as he was not a surveyor. That according to their valuation report, they did not measure the road and therefore he couldn't tell how wide the road was before expansion. That he had got the width of the road from the title deed, where it had showed that the same was 0.046 in reference to parcels No Kericho/Kipchimchim/607, 608, 614, 615, 618, 621, 630, 631 & 2684.
31. That he had no idea how the figure was arrived at as the width of land encroached was not indicated. He further confirmed that they did not measure the width of the 2nd Plaintiff's land and neither did they engage the services of a surveyor during the valuation exercise. That he could not interpret the map, which they had bought from the surveyors, without a tape measure.
32. His evidence was that he had used the area on the title deed to measure the size of the land. That he was not familiar with the recommended width of the road. That he was not aware that what they had been asked to measure was a road reserve. That the land was not surveyed in 2015 and that they had given the value based on the acreage of the land according to title deed and not based on the size of the land



that was acquired for purposes of expanding the road. That they valued the land based on comparables using similar land in the same region.

33. Upon being re-examined the witness reiterated that their valuation report showed the land that was affected by the road expansion. That they had used the acreage given by the surveyor.
34. PW 5 Moses Kipkurui, testified that he lived at Motobo within Kericho Municipality. That he was a photographer and had recorded a witness statement in relation to the case on July 9, 2017. That he took photographs of the Plaintiffs' parcels of lands on instruction of the 1st Plaintiff. That he had then developed the photos. He proceeded to produce the photographs as Pf exh 4 (a & b).
35. When cross examined by Counsel for the 1st Defendant, the witness responded that he had taken the photographs at the 1st Plaintiff's home. That he had known the 1st Plaintiff prior as he was his uncle. That he had no interest in this case and that there were land marks to show that the site in the photographs was at Mr Sambu's home and further that the house in the picture belonged to Mr Sambu.
36. In response to the re-examination, he had confirmed that he had lived in that area for more than ten years. That he knew the 1st Plaintiff's house as appearing in the photo and that it had been the 1st Plaintiff who had instructed him to take the photographs.
37. Patrick Opiyo Adero testified as PW6 to the effect that upon the instructions by the 1st Plaintiff he had gone to the ground and conducted a survey on Kericho/Kipchimchim 2510, 618, 630, 607, 631, 621, 2089, 608 where he was supposed to verify whether the grading of the road had gone beyond the current road reserve. That the normal road size was 6 meters but when he had conducted his survey, he had found sections of the road measuring 13 meters while others measured 11 meters. That the grading of the road had only affected one side of the road. He read out the extent of encroachment as per his report as follows;
 - i. On parcel No 607 there was an encroachment of 2.54m.
 - ii. Parcel No 608 – 2.49m
 - iii. Parcel No 614 – 2.55m
 - iv. Parcel No 615 – 2.53m
 - v. Parcel No 618 – 2.52m
 - vi. Parcel No 621 – 2.54m
 - vii. Parcel No 630 – 2.51m
 - viii. Parcel No 631 – 2.53m
 - ix. Parcel No 2089 - 2.50m
38. That the acreage was also tabulated in the report whereby the total area of encroachment was 0.1642 hectares which was equivalent to 0.406 acres or approximately half an acre. He had also surveyed the 2nd Plaintiff's land parcel No Kericho/Kipchimchim/2510. That the distance was 25 meters with the difference being 6 meters in terms of encroachment. That the area of encroachment was 0.0470 hectares. That he had used a measuring tape to measure the length and width of the road.
39. His evidence was that he had gone to the survey office from where he had been given the original size of the road as 6 meters. That he was then able to see that there had been an encroachment as what was on the ground differed from what was on the map. That with respect to parcel No 2510, the area of



encroachment had been 0.1056 hectares which was approximately ¼ an acre. That in the diagram, he had demonstrated the various sections of the road and the extent of their encroachment.

