



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E006 OF 2020

MERCY KANINI MUTWERANDU.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF MERU.....RESPONDENT

Being an appeal from the Judgment of Hon. D. Nyambu (C.M.)

delivered on 21st September, 2020, in Meru CM ELC No. 65 of 2018)

JUDGMENT

A. APPEAL

1. The appellant faults the lower court judgment for:- failing to correctly interpret the evidence hence reaching the wrong decision; failing to read and correctly interpret the area map and make a finding that the road complained of was under the mandate of Kenya Urban Road Authority and is constructed by H Young; finding that the road in question was a by-pass tarmac while the road was a feeder road (murrum) joining the by-pass; finding the respondent was wrongly sued and lastly ruling against the weight of the evidence.

2. This being a first appeal the court is required to re-assess, rehear and re-appraise itself on the lower court record, come up with its own findings and conclusions while bearing in mind it did not see the witnesses. *See Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.*

B. PLEADINGS

3. At the trial court, the appellant sued the respondent for trespassing into her **Parcel No. L.N Nyaki/Chugu/534** in September 2016 while constructing Meru Town – Kaithe by-pass Chugu area causing damage to her boundary, crops, trees, gutters and leaving therein a heap of debris hence blocking the applicant's access to her land.

4. She prayed for special damages, general damages, mesne profits and a permanent injunction barring and restraining the respondent from re-entering, trespassing into and or in any way whatsoever dealing with her property.

5. The respondent denied the claim and filed statements alongside the defence dated 21.5.2019 stating the alleged road did not fall under its mandate but the National Government who had contracted a third party to undertake the project and that they did not own the alleged machinery.

C. TESTIMONY

6. The appellant told the court on 16.8.2016, a bulldozer from the respondent came to her land and started uprooting trees with no prior notice or justification alleging her land was on a road reserve. Afterwards they dumped a huge heap of soil therein.

7. She produced a demand letter, valuation report, a search certificate and a sketch map as **P exh 1 – 4** respectively. She denied her land was on a road reserve. As alleged.

8. In cross examination, the appellant claimed the road works were being done by an administrator of the respondent though she had no documents to prove that and that even though she had reported the matter to the police. She produced no particulars to back her allegations.

9. PW2 produced the valuation report for the assessed damage. He estimated the damage at **Kshs. 862,000/=** and produced **MFI 2 as P exh 2**.

10. In his view the RIM indicated the road as 6 meters. He stated there had been an encroachment of the appellant's land by 3 metres for a length of 0.023 Ha. due to the excavation works.

11. Even though the appellant had sought for leave to call the County Surveyors, he did not bring him at all. The respondent's witness told the court that even though PW2 described the road as a feeder road, it was actually a by-pass under the mandate of Kenya Urban Road Authority which fell under the National Government.

12. He told the court the Kenya Urban Road authority had contracted M/s H Young Co. Ltd. to undertake the road works and the appellant had produced no documents to prove the liability of the respondent. The trial court in its judgment dismissed the case leading to this appeal.

D. WRITTEN SUBMISSIONS

13. Parties by consent opted to canvass the appeal through written submissions to be filed by 1.12.2021. The respondent did not file by 8.12.2021 as ordered.

14. The appellant submitS the main bypass begins at Meru Level 5 Hospital (Meru Teaching and Referrals Hospital Anex) and joins the main road between Meru School and Kaaga School and that Meru - Kaithe bypass and or feeder road (Murrum) joined the main bypass midway and that was still under construction.

15. It is trite law that submissions cannot amount to evidence at all. The appellant is trying to introduce piece of evidence which was never submitted through written submissions before the trial court. Similarly, the appellant did not seek to adduce additional evidence before this court. I therefore reject that evidence as improperly being introduced before the court.

16. Further, the appellant submits part 2 of fourth schedule of the Constitution stipulates the functions of the National and the County Government and that the proposed Meru Town – Kaithe bypass was not a National trunk road since it did not connect ports, airports and cities.

17. It was submitted the Kenya Urban Rural Authority and H Young Co. Ltd had no mandate to construct County roads. She relied on **Council of County Government –vs- Attorney General & 4 Others [2015] eKLR.**

18. Further, it was submitted any breach by the party contracted by the respondent made it vicariously liable. The appellant relies on **Adrian Kamotho Njenga –vs- Council of Governors & 3 Others [2020] eKLR** on the proposition that road transport is a shared responsibility between the two governments under **Article 186 (2) and 189 of the Constitution.**

19. In addition it was submitted the Kenya Urban and Rural Authority and H Young and Co; Ltd had no role in the subject matter as the road fell under the respondent as held in **Council of County Government (Supra).**

E. LEGAL ANALYSIS

20. It is trite law that parties are bound by their pleadings and issues flow from the pleadings as held in **IEBC & Another –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR.**

21. The appellant's claim was the respondent trespassed into her land and committed acts of encroachment and destruction. The appellant had a duty to plead and prove who, how and the particulars of the respondent's acts of trespass and destruction. The appellant did not give any particulars of the bulldozer, its registration details, and the driver. The appellant did not provide any copies of registration details from the N.T.S.A indicating it was owned by the respondent.

22. If indeed the appellant made a report to the police and the D.C's office, one would have expected at the very least a copy of the OB extract containing all the details.

