



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. NO. 531 OF 2017

JAMES NGUGI KARIUKIPLAINTIFF

-VERSUS-

PETER KAMAU KARIUKI..... DEFENDANT

JUDGMENT

By a Plaint dated **28th April 2017**, the Plaintiff herein **James Ngugi Kariuki** sought for judgment against the Defendant and prayed for:-

- a) An order directing the Defendant to cut down all trees growing within 10 meters range or distance from the common boundary with the Plaintiff's and Defendant's land and to uproot the stumps thereof and in default, the Plaintiff be at liberty, at the Defendant's cost to cut and uproot the same and such costs and/or expense as shall be borne be recoverable from the Defendant summarily.***
- b) General damages for loss of economic use and/or loss of income of the suit premises.***
- c) Costs of the suit.***

The Plaintiff averred in his Plaint that he is the owner and is in actual physical possession of all that piece of land known as **Title No. Escarpment Jet Scheme/1379**. Further that the Defendant is the owner and in possession of **Escarpment Jet Scheme/1380**, which adjoins the Plaintiff's land. That he resides on his parcel of land and cultivates nappier grass on a portion of the said land which borders the Defendant's parcel of land.

Further that the Defendant has planted a number of **eucalyptus trees** on his parcel of land which are 2 feet close to the common boundary of the two parcels of land. That the roots from the said trees have penetrated the land which the Plaintiff has cultivated the said nappier grass and said roots suppressed growth and poor harvest on the Plaintiff's land since **2013**. Further that the branches of the said trees have caused continuous and destructive shade upon the Plaintiff's crops and leaves shed by the said trees have been deposited on the Plaintiff's land adversely affecting quality of the said crops. Therefore the Plaintiff's land has been wasted and his crops have been severely damaged and the Plaintiff has suffered loss and damages. That unless the said nuisance is abated, the Plaintiff shall continue to suffer loss and damage and thus claims for damage.

That the Defendant has failed to observe the relevant Agricultural Laws and regulations wherein, he should have planted the said eucalyptus trees more than **Ten (10) meters** from the common boundary, separating the two parcels of land. It was his contention that despite demand and notice of intention to sue, the Defendant has declined to cut or uproot the said **eucalyptus trees** to abate the nuisance and thus this suit.

The suit is contested and the Defendant filed his Defence on **19th May 2017**, and denied in totality all the averments contained in the Plaint. He denied that the said trees are too close to the Plaintiff's land. He also averred that the suit herein is an afterthought and did put the Plaintiff to strict proof. Further that the Plaintiff participated in the Planting of the said trees and that he has not demonstrated any loss. He also alleged that the timing of this suit is highly suspect and the same is actuated by malice after the Defendant cut the weekly support he used to give the Plaintiff. Therefore, the suit is aimed at extorting money from the Defendant. He also denied ever receiving a notice of intention to sue and he urged the court to dismiss the suit with costs.

When the matter proceeded for viva voce evidence, the Plaintiff gave evidence for himself and called no witness. The Defendant too gave evidence for himself and called no witness.

PLAINTIFF'S CASE

PW 1 James Ngugi Kariuki from Githithia Village in Uplands area averred that he is a farmer. That prior to that, he worked with the **Post Office** and was based at **Nandi Hills**. Further that the Defendant is his elder brother who is his neighbor too. That the Plaintiff owns the land

title No. Escarpment Jet Scheme/1379, and he produced the title deed for the said land. That his brother owns the adjacent land **Escarpment Jet Scheme/1380**, and he produced the area survey maps as exhibit in Court. He alleged that the Defendant has planted **eucalyptus trees** at their common boundary and the said trees have affected his crops and the land has become barren. That he raised the said concerns in the year **2009**, but the Defendant ignored him. That in the year **2013**, the trees started to affect his land and nothing grows on the side of the land that borders the Defendant. That the Plaintiff reported the matter to the Assistant Chief and when the Defendant was summoned, he ignored the said summons. The Plaintiff was referred to the Rural Forest Officer who visited the land on **16th October 2013**. The Defendant was informed of the said visit, but he failed to turn up. That the Rural Forest Officer assessed the damage and confirmed that the Plaintiff's concerns were genuine. That the Defendant's wife was present and she was shown by the Forest Officer where the trees ought to have been planted, that is about **10 meters** from the common boundary.

That Forest Officer visited again on **2nd November 2013**, and the Defendant too failed to turn up. Further that the Plaintiff reported the matter to the Chief who summoned the Defendant on **21st January 2014** but he failed to appear. He produced the summons as **exhibit no 5**. Further he produced the recommendations of the **Rural Forest Officer** as exhibit no 6. He also testified that he has a strained relationship with his brother and they have never discussed the matter and that the trees have affected about half an acre of his land. He also produced the demand letter to the Defendant as exhibit in court.

That he has suffered great economic loss to the projection of **100,000/= per year** and the said loss has occurred since the year **2013**. He denied having advised the Defendant to plant the said trees nor helped him to plant them. He urged the court to allow his claim.

In cross examination, he stated that the land started having crop failure in the year **2013** because of shade and leaves and the area affected was the one near their common boundary. He however did not have evidence to show the said crop failure.