40. Cross examined by Counsel for the 1st Defendant, the witness had the respondent that he was based in Kisumu and was a licensed private Land Surveyor having graduated in 1986. That previously he had worked for the Government for 14 years in the Ministry of Lands. That the road he had surveyed was categorized as an access road meaning that it was used to access the homes in that area. He confirmed that the road went further past the 1st Plaintiff's home.
41. His evidence was that according to the map, the road measured 6 meters. He also confirmed that in his report, he had indicated that the road reserve was supposed to be 9 meters which was a typing error as a road reserve ought to be 6 meters and not 9 meters. That indeed this particular road was 11 meters and 13 meters. That the measurement before the expansion was 6 meters wherein on average it was expanded to about 8.5 meters. He confirmed that he neither filed his report with the Ministry of Lands, sought for clarification from them nor visited their offices.
42. In re-examination, the witness reiterated that his diagram showed that the road reserve was 6 meters. The 9 meters was therefore a typing error. He confirmed that the size of the road reserve is certified by the Ministry of Lands. His evidence marked the close of the Plaintiff's case.

Defence Case.

43. Despite numerous applications for an adjournment by the 1st Defendant and the indulgence of the court, they still had no evidence to tender wherein their case was closed and the 2nd Defendant proceeded with its case.
44. Bernard Kiptoo Chepkwony testified as DW1 to the effect that, he resided in Kericho County and that he was the Director of Bestland Enterprises Ltd the 2nd Defendant herein. That he was in court concerning some road works he had done on the Kwa Sambu-Motobo road in January, 2014. That the works had been commissioned by the County Government of Kericho wherein the same had involved maintenance of the said road. That he had been required to grade the road to expand it from 6 meters to 9 meters. He produced the tender document No 7 of 2013/14 as Df exh 1.
45. He proceeded to testify that the road, which is classified as Class D/E and which was similar to a minor road, was a rural road and was supposed to be 9 meters wide. That the marking and beaconing of the road was done by the County Surveyor with the help of County Engineers. That page. 43-46 of the tender documents contained the drawings of the road. The carriage width was supposed to be 5.4 meters. There was supposed to be a ditch on either side of the road measuring 3.4 meters in total for draining rain water, and the service lane was about 0.5 meters. That the work was supervised by the County Roads Engineer who certified that what he had done on road had been in accordance with the specifications of the tender documents. Upon completion, he had handed over the road to the County Government who had paid his fees.
46. The specifications were captured at Page 44 of the tender document and that at the time they started the works, he had agreed with the County Government that they would get in touch with the local community whose land abuts the road so that they could clear it. This took two weeks after which he had gone to the site where he had found that the road had been cleared and the beacons had been demarcated. That his company had no clearing equipment and his work only involved grading the road which had since been expanded further and tarmacked by another contractor. He therefore did not know why he had been sued as he was not involved in the road clearance.



47. On cross examination by Counsel for the Plaintiff, the witness confirmed that the length of the road was 3.4 km with a width of 9 meters. That the length of the road was indicated at Page 1 of the tender document. That he did not go to the Lands Officer or District Surveyor to confirm the width of the road but went to the site with the County Surveyor.
48. He further stated that according to the tender, the road was to be 9 meters and that when he had gone to the site, there were trees on either side of the road and that the road was 6 meters wide. That he had been awarded the tender in December, 2013 wherein he had started the works in January 2014. He also confirmed that he knew the Plaintiffs.
49. He acknowledged that on the February 11, 2014, he had been served with a court order restraining him from proceeding with the project upon which he had stopped the works. That at the time they had already covered 3.3 km of the road. He denied having removed the trees and structures which he claimed to have been done by the local community. That each land owner had been given time to clear the portions that would be affected.
50. That by the time he received service of the court order, he did not have any machinery on site. It had been the 1st Defendant who had hired some bull dozers to remove tree stumps. That the community had been informed about the project by the 1st Defendant. He acknowledged that he did not have any documents from the Ministry of Public Works to show that the road was supposed to 9 meters.
51. He was cross-examined by Counsel for the 1st Defendant wherein he responded that he had a contract with the County Government and that he did not work for the County Government. That his company was independent and that he had a Roads Engineer in the company. That the road specifications was in the tender document which had indicated that the road was 6 meters. That he had sent his roads engineer to confirm the measurements.
52. He also confirmed that the road fell under the classification of minor roads which were 9 meters. That the land owners had been given notice to clear the road wherein some of them had refused. He however confirmed that in accordance with the tender document, the contractor was to clear all the vegetation including small trees, shrubs and undergrowth. That indeed he was only to do light clearing. That the road was now wider but he did not know who the subsequent contractor was.
53. In re-examination, he reiterated that the survey and beaconing of the road was done by the 1st Defendant and that at the time he moved onto the site, it had been beaconed. He confirmed that the contract did not entail public participation as he was not the one who had issued notices to the community. That he also did not know the owner of the bulldozer and neither did he conduct a search to establish the owner. That it was not his role to compensate the land owners who had been affected as he had come in when the community had done the removal of trees and therefore his job was merely to clear the tree stumps and do the grading and culverts. The 2nd Defendant thus closed their case.
54. On the February 1, 2019 the court made a site visit, in the presence of the District Surveyor and the parties herein, to land parcel no Kericho/Kipchimchim/2510, 607, 608, 615, 618, 621, 631 and 2684 wherein the measurements of the road was taken on all affected parcels of land to ascertain their measurements. It was then directed that the District Surveyor and County Surveyor prepare a joint report and file it in court.
55. Pending the filing and adoption of the said a joint report, the Plaintiff herein filed an application seeking to amend the Plaint so as to join the District Land Registrar to the suit for the purpose of producing the mutation forms so as to confirm the size of the Plaintiffs' land, so as assist the court in showing



