



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 80 OF 2014

JANE WANGITHI MURIITHI.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KIRINAYGA.....DEFENDANT

JUDGMENT

INTRODUCTION

By a plaint dated 22nd January 2014, the plaintiff sought judgment for the following orders:

- a. Kshs. 73,440/= and general damages/mesne profits for non usage of ¼ acre out of land parcel No. MWEA/NGUCWI/573.**
- b. An order directing the District surveyor and Land Registrar Kirinyaga to rectify and carve out the road as reflected in their records.**
- c. The costs of the suit and any other relief the Honourable Court may deem fit to grant.**

In a defence dated 10th April 2014, the defendant denied the plaintiff's claim and put her to strict proof thereof.

PLAINTIFF'S CASE

The plaintiff gave testimony and adopted her statement filed on 14th March 2014. In her testimony, the plaintiff stated that sometime on 28th April 2012, she fenced her land parcel No. MWEA/NGUCWI/573 at a cost of Ksh. 73,440/= being the cost of cedar poles and barbed wire. The plaintiff further stated that she undertook the said fencing after her surveyor one Mr. Murimi had shown her the beacons. She had also visited the Chief's office and saw one Mr. Muchiri who gave her a letter to take to the Land Registrar who advised her to fence her shamba. The plaintiff further stated that on the 26th October 2013 at around 10.00 a.m. or thereabout, she was called by one Paul Gichobi who told her there was a grade tractor clearing a road that passes through her land which destroyed 32 of her cedar poles and 37 gravellier trees which she had planted along the fence as well as Napier grass. She went to the scene and found out that a grader registration number GK A 989 B was doing the clearing. The plaintiff stated that prior to the destruction of her property, she had been summoned by the County Coordinator Kirinyaga County who asked if she will open the road or not. She was referred to the District Surveyor's office who told her to open the road first and thereafter the right procedure shall be followed. She attempted to show them the map of the area but refused to look at it or act upon it. On 8th August 2013, the Land Registrar Kirinyaga wrote to her telling her that he would come back again to identify where the road passes. The plaintiff stated that road was curved out from her land where the Napier grass which she used to cut and sell at Ksh. 3,000/= after every two (2) months as income that she has now lost. The gravellier trees which were damaged were four (4) seasons old. In conclusion, the plaintiff sought an order for the removal of the road which was carved from her land and compensation for the loss she incurred for non-usage of the portion of land that was curved out and loss of 32 cedar poles and costs of this suit. The plaintiff produced documents contained in a list filed in Court dated 22nd January 2014.

DEFENDANT'S CASE

The defendant failed to call any witness and the defence case was therefore closed.

ISSUES FOR DETERMINATION

The parties did not draft any issues for the Court's determination. However, the following are the appropriate issues for determination:

1. Whether a road has been curved from the plaintiff's land parcel No. MWEA/NGUCWI/573?

2. Whether the plaintiff is entitled to the orders sought?

3. Who shall bear the costs of this suit?

ANALYSIS AND DETERMINATION

The plaintiff in paragraph 6 of her plaint averred as follows:

“6. That on the 26th October 2013, the defendant without any colour of right instructed that a road be curved out of the parcel and indeed a tractor registration No. GK A 989 B curved out a road through the parcel damaging the Napier grass, 32 cedar pole, 37 gravellier trees and the barbed wire”.

In order to prove whether a portion of her land has been excised from her land, it behoves upon the plaintiff to call a surveyor who will then file a report showing the alleged excision indeed happened. From the list of documents dated 22nd January 2014, no such report has been filed or produced in Court showing that a road has been curved from the plaintiff's land parcel No. MWEA/NGUCWI/573. To the contrary, the documents which were also produced as exhibits indicates that a boundary dispute was reported to the office of Chief Murinduko in Wanguru who on 28th November 2011 wrote to the Land Registrar Kirinyaga informing her that the owner of the land parcel No. MWEA/NGUCWI/573 wishes to be shown the actual boundary between her land and the road.

Following the said request by the area Chief on 6th August 2013, the District Surveyor Kirinyaga wrote to the Registered proprietor of land parcel No. MWEA/NGUCWI/573 one Jane Wangithi Muriithi who is also the plaintiff in this case together with registered owners of the neighbouring parcels of land Nos. MWEA/NGUCWI/285, 618, 619 and 1175 informing them that she was going to visit the disputed boundary to determine and indicate its position on 8th August 2013 at 12.00 noon. The District Surveyor therefore summoned the registered proprietors of the affected parcels of land to appear before her with their witnesses for purposes of resolving the boundary dispute. The plaintiff did not file and/or produce the findings by the Land Surveyor on 8th August 2013. However, the defendant filed the same in her list of documents dated 10th April 2014. Since the report was not produced I say no more save to add that in civil cases, the onus of proof lies squarely upon he who alleges and the standard is usually on a balance of probabilities. The plaintiff in my view has not discharged her onus as no report has been produced by a Land Surveyor that her land has been excised towards the creation and construction of a road. **Section 107 as read with Section 108** reads as follows:

“107 (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that these facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

The plaintiff in this case seeks to be given judgment based on allegations that the defendant excised her land towards the construction of a road. The plaintiff has not called an expert witness such as a Land Registrar or a Land Surveyor to show that his land has indeed been excised by the defendant to make a road. The other issue for determination in this case is the claim for general damages and mesne profits. It is trite law that a claim for special damages must not only be pleaded with particularity but must also be proved strictly. In the case of Ratcliffe Vs Evans (1892) 2QB 524 Bowen LJ held as follows:

“The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree and certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principle. To insist upon more would be the vainest pedantry”.

I totally agree with the principle required in proof e.g. special damages. The claim by the plaintiff for damages caused to destruction of his Napier grass is a special damage which must be assessed by an agricultural economist or any expert in that field. The plaintiff did not call an expert witness in that field. The plaintiff also failed to lead evidence showing that it was the defendant's servants and/or employees who damaged the cedar poles and/or barbed wire she had used to fence her shamba. In the upshot, I find that the plaintiff's claim has not been proved to the required standard. In the result, the plaintiff's claim must fail and the same is hereby dismissed with costs to the defendant.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 21st day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Mr. Ndana holding brief for Munene Muriuki