DEFENDANT'S CASE

DW 1; Peter Kamau Kariuki from Lari in Kiambu admitted that the Plaintiff is his elder brother. That they planted the trees together after the Plaintiff came back from the Rift Valley due to **Post Election Violence**. That he had assisted his brother with everything and he even used to give him **2,000/=** per week. That the two used to cultivate the Defendant's land together and they decided to plant trees on their parcels of land. He stated that he gave the Plaintiff **Kshs. 20,000/=** to plant trees but instead he misused the money. He further gave him **Kshs. 15,000/=** to build his own gate. That since the Plaintiff's children are well educated, working and do support him, he stopped supporting him financially and the Plaintiff was not happy with that. That the Plaintiff's children even built a home for him but he chose to stay with the Defendant. Further that the Plaintiff wanted him to cut the trees before maturity and when he refused, the Plaintiff reported the matter to the Chief and later filed this case. He urged the court to dismiss the Plaintiff's suit.

In cross examination, he testified that the Plaintiff complained when he stopped giving him assistance. He averred that he did not know the distance that they were supposed to keep from the common boundary. Further that when the Rural Forest Officer visited the site, he was not present but his wife and children were present. He insisted that he has a right to have the trees grow to maturity and then harvest them for a profit and that the Plaintiff is the one who came up with the idea of planting the trees.

After the close of the viva voce evidence, the parties filed their respective written submissions which the court has carefully read and considered. The court will make the following findings;

There is no doubt that the Plaintiff and the Defendant are blood brothers. There is also no doubt that the two brothers own parcels of land adjacent to each other. The Plaintiff is the owner of **Escarpment Jet Scheme/1379**, whereas the Defendant is the owner of **Escarpment Jet Scheme/1380**. Further, there is no doubt that the Defendant has planted trees on his portion of land. The Plaintiff has alleged that the trees were planted at their common boundary and only 2 meters from the Plaintiff's property. The Defendant has not disputed having planted the said trees. However, he alleged that the Plaintiff was part of the team that planted the said trees. That he brought this suit out of malice.

The Plaintiff has alleged that the said trees have affected his land and has made it barren and thus has had crop failure since **2013**. He has urged the court to allow the claim.

Having found that there is no doubt about the Defendant having trees growing on his parcel of land, the issue for determination is whether the Plaintiff is entitled to the prayers sought in the plaint.

It is evident that the suit herein is founded on the tort of nuisance and strict liability. As was submitted by the Plaintiff, nuisance is described as

“in order to constitute a nuisance, it must appear that physical injury is inflicted on the Plaintiff's property and that the ordinary use of the Plaintiff's property is materially infected with and that the ordinary comfort and healthfulness of human existence hereby is materially diminished.

The tort of strict liability is espoused in the case of **Raylands –vs- Fletch (1866) 1EX 265**, where it was held that:-

“We think that the rule of law is that the person who for his own purpose brings on his land and collects and keep there anything likely to do mischief if it escapes, must keep it at his own peril and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

It is trite law that he who alleged must prove. The Plaintiff herein is the one who has alleged and therefore he had the onerous task of calling sufficient evidence to prove his case. See **Section 107 of the Evidence Act**:

(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 those 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.

As the court stated earlier, there is no doubt that the Defendant has planted trees on his parcel of land. The Plaintiff alleged that the Defendant's trees are only 2 meters away from his parcel of land which action is against the known agricultural practices as he was supposed to have planted them 10 meters from the common boundary. Though the Plaintiff produced a report from the Lari Sub County Forest Officer, there were no photographs of the alleged planted trees. The said Sub-County Forest Officer was not a witness in court and the relevant sections of the Agricultural Act were never quoted or referred to. It was also alleged that the Plaintiff's land suffered crops failure. There was no evidence of this crop failure such as photographs of the said area showing crops failure or assessment of the damaged crops by an agricultural officer. All that the Plaintiff has done is to allege without providing evidence.

Though there are letters produced in court to show that this dispute had been referred to the Assistant Chief and later to the Chief, there was no evidence that was produced in court to confirm what was discussed and the outcome. The two Administrators and the Sub-County Forest Officer were not called as witnesses to support the Plaintiff's allegations of crop failure. The Plaintiff's evidence therefore remained mere allegations, which allegations cannot be said to have proved the case on the required standard of balance of probabilities.

The Defendant on his part alleged that the suit herein has been actuated by malice. No evidence was tendered to support that. However, it is the Plaintiff who alleged and it is him who has the duty to prove his case. The Defendant in his witness statement dated **19th May 2017**, averred that the trees had three more years before harvest. Three years are now almost over and the Defendant should prepare to harvest the said trees for purposes of maintaining good neighborliness with his brother, the Plaintiff herein.

Having now carefully considered the available evidence, the court finds that the Plaintiff herein has failed to prove his case on the required standard and he is therefore not entitled to the prayers sought in the Plaint.

Consequently, the court finds the Plaintiff's claim herein not merited and it is dismissed entirely.

On costs which is granted at discretion of the court, the court finds the parties herein are brothers and therefore direct that each party to bear his own costs.

It is so ordered.

Dated, signed and Delivered at Thika this 15th day of June 2020.

L. GACHERU

JUDGE

15/6/2020

Court Assistant – Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

No consent for the Plaintiff

No consent for the Defendant

L. GACHERU

JUDGE

15/6/2020