the extent of encroachment to enable it assess the level of compensation if any. The application was allowed vide the ruling of the July 4, 2019.

56. Subsequently another application dated July 15, 2019 was filed by the Plaintiff seeking to expunge from the record, the joint survey report dated the February 21, 2019, which had been compiled by both the District surveyor and the County surveyor Kericho, and further that the court to review its orders of February 1, 2019 calling for the said report. The application was dismissed vide a ruling of the February 26, 2021.
57. Pursuant to the amended Plaintiff's case was re-opened wherein the one M/s Hellen Mutai testified as PW7 to the effect that she was the County Land Registrar Kericho and had been summoned to produce the mutation forms in reference to Kericho/Kipchimchim/2510. She testified that the said land No 2510 was a product of the subdivision of Kericho/Kipchimchim/619. She produced the mutation form as Pf Exh 5. She also confirmed that she had the green card relating to the parcel of land.
58. On cross-examination, she stated that the mutation forms had been prepared by the District Surveyors and that she could only interpret the registration part of it. That if there was a discrepancy between what was drawn on the mutation and what was on the ground, then it could be the mistake of the surveyor. That the acreage indicated on the title was an approximation.
59. The Plaintiff thus closed its case and parties were directed to file their written submissions wherein only the Plaintiff and the 2nd Defendant complied.

Plaintiffs' Submissions.

60. The Plaintiffs filed their issues for determination as follows;
 - i. Whether or not the Defendants trespassed and/or encroached into the Plaintiffs' portions of land.
 - ii. Whether or not the Plaintiffs are entitled to compensation for special damages of Ksh 45,436,240/=
 - iii. Whether or not in addition to an award of special damages the Plaintiffs are entitled to general and aggravated damages.
61. On the 1st issue for determination, the Plaintiffs submitted that it was not in dispute that they were the registered proprietors of the suit parcels of land where they were in possession and occupation. That the said parcels of land bordered each other and were abutted by the Chepkolon-Motobo-Kipchimchim road within Kericho Municipality.
62. That when the Plaintiffs got wind of the impending expansion of the road from 6 meters to 9 meters, which move was going to affect their parcels of land and without notice, they had sought relief and had obtained the orders from the Kericho Chief Magistrates Court in Civil Case No 39 of 2015 temporarily restraining the Defendants from entering into the suit parcels of land pending the hearing and determination of the suit, orders which were ignored by the Defendants who continued with the expansion of the road thereby occasioning the Plaintiffs loss and damage to a tune of Ksh 45,436,240/=.
63. That from the witness statements and the evidence adduced in court, it had been clear that upon winning the tender to expand the road, the 2nd Defendant went on a rampage destroying property within the said parcels of land and converting portions of the Plaintiffs' lands to be part of the subject road thus the encroaching and/or trespassing onto their property and compulsorily acquiring their property without compensation.



64. That although the 1st Defendant was entitled to compulsory acquire portions of the Plaintiffs' land for the expansion of the road, yet it ought to have complied with the existing legal regime that governed compulsory acquisition of land in Kenya. The Plaintiffs relied on the provisions of Section 107 of the Land Act to submit that the Commissioner of Lands although mandated to compulsorily acquire land for not only the National Government but also the County Government, yet it ought to have issued a notice of acquisition to those who had interest to acquire land to be gazetted pursuant to which they would have engaged the Plaintiffs by making full and prompt compensation to them for the loss occasioned by the acquisition.
65. That the Defendants having chosen to disregard the legal requirements in as far as compulsory acquisition of land was concerned, they ought to suffer the consequences severally and the jointly. That by encroaching and compulsorily converting portions of the Plaintiffs land to public road use and destroying some of the Plaintiffs' properties without full and prompt compensation, the Defendants had violated the provisions of Article 40(3) of the Constitution.
66. On the 2nd issue for determination, the Plaintiffs submitted that they had suffered loss and damage to a tune of Ksh 45,436,240.50/= as tabled in the valuation report. That although the 1st Defendant did not offer evidence despite entering their defence, it was not in contention that they had awarded the tender to the 2nd Defendant to expand the road from 6 meters to 9 meters wherein heavy machinery had been used to expand the road, following which the Plaintiffs' properties were not only alienated, but also damaged, a fact which the Defendants could not run away from.
67. That although the 1st Defendant did not tender evidence despite filing their defence, pursuant to the provisions of Order 2 Rule 11 of the Civil Procedure Rules, they were deemed to have admitted the Plaintiffs' claim simply because they failed to join issues as pleaded by the Plaintiffs in paragraph 10 of their Plaint.
68. That through the evidence of PW3-6, the Plaintiffs' claim had been supported, with the production of valuation reports and photographic evidence illustrating the extent of damages, which evidence was not rebutted.
69. On the third issue for determination, the Plaintiffs submitted that the Defendants having been served with restraining orders, and having chosen to defy the same wherein they had moved into the Plaintiffs properties and alienated the same while destroying others, there was no dispute that such acts could only be considered as an assault to the Constitution and therefore the Plaintiffs were entitled to both general and aggrieved damages, not forgetting that the compulsory acquisition took place in the year 2014. The Plaintiffs sought that the court upholds their suit and grants them the prayers so sought.

2nd Defendant's Submissions.

70. The 2nd Defendant framed his issues for determination as follows;
 - i. Whether or not the Plaintiffs have proved their claim for compensation for compulsory acquisition of their properties by the 1st Defendant of Ksh 45,436,240/=
 - ii. Whether the Plaintiffs have proved their case against the 2nd Defendant herein.
 - iii. What order is to be made as to costs
71. On the first issue for determination, the 2nd Defendant submitted that the answer was in negative the Plaintiffs having not proved their claim for compensation of Ksh 45,436,240/= for compulsory acquisition of their properties by the 1st Defendant. That the 1st Defendant could compulsorily acquire



land for public purpose or in public interest as envisaged in section 107 of the [Land Act](#). That the road which was in contest herein was expanded for public interest and therefore within the purview of Section 107 of the [Land Act](#).