23. Similarly, the details of the officers who allegedly visited her premises supervising the road works were not given out to the court as agents or employees of the respondent.

24. Secondly, the appellant claims the officer who came alleged they were from respondent.

25. If the appellant had collected the registration details of the bulldozer and conducted a search, she would as well have known whether the same belonged to the respondent or not. The appellant cannot merely allege the trespass and destruction was done by the agents or servants of the respondent without establishing the nexus between the respondent and the machinery used. At the very least also, the appellant would have taken photographs of the bulldozer at her premises land for production in court.

F. CLASSIFICATION OF ROADS MANDATE IN KENYA

26. Turning to the issue of whether or not the road fell under the respondent or the National Government, roads in Kenya are governed by the **Kenya Roads Act No. 2 of 2007**. This Act establishes both the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority each with distinct functions and classes of road under its mandate as per the first schedule of the **Act**.

27. The appellant claims the subject road fell under the jurisdiction of the respondent hence it is vicariously liable. Unfortunately, the appellant brought no evidence to show anything contrary to the classification of the aforesaid road under the first schedule of the **Kenya Roads Act** that it does not fall under the respondent's mandate.

28. It is not enough to make submissions or statements which are not pleaded as facts in the plaint or witness statements of the appellant. Roads in Kenya are classified as a matter of law and not on the claims or views of parties. The respondent's testimony was clear the road did not fall on its mandate and that the works were undertaken by an agent of the National Government.

29. The appellant has not laid any basis why she holds that strong view the road falls under the mandate of the respondent. Even if that were to be so, the respondent has denied they were the ones undertaking the construction at the time. Liability cannot be inferred or implied. It is either there or not there. See **Republic –vs- N.T.S.A & 10 Others Exparte James Maina Mugo [2015] eKLR.**

30. The onus to prove the road fell under the respondent was always on the appellant and not the respondent since he who avers must prove under **Sections 107 and 109 of the Evidence Act**. The appellant did not bring the gazette notice and a copy of the road construction contract between the respondent and whoever was the contractor.

31. The appellant brought no evidence the contractor was an employee or agent of the respondent or they were working under its control. See **Ochieng –vs- Amalgamated Saw Mills Limited [2005] 1 KLR 151.** In absence of the contract which the appellant could have sought and obtained from the relevant ministries, I find there was no basis to find the respondent liable for the alleged acts of trespass and or destruction. None of its agents, servants or employees have been named and evidence tendered on the manner they trespassed into and committed acts of destruction on the appellant's parcel of land.

32. In **Duncan Nderitu Ndegwa –vs- Kenya Pipeline Co. Ltd & Another [2013] eKLR** while quoting **Sin Heap Lee Murubeni Sda Bhd – vs- Yip Shon Shal [2005]** where excavation by the appellant had seriously affected the land, the court held that as long as the condition of the said land remained the same, the trespass was continuing.

33. On the issue of liability, the court in **Duncan Nderitu Ndegwa (Supra)** while quoting **Bowstead and Reynolds on agency 19th Edition by Peter Watts and F M B Reynolds** at page 1 -031 held thus:

“The dichotomy of servant or employee and independent contractor stems from the law of tort: a person is more readily liable for the torts of his servants than those of his independent contractors. The difference turns on the degree or control exercised.”

34. The court went on to state a servant was ordinarily the one under the control of the employer on how he did the works while an independent contractor was the one who while executing the works was not under the orders or control of the person for whom he did it and may use his discretion in things not specified beforehand.

35. In this case no evidence has been brought as stated above that the bulldozer belonged to the respondent or was under the control and or supervision of the respondent. In absence of the contract/tender documents over the works, this court is unable to determine the scope of works, the engineer who was in charge and the employer of the persons who allegedly trespassed into the land of the appellant.

36. Ordinarily, road contractors are mandated under the law to display the signage which includes all these particulars. The appellant did not gather and produce such details so as to point a nexus between the respondent and the road works. The appellant did not tender any evidence that the respondent was the principal whose agents committed the alleged acts of trespass so as to be held vicariously liable for acts committed in the course of the road works as held in **Unilever Tea Kenya Ltd –vs- National Land Commission & 2 Others [2018] eKLR.**

37. In **Edgar Kadenyi –vs- County Government of Vihiga & 2 Others [2018] eKLR,** the issue was whether the rights of the petitioner had been violated by the respondents while executing road works.

38. The petitioner in that case had produced photographic evidence showing the bulldozers and machines belonging to the contractor while on his land. There was also evidence the contractor had been awarded the tender by the 1st respondent.

39. A copy of the tender documents was produced to show the nexus between the County Government and the contractor over a County road.

40. The petitioner had also produced a map showing the boundary existing and which the respondent had interfered with and curved off about 3 meters width and 200 metres length into the petitioner's land. The court found the respondent liable for not adhering to **Article 28, 40 and 47 of the Constitution** and ordered for compensation for trespass and damages for the loss caused.

41. In the instant suit, it is apparent the appellant did very little if any, to assemble evidence pointing at the respondent. She did not prove the encroachment and destruction against the respondent hence the trial court was right to dismiss the suit.

42. The appeal therefor lacks merits and is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 2ND DAY OF FEBRUARY, 2022

In presence of:

Orimbo for appellant

Kiautha Arithi for respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE