



**Erdemann Property Limited v Kanyi (Environment & Land Case
285 of 2018) [2023] KEELC 18698 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 285 OF 2018**

MD MWANGI, J

JULY 6, 2023

BETWEEN

ERDEMANN PROPERTY LIMITED PLAINTIFF

AND

HON CHARLES NJAGUA KANYI DEFENDANT

JUDGMENT

Background Of The Plaintiff's Case

1. The Plaintiff in this case avers that it is the registered owner of all the parcel of Land known as L.R 209/20567 measuring 2.302 Ha at Ngara area of Starehe Constituency within the Nairobi City County. The Plaintiff alleges that on 10th October, 2017, the Defendant unlawfully and without any justifiable cause and in the company of hooligans maliciously and extensively damaged the Plaintiff's stone/brick perimeter wall erected around the suit property. As he was undertaking the destruction of the perimeter fence, the Plaintiff allegedly vowed not to rest until the entire wall was brought down causing the Plaintiff shock, restlessness and uncertainty.
2. The Plaintiff prays for compensation for the loss and damage suffered assessed at the figure of Kshs. 3,000,000/=, general damages for the malicious damage and a permanent injunction against the Defendant restraining him from interfering with the Plaintiff's possession and occupation of the suit property, trespassing, encroaching, destroying or damaging any part of the Plaintiff's property whatsoever. Additionally, the Plaintiff prays for costs of the suit and interests on the prayers above.

Response by the Defendant

3. The Defendant in his Defence denied the Plaintiff's allegations against him putting the Plaintiff to strict proof. He denied demolishing/damaging the Plaintiff's wall as alleged or at all. In any event the Defendant states that the Plaintiff had no evidence linking him to the alleged damage. The Defendant prayed for the dismissal of the Plaintiff's case against him with costs.



Evidence adduced

4. At the hearing of the case, the Plaintiff called two witnesses who testified in its favour. The Defendant did not call a witness during the hearing.
5. PW 1 was the general manager of the Plaintiff company's planning department. He is also the personal assistant of the Managing Director of the Company. He adopted his witness statement filed earlier on as his evidence. His evidence was that the Defendant who was the member of Parliament of Starehe Constituency then led a group of people to demolish the wall around the suit property. He stated that he was informed by a colleague that the Defendant had led a group of rowdy youths that demolished a part of the Plaintiff's boundary wall.
6. PW1 stated that after receiving the information he called a contractor who confirmed the information. He immediately thereafter informed his Managing Director who instructed him to report to the Police Station. He indeed made a report at Pangani Police Station.
7. PW1 explained that he later in the afternoon of the same day saw a post on the social media by the Defendant stating and confirming that he had led a group to demolish a wall put up by 'a developer'. Subsequently, PW1 confirmed that they engaged a valuer to value the damage caused.
8. In cross-examination by the advocate for the Defendant, PW1 clarified that the incident occurred on 5th October, 2017 and not 10th October 2017 as stated in the Plaintiff. He testified that the colleague who informed him about the incident was a Mr. Mwangi, and that what he had stated before the court was what he was told by this Mr. Mwangi. He had not personally witnessed the demolition of the perimeter wall.
9. Though PW1 had reported to the Police, the Occurrence Book where the report was recorded was not amongst the documents produced as exhibits in support of the Plaintiff's case. He stated that although the Defendant led the group in demolishing the fence, he had not sued the other Defendants. He confirmed taking photographs of the damage at the site of the incident with his phone. However, the Photographs in the Plaintiff's List of Documents were taken using the office camera. The witness was not able to confirm if the demolition had happened in the presence of Police Officers.
10. It was the testimony of PW1 that he was advised that he needed a Valuer to assess the loss. Their claim of Kshs. 3.0 million was based on the figure in the Valuation Report not the actual expenditure incurred. He confirmed that they rebuilt the wall almost immediately after the demolition. He had however not attached the receipts for the reconstruction of the wall.
11. In re-examination, the witness informed the court that he could not remember the exact date when the wall was reconstructed. He stated that at the time of filing this suit, he did not have the receipts evidencing the reconstruction of the wall. He further confirmed that he passed by the site on his way to report to the police.
12. In response to the questions from the court, the witness stated that the Land L.R. 209/ 20567 is 5.5 acres. He could not confirm the exact length of the portion of the wall that was demolished. He estimates it was about a 100 metres or thereabout. The demolished section had almost been completed by the time of the damage. They had used quarry stones, machine-cut stones, steel bars, cement, ballast and sand to construct the wall.
13. Boniface Kamau Mwaniki testified as PW2. He informed the court that he was the Head of I.T. in the Plaintiff Company. He produced the certificate of Electronic Evidence dated 19th June, 2018 as an exhibit in support of the Plaintiff's case stating that the screen shots on page 61 to 67 of the Plaintiff's