72. That the court visited the site on February 1, 2019 together with the parties wherein the surveyors conducted a survey to ascertain the alleged affected property. Thereafter a report had been prepared and filed which had showed that the amount of land acquired to have been 0.7 meters (0.0007 hectares) in land parcel No Kericho/Kipchimchim/2510. That in regard to land parcel No Kericho/Kipchimchim/607, 608, 615 and 621, only 1.5 meters (0.00015 hectares) had been acquired. The said the acreage that had been acquired for the purpose of the expansion of the road had been totally different to what had been stated in the Plaintiffs' *Plaint*. That if at all the Plaintiffs' land had been affected as insinuated in the *Plaint*, (being 0.1092 hectares and 0.405 acres respectively) then the deference constituted a road reserve and was not part of the land that should be subject to compensation. The 2nd Plaintiff urged the court to adopt the surveyors' report of February 21, 2019 as the said survey was conducted in the presence of the court.
73. The 2nd Defendant attacked the credibility of the valuation report by Prime Land Valuers Limited to the effect that PW4 who had purported to produce the report as Pf exh 4 was not a registered surveyor reference was made to the decided case in [Thomas Kimagut Sambu vs National Land Commission & 2 others](#) (2018) eKLR, the maker of the same, never visited the suit land nor conducted the survey. The maker of the report was never called to testify. The report was therefore inadmissible under Section 21 of the [Valuer Act](#). It was their submission that parties who sought to rely on an expert witness ought to be more diligent in ensuring that the said witnesses met the legal requirements. The evidence of PW4 was therefore was inadmissible and ought to be disregarded.
74. There was submissions that no comparable were used by Prime Land Limited in arriving at the market value of the Plaintiffs' property and therefore they could not justify on how they had arrived at the value of the subject property which was alleged to have been acquired by the 1st Defendant. The said valuation report was incredible, farfetched, unauthentic and/or a sham and therefore could not be relied upon by the court to award compensation to the Plaintiffs.
75. The 2nd Defendant also attacked the valuation report produced by PW3 as Pf exh 3(a-b) by (the Kenya Forestry service) for reasons that the report had cast a lot of doubt on how the figures of the destroyed trees had been arrived at. That the said witness did not visit the site but had relied on the photographs that had been taken by PW 5 and that was why his report seemed to suggest that all the trees of the same species were similar in size and/or diameter. That it was further doubtful as to why the report had been made by an officer in Nyando where the suit property was in Kericho County which had its officers. The only conclusion to make was that the PW3 had been compromised into writing such an exaggerated report.
76. That both the valuation reports having been impugned, the court did not have a basis to assess the damages for propose of compensating the Plaintiffs. This is coupled with the fact that there being difference in the acquired acreage depicted in the *Plaint vis a vis* that which was confirmed by the surveyors in the presence of the court, it was clear that the Plaintiffs had not made out their case.
77. On the 2nd issue for determination, it was the 2nd Defendant's submission that the answer was in negative for reasons that from the evidence tendered in court it had been clear that the 2nd Defendant was only contracted by the 1st Defendant to carry out the expansion of the road in question. The Plaintiffs had not proved any liability pertaining to the 2nd Defendant or that the 2nd Defendant acted negligently and carried out works that had exceeded its mandate. Indeed if anybody was liable that it



ought to have been the 1st Defendant for failure to follow the due procedure in acquiring the Plaintiffs land. The case against the 2nd Defendant had not been proved.

78. On the issue as to who should pay costs, the 2nd Defendant submitted that costs followed the events therefore costs ought to be awarded to them.

Determination.

79. I have considered the evidence adduced in court, the documents produced as exhibits, and the recorded statements thereto. It is imperative to note that although the 1st Defendant filed their Defence as well as an amended defence, they did not adduce any evidence in court nor file their submissions. Although the suit against the 1st Defendant was undefended, yet the Plaintiff still had the duty to formally prove his case against them on the balance of probabilities as required by law.
80. Secondly it must also not be lost that this matter was initially filed in the Kericho Chief Magistrates court vide Civil Case No 39 of 2015 wherein temporarily restraining orders against the Defendants had been sought and issued. Thereafter, for lack of jurisdiction, the matter was withdrawn and filed before this court. In essence thereof the proceedings in the sub-ordinate court terminated the court have having not been seized with jurisdiction and therefore those proceedings have no bearing on the proceedings before this court.
81. From the evidence adduced in court it is not disputed that the Plaintiffs herein were proprietors to land parcels No Kericho/Kipchimchim/607, 608, 614, 621, 2684, 618, 630 and 631 and No Kericho/Kipchimchim/2510 respectively.
82. It is also not in dispute that sometime between January and February 2014 some road works were done on the Kwa Sambu-Motobo road wherein the same was expanded from a width of 6 meters to 9 meters. That subsequently the 1st Defendant, the County Government of Kericho had contracted the 2nd Defendant to grade the road so as to expand it from the width of 6 meters to 9 meters as per tender document No 7 of 2013/14 herein produced as Df exh 1.
83. It is also in evidence that it had been during this exercise that the Plaintiffs live fence, trees and vegetables were destroyed and/or uprooted and in the process, it was the Plaintiffs claim that part of their land was compulsorily acquired without prior notice and compensation. That subsequently the Plaintiffs hired valuers who valued the loss and damage caused to the suit lands at Ksh 45,436,240.50/= a claim which the Plaintiffs now seeks as compensation for the acquisition of their land.
84. I have further noted that by consent parties sought for the court to visit the site which it did on February 1, 2019 together with the parties and surveyors who conducted a survey to ascertain the alleged affected property. Thereafter a report dated February 21, 2019 had been prepared and filed in court on the February 25, 2019 therefore forming part of the court record.
85. According to the report,
- i. The extent of encroachment could not be established for parcels numbers No Kericho/Kipchimchim/615, and 621
 - ii. There was no claim by any of the parties regarding encroachment to No Kericho/Kipchimchim/ 630 and 631
 - iii. That parcel number No Kericho/Kipchimchim/ 2684 could not be located.



86. The surveyors had concluded that the road had been expanded beyond its indicated dimensions by about 0.7 meters on a stretch of 9.7 meters on parcel No Kericho/Kipchimchim/ 2510 and by 1.5 meters on a stretch of 7.5 meters on No Kericho/Kipchimchim/607 and 608
87. Following the findings of the surveyors' in the presence of the court the plaintiffs herein vide an application dated July 15, 2019 sought to expunge from the record, this joint survey report which had been compiled by both the District surveyor and the County surveyor Kericho and also for the court to review its orders of February 1, 2019 calling for the said report. The simple reason for the plaintiffs action was the cause this the report was not favorable to them in comparison to the valuation made by their private surveyors. The application was dismissed vide a ruling of the February 26, 2021 and rightly so
88. What is disputed herein is whether or not the Plaintiffs had proved their claim for compensation for compulsory acquisition and special damages to their properties by the Defendants to a tune of Ksh 45,436,240/=
89. The issues for determination can thus be framed as follows:
- i. Whether a case has been made out against the 2nd Defendant.
 - ii. Whether the 1st Defendant trespassed and/or encroached into the Plaintiffs portions of land.
 - iii. Whether the Plaintiffs are entitled to compensation for special damages of Ksh 45,436,240/=
 - iv. What should be the order as to costs?
90. On the first issue for determination, it is was not in dispute that via Tender document No 7 of 2013/14 herein produced as Df exh 1, the 2nd Defendant had been contracted by the 1st Defendant to grade the Kwa Sambu-Motobo road and expand it from 6 meters to 9 meters. There therefore existed a Principle-Agent relationship between the 1st Defendant and the 2nd defendant. The evidence on record is that by the time he had gone to the site, the 1st Defendant had already hired some bull dozers to remove tree stumps the community had done the removal of trees and therefore his job was merely to clear the tree stumps and do the grading and culverts. This evidence was not contradicted and is indeed supported by the 1st Plaintiffs' evidence to the effect that although the Defendants had used bulldozers on his land, he had not ascertained ownership of the same. It is trite that an agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage, yet in the present instance, I find the claim against the 2nd defendant has not been discharged to the required standard.
91. On the second issue for determination, it was held in *Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited* (2012) eKLR, the statutorily, the sanctity of title to land is assured and protected under Sections 24, 25 and 26 of the *Land Registration Act*. From the above provisions of the law, and the fact that the Plaintiffs had proved through the production of certificates of search that they were the registered proprietors of some of the affected parcels of land herein, I find that they had disclosed a legal interest capable of protection under the law and therefore they were not to be deprived of their land by the State or any public authority against their wish unless expressly authorized by law and public interest which decisively demands so, and with compensation.
92. The Plaintiffs' case is that being the proprietors of the suit lands herein mentioned and by the 1st Defendant seeking to expand the width of the Kwa Sambu-Motobo road which was classified as Class D/E and which was similar to a minor road, from 6 meters to 9 meters, the 1st Defendant herein had contracted the 2nd Defendant to grade the road and in the process the Plaintiffs' fence and vegetation



and/or trees had been damaged and part of their land compulsorily acquired without either notice or compensation.

93. Acquisition by the Government is ordinarily direct and by processes known to the [Land Acquisition Act](#) (now repealed) by the [Land Act](#). The law governing compulsory acquisition is in Part VIII, Section 107 to 133 of the [Land Act 2012](#).
94. The process of compulsory acquisition was laid down in the decided case of [Patrick Musimba v National Land Commission & 4 others](#) [2016] eKLR where the court held as follows;

"Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.

Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually



be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the Land Registrar being duly notified: see Sections 120-122 of the Land Act.

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

The Constitution dictates that acquisition be in accordance with the provisions of the Constitution itself and any Act of Parliament. The Constitution itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative."

95. In the present case, there was no evidence adduced the effect that the 1st Defendant had published any notice in the Kenya Gazette on the impending acquisition of the Plaintiffs' land by the Government or any other body for that matter. Indeed the evidence on record was that the 1st Defendant had trespassed on the Plaintiffs' land and forcefully taken/acquired the said property, which act constituted an illegal acquisition of private property without prompt and full compensation, and in violation of the Plaintiffs' right to property which is protected under Article 40 of the *Constitution*.
96. Having found that the 1st Defendant herein forcefully took the Plaintiffs' property and that such acquisition was illegal, the next step was for the Plaintiffs to prove how much was due to them as compensation. The Plaintiffs have sought for compensation for special damages of Ksh 45,436,240/= . Indeed it has been said time and again and there is no dispute that special Damages must be both pleaded and proved, before they can be awarded by the Court.
97. In quantifying their claim, the 1st Plaintiff's evidence was that they had a valuation conducted by Prime Land Valuer who had estimated the effected land of 0.406 acres at Kshs 4,700,000/=, whereas the value of trees and fence that had been damaged had been valued at Kshs 7,960,412.50/= by the Forestry department. That this made a grand total of loss amounting to Kshs 21,966,730.50/= . A casual look at this mathematics would leave doubt in the mind of any sane person.
98. The 2nd Plaintiff's evidence was that the total of the damage that had been caused to his land had been Kshs 23,469,510/= That he had lost 0.1092 hectares of his land or about 27.3% of the total land area to the public road reserve due to the action of the Defendants following the acquisition of his land.
99. In the case of *Zacharia Waweru Thumbi vs Samuel Njoroge Thuku* [2006] eKLR, it was held as follows;

“...The law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in Hahn V Singh, Civil Appeal No 42 of 1983 [1985] KLR 716, at P 717 and 721, where the Learned Judges of Appeal — Kneller, Nyarangi JJA, and Chesoni Ag JA — held:



"Special damages must not only be specifically claimed (pleaded) but also strictly proved. ...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. "...If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complained of". This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims, the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test... I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances. I begin by emphatically stating that special damages can't be too high, or too low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the court. The court simply awards what has been pleaded and proved...It must always be kept in mind that no two cases can be exactly identical. Accordingly, doing the best I can in comparing the injuries sustained by the Respondent herein vis-à-vis those in the two comparables cited, and given the passage time between then and when the lower court delivered its judgment, and when the accident occurred mid-2001, I find no sufficient reason to interfere with the Learned Magistrate's award of KShs 180,000/- (One Hundred Eighty Thousand Only) under the head of general damages. Accordingly, I uphold the lower court's award..."

100. In the present scenario, I find that although the valuation report by Prime Land Valuer was sought to be produced as Pf exh 4 at some point, it had actually been marked for identification (PMFI 5).
101. Court of Appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* (2015) eKLR held as follows:

"The fundamental issue for our determination is the evidential effect of a document marked for identification that is neither formally produced in evidence nor marked as an exhibit. Is a document marked for identification part of evidence? What weight should be placed on a document not marked as an exhibit?.....

The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. secondly, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.



The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of the document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation or its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the documents produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would be hearsay, untested and unauthenticated account.

In *Des Raj Sharma –vs- Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa –vs- The state* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”

