



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1190 of 2004

**WILSON WAITHAKA GITAU.....
PLAINTIFF**

VERSUS

**PHILIP KURIA WAINAINA.....
DEFENDANT**

JUDGMENT

The plaintiff brought this suit against the defendant for judgment seeking:-

- (a) A declaration that the plaintiff is the legal owner and absolute proprietor of the property known as L.R. NO. KIGANJO/GACHIKA/909.
- (b) An order of eviction of the defendant from the suit land L.R. NO. KIGANJO/GACHIKA/909
- (c) Damages
- (d) Costs of the suit
- (e) Such other and/or further relief as this Honourable Court may deem fit and just to grant.

By a Chamber Summons dated 7th July 2005 the plaintiff had applied for orders that the Defendant's statement of defence and counter claim filed herein on 6th December 2004 be struck out and in the result judgment be entered in favour of the plaintiff as sought in prayers (a), (b) and (d) of the plaint and the claim under prayer (c) of the plaint do proceed to formal proof.

The application was heard on 3rd May 2005 and the judge allowed it and made the orders as follows:-

1. That the Defendant's statement of defence and counterclaim filed herein on 6th December 2004 be and is hereby struck out and judgment be entered in favour of the plaintiff.
2. That the plaintiff be and is hereby declared the legal owner and absolute proprietor of the suit property L.R. NO. KIGANJO/GACHIKA/909.
3. That the defendant be evicted from the suit land known as L.R. NO. KIGANJO/GACHIKA/909 and vacant possession thereof be delivered to the plaintiff forthwith.
4. That the claim for damages do proceed to formal proof.
5. That the costs of this application be paid by the Defendant.

On 21st February 2006 the suit came before me for formal proof of damages.

The plaintiff in his evidence told the court that he had purchased the suit land in a public auction on 24th July 2001 and paid Sh.3.1 million for it and the suit land L.R. NO. KIGANJO/GACHIKA/909 was transferred and registered in his name. He was issued with title deed on 16th August 2001. But the defendant refused to give vacant possession. He sought damages because the defendant continued to pick the tea on the suit land and pocket the proceeds. The area under tea is 1.3 acres which has 30,000 tea bushes.

He went and confirmed from Kagwe Tea Factory that the total value of the tea that the defendant had picked was Shs.2,025,851.40. He called Charles Rubia Kimani (PW2) an official from Kagwe Tea Factory who in his evidence confirmed that between the 2001 and 2005 the defendant had earned a total sum of Sh.2,025,851.40 from the tea delivered to the factory.

This is a claim for special damages and special damages must be pleaded and proved.

In the case of SANDE VS. KENYA CO-OPERATIVE CREAMERIES LTD – CIVIL APPEAL NO. 154 OF 1992 (Unreported) the court said:

“We now turn to the Appellant's main ground regarding the alleged loss of profits and other expenses amounting in all Shs.14,151,650.10. As we pointed out at the beginning of this judgment Mr. Lakha readily agreed that these sums constituting the total amounts were in the nature of special damages.

These were not pleaded. It is now strite law that special damages must not only be pleaded but must also be specifically proved.

We do not think we need to cite any authority for this simple and hackneyed proposition of law.”

I can say that what was said by the Court of appeal in the Sande case has been said time and again and there is no point restating the principles again.

The sums sought by the plaintiff ought to have been pleaded as special damages and then specifically proved.

The plaintiff's claim for damages is dismissed with costs.

Delivered and dated at Nairobi this 13th day of September 2006.

J.L.A. OSIEMO

JUDGE