- trial bundle were taken from the Instagram account of Hon. Charles Njagua Kanyi's official social media account. The witness alleged that the Instagram Account belonged to Charles Njagua Kanyi, the then MP for Starehe Constituency and the Defendant in this case.
14. The witness further averred that the photos of the site (produced as Plaintiff's exhibits) were taken using a Nikon Camera make Number D5300. He used a H.P. Laptop Elitebook. The photos are from Page 47 to Page 62. The Photos according to the witness confirm the destruction of the wall.
 15. During cross-examination, PW2 stated that he did not have any testimonials or documents to confirm that he is an I.T. expert as stated in the Certificate of electronic evidence and in his testimony. He had not witnessed the demolition of the wall. He was sent to the site to take photos on 6th October, 2017. He averred that it was not true that the incident happened on 10th October, 2017.
 16. PW2 confirmed that it was his first time interacting with the Defendant's account, when he took the screenshots. He had however not attached any evidence to confirm that the account 'jaguarkenya' was actually the Defendant's official account. The witness confirmed he was aware of 'parody accounts' - fake accounts. He had heard of parody accounts by prominent persons.
 17. The witness stated that he took the Screenshots of the photos in the Instagram account. He could not tell who had posted the photos in the account, neither could he tell which gadget was used to take them. Further, he was not in a position to tell if the photos or videos in the Instagram account were edited or not. Only the person who took them could tell. He had not given the specific details of each of the screenshots.
 18. The witness stated that the Defendant was not in any of the Photos that he had taken because he took them after the event. There was no indication on the photos, the time and the date when they were taken. That the Nikon Camera that he had allegedly used belonged to the Plaintiff Company; it was not specifically assigned to him but kept at the strong room.
 19. He confirmed that Paragraph 4 of his Certificate does not indicate if he is the one who took the photos.
 20. In re-examination, the witness stated that he made the certificate of electronic evidence. That the social media account was verified by Instagram, the social media company. That the verification is done on request. The verification is confirmed by the blue tick on the screenshots. That once the account is verified, no one else can own it. In such a case the content therein would belong to the owner of the account.
 21. In response to the question from the court, PW2 stated that the screenshots were taken around 9th October, 2017 while the photos were printed from the camera. He had not however produced any hard copy photos.
 22. When the matter was slated for further hearing, the Plaintiff's Counsel sought to admit the Valuation Report dated 11th October, 2017 without calling the maker. Counsel for the Defendant had no objection. The Valuation Report was admitted as an exhibit for the Plaintiff.
 23. The Plaintiff then closed its case and as stated elsewhere in this Judgement, the Defendant did not call any witness.

Court's directions

24. At close of the hearing, the court directed parties to file their respective written submissions. Both parties complied. The Plaintiff's submissions are dated 23rd March, 2023 whereas the Defendant's submissions are dated 13th June, 2023.



Issues for Determination

25. In the court's considered opinion the issues for determination in this matter are;
 - a. Whether the Defendant is liable for the destruction of the Plaintiff's stone perimeter wall.
 - b. Whether the Plaintiff is entitled to the reliefs sought against the Defendant.
 - c. Who should bear the costs of the suit?

Analysis and Determination

A. Whether the Defendant is liable for the destruction of the Plaintiff's stone perimeter wall

26. As stated earlier, the Defendant filed a statement of defence denying the allegations levelled against him by the Plaintiff. He did not however call any witness during the hearing of the case.

27. It then follows that the assertions by the Defendant made in the Defendant's Statement of Defence remain mere allegations. There has, indeed been many decided cases in support of that position. On such case is, the Court of Appeal decision in the case *Edward Mariga through Stanley Mobisa Mariga v. Nathaniel David Shulter & Another* [1979] eKLR said:-

“The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother.”

28. The Plaintiff however has the onus of proving its case against the Defendant whether or not the Defendant adduced evidence.

29. That the burden of proof was on the Plaintiff is not in doubt. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

‘Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.’

30. On evidentiary burden of proof, Sections 109 and 112 of the *Evidence Act* provide as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

31. The two provisions were dealt with in the case of *Anne Wambui Ndiritu -v- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden, that is, placed upon a



party..... the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

32. The Plaintiff alleges that on 10th October, 2017, the Defendant unlawfully and without any justifiable cause and in the company of hooligans maliciously and extensively damaged the Plaintiff’s stone/brick perimeter wall erected around the suit property. PW 1’s evidence was that he was informed that the Defendant led a group of people to demolish the wall around the suit property. After receiving the information, he called a contractor who confirmed it. The witness stated that he later in the afternoon of the same day saw a post on the social media by the Defendant stating and confirming that he had led a group to demolish a wall put up by a developer. The informant, a Mr. Mwangi was however not called in to testify neither was the Contractor who was allegedly on the site at the time of the demolition called as a witness.

33. Section 63 of the *Evidence Act* which was relied upon by the learned counsel for the Defendant provides as follows:

“

“(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, “direct evidence” means

(a) with reference to a fact which could be seen, the evidence of a witness who says he saw it;

(b) with reference to a fact which could be heard, the evidence of a witness who says he heard it;

(c) with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.”

34. The evidence by PW1 in this case is clearly hearsay evidence which is inadmissible.

35. The evidence of PW 2 on the other hand does not help the Plaintiff’s case in any way. He informed the court that he is the head of I.T. in the Plaintiff Company and an I.T expert. He did not however produce any testimonials to confirm his expertise. He did not provide any or sufficient evidence for that matter to prove that the account he took the screenshots from, “jaguarkenya” was actually the Defendant’s official account as he alleged. It was not possible, according to the witness to tell who posted the photos in the said account; neither could he tell the time when they were taken and posted. Further, he was not in a position to tell if the photos or videos in the Instagram account were edited or not.

36. Most importantly, there was nothing to specifically link the said screenshots with the alleged demolition of the Plaintiff’s wall.



37. In regard to the photos produced as exhibits there is no indication on the photos, the time and the date when they were taken. The certificate of electronic evidence produced by PW 2 does not indicate if he was the one who took the photos. It does not conform with the provisions of section 106B of the *evidence Act*.
38. From the evidence, PW 2 was testifying as an employee of and on behalf of the Plaintiff, not as an I.T. expert.
39. From the foregoing, the Plaintiff has not only failed to prove on a balance of probability, liability for the alleged destruction of the perimeter wall against the Defendant but also failed to prove the alleged destruction. It is therefore my finding that the Plaintiff has failed to discharge its evidentiary burden of proof linking the Defendant to the alleged demolition of the perimeter wall.
40. I would dismiss the Plaintiff's case at this juncture. However, as good practice demands, I will proceed to consider the other issue before pronouncing the final order.

B. Whether the Plaintiff is entitled to the reliefs sought as against the Defendant

41. The Plaintiff prays for compensation for the loss and damage suffered in form of special damages of Kshs. 3,000,000/=, and general damages for the malicious damage. The Plaintiff further prays for a permanent injunction against the Defendant restraining him from interfering with the Plaintiff's possessions, occupation of the suit property, trespassing encroaching, destroying or damaging any part of the Plaintiff's property whatsoever. Additionally, the Plaintiff also prays for costs of the suit and interests on the damages so awarded as prayed above.
42. The law on special damages is well spelt out. Special damages must not only be specifically pleaded but must be strictly proved. In the case of *Hahn -v- Singh* (1985) KLR 716, the Court of Appeal held that: -

“special damages must not only be specifically claimed (pleaded) but must also be strictly provedfor they are not the direct natural or probable consequence of the act complained of and many 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.”
43. In *Total (Kenya) Limited formally Caltex Oil (Kenya) Ltd - v- Janevans Ltd* (2015) eKLR the court insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide proforma invoices sent to the party by a third party.
44. In this case, the Plaintiff in support of his claim for special damages produced a valuation report. This was in spite of the testimony by PW 1 that the Plaintiff had reconstructed the perimeter immediately after the demolition. The Plaintiff should then have produced the receipts or evidence of the actual expenditure incurred in reconstructing the perimeter wall. The valuation report is not proof of special damages. It is based on estimations. In this case the Plaintiff had already expended money reconstructing the wall. What was required of it was to provide proof of the actual expenditure.
45. The court's finding is that the claim for special damages is no proved.
46. As for general damages, the same are dependent on proof of liability. I have already made a finding that the Plaintiff has not proved liability against the Defendant.



47. Regarding the prayer for an Order of permanent injunction, I align with the holding in the case of *Kenya Power & Lightning Company Ltd -v- Sheriff Molana Habib* (2018) eKLR, where the court made the following pronouncement as regards a perpetual permanent injunction;

“A permanent injunction also known as a perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.”

48. The Plaintiff has not made a case for issuance of an Order of Permanent injunction in his favour.

49. I need to comment on the issue of the date when the alleged incident occurred. In its pleadings, the Plaintiff pleaded that the incident occurred on 10th October 2017. The Plaintiff's witness in their testimony however, alleged that the incident occurred on 5th October 2017. Despite the testimony of its witnesses, the Plaintiff did not find it fit to amend the pleadings to align with the testimony of its witnesses. This court has in several decisions categorically stated that parties are bound by their pleadings. I would in addition to my other findings above, hold that the Plaintiff's pleadings do not align with the evidence adduced by its witnesses.

50. Consequently, it is the court's finding that the Plaintiff's suit is not merited and is therefore dismissed in its entirety with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Justus for the Plaintiff.

Ms. Aniela holding brief for Mr. Okach for the Defendant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