102. It was therefore a fatal error on the part of the Plaintiffs not to call any witness to produce the document they had marked for identification.
103. PW4 only produced as Pf exhibit 4 (a-b) valuation reports of the worth of the Plaintiffs properties stating that whereas the 1st Plaintiff’s properties were valued at Kshs 4.7 million, the 2nd Plaintiff’s property was valued at Kshs 3 million. In cross examination however he had confirmed that he did not record any witness statement, he did not prepare the valuation report as the same had been prepared by his colleague Mr Sang. He also confirmed that he never visited the Plaintiff’s parcels of land as he was not a surveyor. That according to their valuation report, they did not measure the road and therefore he couldn’t tell how wide the road was before expansion. This to me was not a witness the maker of the same, never visited the suit land nor conducted the survey. There was no evidence adduced by PW4 proving that he was a registered valuer and therefore his alleged business of practicing as a valuer was in contravention of the provisions of Section 21(a) of the *Valuers Act*. Of interest to note, is that the maker of the report was never called to testify.
104. Indeed Section 21 of the *Valuers Act*, provides as follows:
 - (a) no individual shall carry on business as a practising valuer unless he is a registered valuer;
 - (b) no partnership shall carry on business as practising valuers unless all the partners whose activities include the doing of acts by way of such practice are registered valuers;



- (c) no body corporate shall carry on business as valuers unless the directors thereof whose duties include the preparation of valuations in respect of any type of movable or immovable property are registered valuers.
105. Prime Land Limited being a body corporate was bound by the provisions of Section 21(c) of the *Valuers Act*. No evidence was tendered by PW4 that he was one of the Directors of Prime Land Limited in contravention of the said law which stipulates that for a valuation report by a body corporate to be admissible, the said valuation must be carried out by its directors, who must be registered valuers. I thus find the evidence tendered by PW4 and the production of Pf exh 4 being inadmissible in the circumstance and the same is herein disregarded.
106. A valuation report of the trees that were destroyed was produced as Pf exh 3(a & b), by Forester David Alao who testified as PW3 to the effect that he had done a valuation on the respective land parcels being No Kericho/Kipchimchim/607, 608, 615, 618, 621, 630 and 630 belonging to the 1st Plaintiff and Kericho/Kipchimchim/2510 belonging to the 2nd Plaintiff wherein the valuation of the 1st Plaintiff's damaged trees that had been felled was Ksh 7,960,412/= whereas the 2nd Plaintiff's trees damaged had been valued at Ksh 13,923,775/=. Evidence of the witness was that the unit cost had been based on the Kenya Forest Service General Order which showed the value of the trees, and that he had not attached the said order to his report and therefore he could not confirm the value without the order.
107. It is against this report that I have considered the findings in the report dated February 21, 2019 (see para 85-85) which had been prepared and filed in court on the February 25, 2019 at the instance of the court which had visited the site and which had found that indeed the road had been expanded beyond its indicated dimensions by about 0.7 meters on parcel No Kericho/Kipchimchim/ 2510 and by 1.5 meters on No Kericho/Kipchimchim/ 607 and 608 that I find the dimensions indicated in this report as farfetched and cannot be relied upon. Special damages must not only be specifically claimed (pleaded) but also strictly proved (see *Zacharia Waweru* supra)
108. In the end, I find that the Plaintiffs have not proved their case in regard to the issue of compensation for special damages to the tune of Ksh 45,436,240/= and therefore this prayer is rejected.
109. The court has found that the 1st Defendant had trespassed and forcefully taken/acquired the Plaintiffs' property and that such acquisition constituted an illegal acquisition of private property without prompt and full compensation. It is trite that compensatory damages, also called actual damages, are typically broken down into two broad categories thus Special and General (the Plaintiff has failed to prove on the first category) General damages are given for losses that the law will presume are natural and probable consequence of a wrong so as to compensate the Plaintiff.
110. It is trite law that trespass to land is actionable per se (without proof of any damage). See the case of *Park Towers Ltd v John Mithamo Njika & 7 others* (2014) eKLR where JM Mutungi J, stated:-
- "I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case..."
- "...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages."
111. This said and done, it is my finding that:



- i. There being no evidence led against the 2nd Defendant, I proceed to dismiss the case against them with costs.
- ii. I however enter judgment for the Plaintiff against the 1st Defendant as follows;
 - a. The 1st Defendant shall pay general damages of Kshs 500,000/= to the 1st Plaintiff to compensate him for the wrongful entry onto his land parcels No. Kericho/ Kipchimchim/ 607 and 608
 - b. The 1st Defendant shall also pay general damages of Kshs 200,000/= to the 2nd Plaintiff to compensate him for the wrongful entry onto his parcel of land No Kericho/ Kipchimchim/2510
- iii. Costs of the suit and interest at court rates

It is ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 13TH DAY OF OCTOBER 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

