



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 127 'A' OF 2014**

**SAMUEL H. KANYI.....PLAINTIFF**

**VERSUS**

**WATER RESOURCE MANAGEMENT AUTHORITY,**

**MINISTRY OF WATER RESOURCES,**

**TANA RIVER CATCHMENT AREA SUING**

**THROUGH THE ATTORNEY GENERAL.....DEFENDANT**

**JUDGMENT**

The plaintiff instituted this suit against the defendant vide a plaint dated 20/04/2011 and Further Amended on 07/12/2017 seeking the following orders:-

- d) That the plaintiff be compensated for damage on property destroyed during the digging of trenches and lying pipes therein i.e destroyed water tanks, ruined ceiling, cabinets, floor, tiles, house walls, house doors his residential houses in MUTIRA/KIRIMUNGE/186, nonuser of land as intended and cultivation of crops and that the pipes laid in his land parcel NO.MWERUA/BARICHO/460 be dug out to enable the plaintiff use his land as intended.**
- e) General damages as the court may deem just and expedient to award.**
- f) Cost of this suit from the date of filing to the date of judgment.**
- g) Any other or better relief as the court may deem fit to grant**
- h) That the plaintiff also be compensated for the loss of not selling land parcel number MWERUA/BARICHO/460 to desirous sellers for Kshs. 6,325,000.00 as ZENITH(MANAGEMENT) VALUERS LIMITED as provided in their Report.**

The defendant through the Honourable Attorney General filed defence to the plaintiff's claim on 22/07/2011. On 03/12/2018, Tana Water Services Board file a statement of defence to the plaintiff's claim. On 14/01/2019, the plaintiff filed an answer to the interested party's defence. The parties filed their compliance documents and set down the suit for hearing.

**PLAINTIFF'S CASE**

This suit was fixed for hearing on 20/03/2019. The plaintiff three witnesses who gave sworn testimony.

The plaintiff (PW1) referred to his witness statement which he adopted and stated that he is the proprietor of land parcel number MWERUA/BARICHO/460 which he bought with an intention of building a High class school and another land parcel number MUTIRA/KIRIMUNGE/552 where he lives. He said that he caused plans and drawings for the school to be prepared which costed him Kshs.1,600,000. One day in the month of March 2006, while he was looking for funds to start the school, he received a call from a neighbour who informed him that there were people working on his land. He decided to go to scene and on arrival, he saw a crowd of people in his land, some digging trenches while others were lying down the water pipes. He went closer and asked whether they had any authority to enter his land and do whatever they were doing on his land. He was told that the area District Officer and the Water Department Officer had instructed them to do the work. He went to inquire from the office of the District Officer who insulted him and called him names and forced him to leave his office. On the following day, he wrote a complaint to the District Commissioner Kirinyaga copied to the Minister for Water and the Provincial Commissioner, Central Province. Two weeks later, the District Officer, Baricho was removed from office. After realizing that no action was being taken, he instituted this case. After he filed this suit, the Ministry of Water and the Town Water Management Board

disconnected water in his house thereby causing a lot of damage to his house and the water tanks. He made complaints forcing the Water Catchment Board to instruct Engineer Wahome (Valuer) to evaluate the damage caused to his house which they did and filed a report.

PW2 was Duncan Wachira Njoroge who referred to his statement dated 20/04/2011 and adopted by the court in evidence. He recalled that sometimes in March 2006, he was coming from the house of one Mr. Mwai which borders the plaintiff's land when he noticed people digging trenches and others lying the pipes on the dug trenches in Mr. Kanyi's (plaintiff's) land. The people were approximately 30. He recognized one of them as a Mr. Karungu who acted as the foreman. He also recognized a second person by the name Murimi who was working at the Water Engineer's office based at Kerugoya. He then called the owner of the land Mr. Kanyi (plaintiff) on phone and informed him what he had seen on his land. Mr. Kanyi later told him that he had filed a case in court.

PW3 was Lee Mwangi Kiruka attached to Zenith (Management) Valuers Ltd who is a registered and practising valuer. He stated that he was instructed to visit the suit property land parcel No. MWERUA/BARICHO/460 on 30/04/2017 and conduct valuation for compensation purposes due to water pipes that had traversed the suit property. He said that he conducted the valuation and came to the conclusion that the pipes which traversed the plaintiff's land caused damages which made the land un-economical. He assessed the damage plus interest at Ksh. 6, 325,000/=.

### **INTERESTED PARTY'S CASE**

The Interested party called 3 witnesses. DW1 was Kereske Timothy Kamwaro who worked with Tana Water Works Development Agency which was formerly Tana Water Services Board. He retired in April, 2021. He referred to his witness statement filed in court on 03/12/2017 which was adopted by the court in his evidence. He recalled that the issue in dispute was brought to their attention by their mother ministry who wrote a letter to the effect that the owner of land parcel No. MWERUA/BARICHO/460 had sued the Hon Attorney General for encroachment into his property by their agent M/S KIRIWASCO by digging of trenches for purposes of installing 8 inch pipes leading to a storage tank at Baricho measuring 30,000/= litres. They consulted their field officer based at Mwea west to show them the location of the land in question. After they were shown the land and the owner, they sought to know whether the owner was compensated before installation of the pipes through his land. Since this suit had been filed, they instructed their lawyers to seek leave to be joined as an interested party being the licensing entity. After several meetings, they reached consensus on how the compensation was to be done. The compromise was to the effect that the interested party was to pay a compensation to the land owner in the sum of Kshs.1,343,928/= The consensus was communicated to the interested party vide a letter dated 19/03/2013 which was produced as D-exhibit No.1. It was also agreed that the payments would start immediately. On 15/05/2013, they paid a sum of Kshs 700,000/= through a cheque collected by the plaintiff's Advocate from their offices. That on 27/05/2013, the plaintiff's advocate acknowledged receipt of the Kshs.700,000/= and indicated in full. That his client was not comfortable with the payment but wanted the payment in full. He produced the letter as D-exhibit No.2. On 08/10/2013, they forwarded a further payment of Kshs.300,000/= vide a letter dated the same date which he also produced as D-Exhibit No.3. The witness also produced a copy of the cheque for Kshs. 300,000/= dated 19/09/2013 which was produced as D-exhibit No.4. On 16/07/2014, they drew a cheque for the last and final payments of Ksh. 343,928 but before they could forward the same, they learned that land owner changed his mind and reneged on the out of court settlement and moved to court. He also produced the said cheque as P-exhibit No.5. He further stated that it was one of the terms of the compromise agreement that the interested party in conjunction with Kiriwasco would re-route the pipes from the middle of the land to the southern boundary of the land to minimize interference and maximize usage of the suit land by the owner. The interested party would not honour its part of the bargain after the plaintiff moved to court. Regarding the claim by the plaintiff for damages caused to his house by water, the witness said that the interested party is not responsible for supplying water to the plaintiff's house as that is the mandate of Kiriwasco which is the water service provider within Kirinyaga County. On the issue of development and sale of the suit land by the plaintiff, the witness stated that those issues never came up during the meetings and subsequent compensation agreed by consent.

The second witness (PW2) called by the interested party was Charles Wachira Muthukia who is a retired District Water Officer. His duties were to supply piped water to the homes/houses of individual residents. He was also to resolve simple disputes. He was the one who informed Kereske Timothy Kamwaro (PW1) about the dispute between the plaintiff herein and the interested party. Mr. Kamwaro asked him if he knew Mr. Kanyi (plaintiff) and he answered in the positive and confirmed that he was one of their consumers. He went ahead and met the plaintiff in their office at Baricho where they discussed about the dispute and agreed to resolve the same amicably. He informed Mr. Kamwaro concerning the discussions. They later met with Mr. Kanyi and Mr. Kamwaro at Embu Law Courts when the case was still going on. Mr. Kamwaro told him that they have agreed to resolve the case outside the court. After that, they consulted with Mr. Kanyi, Kamwaro, the forester, and the Agricultural officer. They met at his office at Baricho where they agreed on the estimates of the crops damaged. They visited Mr. Kanyi's land to do an estimate of the compensation which was done by the Agricultural officer and the forester. Later, Mr. Kamwaro told him that they had agreed to compensate Mr. Kanyi.

DW3 was Charles Maina Wachira who works with Kirinyaga Water & Sanitation Company as an internal Auditor. His duties include examination and evaluation of the internal control systems of the Company so as to advise the management the extent of their reliability, relevance and give recommendations. He is also actively involved in field work such as supervision of water infrastructure such as pipelines and metres where there is a dispute. He said that he knew the plaintiff as one of the consumers with their water company. That in the year 2011, the plaintiff raised a complaint that the interested party had laid water pipes on his land parcel Number MWERUA/BARICHO/460 and was seeking compensation. He further stated that KIRIWASCO had been providing water to the plaintiff and that the water bill according to their records had arrears of Kshs. 4,600/ which prompted the company to disconnect supply in accordance with the consumer's Agreement form which the plaintiff signed. That was long before the dispute was brought to court. The plaintiff later went to their offices arguing that the disconnection would interfere with the court process prompting KIRIWASCO to reconnect the water. He said that they incurred costs installing a one and a half-inch pipe and supplying water to the plaintiff which he has been using for more than 8 years now while contrary to half-inch pipes used for normal household. The witness stated that since 2011, the plaintiff has continued obstructing their officers by denying them access as the gate is always closed which actions are contrary to the Water Act of 2016. As such, it has become difficult to bill the plaintiff and also repair and maintain company pipes or control water usage by the plaintiff. He said that the plaintiff's claim that his water tanks cracked due to long absence of water in them thereby causing damage to his house cannot be attributed to KIRIWASCO disconnecting his supply of water. He said that KIRIWASCO is not responsible for maintenance of any consumer's water tanks. The witness also stated that the company is only responsible for maintaining water supply pipes to Consumers perimeter wall and any pipes extending into the compound is the responsibility of an individual. Finally, the witness said that the company is only responsible for maintaining any water pipes supplying water to their customers and any complaint on any pipes that burst are acted on promptly to ensure that the company

accounts for non-revenue water and that it is not the work of the company to maintain any water tanks, which is solely the responsibility of the consumer.

## **LEGAL ANALYSIS AND DETERMINATION**

I have considered the pleadings, the evidence adduced by the parties and the witnesses as well as their submissions and the applicable law. The issues for determination are as follows;

- 1) Whether the plaintiff has proved his claim on a balance of probabilities?**
- 2) Who will bear the costs of this suit?**

### **Whether the plaintiff has proved his claim on a balance of probabilities**

The plaintiff's claim is for special damages as pleaded in his plaint which was further Amended and filed on 07/12/2017. Under prayer No. (d) of the said Further Amended plaint, the plaintiff is seeking compensation for damages on his land destroyed during the digging of trenches and laying of pipes therein i.e. destroyed water tanks, ruined ceiling, cabinets, floor, tiles, house walls, house doors, non-user of land as intended and cultivation of crops all adding up to Kshs.6,325,000/=. The plaintiff called one Lee Mwangi Kiruka, a property valuer as one of his witnesses. The said witness produced a valuation report prepared by Zenith (Management) Valuers Ltd dated 30/04/2017. In his evidence, the witness told the Court that the best use of the plaintiff's land was to sub-divide into 50 by 100 feet plots for sale. However, the witness did not provide advertisement showing that the suit land was proposed/offered for sale but buyers declined on grounds that water pipes were laid on the ground. There is even no Sale Agreement for the four comparable plots he relied in the valuation report for compensation would be sold at the alleged prices. The witness did not also produce photographs of the destroyed properties including water tanks, ruined ceiling, cabinets, floor, tiles, house walls, and house doors.

I also note that during cross-examination, the witness confirmed that he did not have any proof that he was a valuer. Having been issued summons to attend court as an expert witness, the witness ought to have come with his practising certificate. Failure to submit his qualification put the valuation report and the contents therein into question. Being a claim for special damages, the plaintiff is required in law to specifically prove as was held in the case of **BANQUE INDO SUEZ VS DJ LOWE AND COMPANY LIMITED (2000) e KLR** where the Court of Appeal held:

*“----Though special damages were specifically pleaded or claimed they were not proved at all. It is simply not enough for the respondent to pluck figures from the air and throw them in the face of the court and expect them to be awarded. It is trite that special damages must not only be claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree and certainty and particularity of proof required depend on the circumstances and nature of the acts themselves.*

*Section 107 of Evidence Act provides that; “Whoever desires any court to give judgment as to any legal right or liability depends on the existence of facts which he asserts must prove that those facts exist.”*

*Further, Section 109 of Evidence Act further states that; 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 that fact shall lie on any particular person.”*

I agree entirely with the decision by the Court of Appeal which is also binding on me. Before I conclude my finding, I wish to say that interested party through its witness namely KERESKE TIMOTHY KAMWARO (DW1) stated that during the pendency of this suit, the plaintiff and the interested party agreed to have this matter settled out of court which was High Court in Embu and the plaintiff had no objection. He said that negotiations commenced and the parties agreed to a compromise settlement of Ksh.1,343,928/=. Towards that end, the plaintiff herein was paid a sum of Ksh.1000,000/= which he acknowledged. However, the interested party withheld a cheque of the balance in the sum of Ksh. 343,000/= after realizing that the plaintiff was becoming impatient and had gone back to court. The witness produced the evidence of the said payments in court which was not controverted. On this ground, I find the plaintiff's claim made in bad faith and scandalous.

## **FINAL ORDERS**

In view of all the aforesaid matters, I find the plaintiff has not proved his claim for special damages on a balance of probabilities and the same is hereby dismissed. Since the parties had agreed to resolve this matter out of court and the plaintiff paid a sum of Kshs 1,000,000/ which was duly acknowledged, I hereby direct the parties to honour their obligation in the remaining part of the Agreement as agreed. Consequently, I make the Orders/Direction:-

- 1) The Interested Party herein to pay the plaintiff the sum of Kshs 343,000/ within 60 days from today being the balance of the Agreed out of court settlement.**
- 2) The Interested party to reroute the water pipes traversing the middle of the plaintiff's land as agreed between them.**
- 3) Each party to bear her own costs.**

**JUDGMENT READ, DATED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 4TH DAY OF FEBRUARY, 2022.**

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. Ms Kimata holding brief for Mrs Gichoi Mwangi for Interested party
2. Plaintiff – present
3. Kabuta, Court clerk – present.