



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC CASE NO. 96 OF 2016**

**JEREMIAH CHELANGA**

**(Suing as the Guardian Ad Litem of JOHN CHELANGA CHEPKONGA.....PLAINTIFFT**

**VERSUS**

**THE BOARD OF MANAGEMENT KAMATONY PRIMARY SCHOOL.....1<sup>ST</sup> DEFENDANT**

**THE SUB COUNTY COMMISSIONER TRANS-NZOIA EAST.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF, SUWERWA LOCATION.....3<sup>RD</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The plaintiff initially filed this suit on **8/6/2016** by way of a plaint dated **7/6/2016**. Subsequently, he filed an amended plaint on **2/11/2016**, which was allowed by consent of the parties on **16/3/2017**, in which he sought the following orders against the defendants jointly and severally:-

- (a) An order of permanent injunction restraining the defendants jointly and severally, by themselves their agents or servants from entering, trespassing, cutting down the plaintiff's trees, constructing a road or in any other way dealing with the plaintiff's parcel of land known as TRANS-NZOIA/SUWERWA/152.**
- (b) A declaration do issue that the interference by the defendants with the plaintiff's ownership and title to TRANS-NZOIA/SUWERWA/152 is illegal.**
- (c) Liquidated damages as per paragraphs 12 hereof.**
- (d) General damages**
- (e) Costs of the suit and interest at court rates.**
- (f) Any other relief this court shall deem fit to grant.**

**PLEADINGS**

**The Plaintiff**

2. In his amended plaint the plaintiff pleaded that on or about **2/6/2016** the 2<sup>nd</sup> and 3<sup>rd</sup> defendants held a meeting with members of the public

and incited the public into cutting down trees and attempting to create a road over his land known as land reference number **Trans Nzoia/Suwerwa/152**. On **3/6/2016** the 1<sup>st</sup> defendant employed persons to cut down the plaintiff's trees for the purpose of the construction of a road through the plaintiff's parcel, leading to destruction of property worth **Kshs.2,289,908.58**. The road was for the purpose of enabling access to the Kamatony Primary School run by the 1<sup>st</sup> defendant. The school's parcel of land is known as **Trans Nzoia/Suwerwa/155**. He avers that the school was established on agricultural land without a change of user or proper planning that would allow for proper access thereto. He maintains that there is no public road through his land as the road that was supposed to be constructed was never authorized by the land registrar. He denies ever consenting to the creation of the road on his land.

### **The Defendants' Defence**

3. The defendants filed their amended joint statement of defence and counterclaim dated **28/3/2017** on **30/3/2017** through the office of the Hon. Attorney General who acted on all their behalf. In their defence the defendants denied the plaintiff's claim. They stated that Kamatony primary school is a public school which was officially opened in **2013** on land purchased by the local community from the defendant which land happened to be landlocked. They further aver that in the year **2010** the plaintiff's father opened the road to the school through his land and in **2011** he donated that access road of approximately **300** metres to provide access by the school to a nearby public road and it has existed since then. Construction materials were ferried to the nascent school via that road and with the plaintiff's knowledge. They state that the plaintiff has no authority to raise the matters he raises as the land belongs to his father. The defendants also aver that the trees in question were felled by the Kenya Power & Lighting Company in **2011** to pave the way for the implementation of the area rural electrification programme and with the consent of the plaintiff who in return had electrification of his home done free of charge.

### **EVIDENCE OF THE PARTIES**

#### **The Plaintiff's Evidence**

4. **PW1, Jeremiah Chelanga**, the plaintiff testified on **21/9/2017** and on **17/1/2018**. He essentially reiterated what is contained in the amended plaint. He admitted that the land belongs to his elderly and sick father. He stated that after the destruction of the property he reported the matter to the police and the Office of the County Commissioner but obtained no help. He stated that the trees were cut by use of pangas axes and power saws by the school management committee led by its chairman and that he took pictures of the activities then. He maintained in his evidence that he is not the person who sold land to the school and whoever sold the land should grant the road of access. He denied that the Kenya Power & Lighting Company cut down the trees in question. While under cross-examination by Mr. Kuria, Senior State Counsel appearing for the defendants, he averred that he was not aware whether his father had donated the road, or of the occurrence of a meeting on **12/3/2011**, or that his father attended that meeting and donated the land for the road thereat.

5. **PW2, Eliud Kipkoech Koskei**, testified on **17/1/2018**. His evidence is that he is a livestock extension officer in Cherangany sub county; that he has undertaken a specialized beekeeping course; that he visited the suit land and assessed the damage; he narrated the losses occasioned at the site: **4** hives, trees hosting the hives; according to him the log hives could have lasted for a period of **10 - 15** years and each hive costs approximately **Ksh 3,000/=**. He stated that one log hive may produce **80** kilos per harvest and that the hive can yield produce twice in a year that is **160** kilogrammes. It was his opinion that each kilo can be sold for **Kshs.750**. Using the mentioned figures and applying a multiplier no **10** years, he arrived at the loss of **Kshs. 1,212,000/=** in respect of the loss occasioned by the loss of the beehives and the bee habitat. He produced his report in court and it was labelled **P. Exh 2**. Upon cross examination by Mr. Kuria he admitted that the figures he applied were only estimates, and that actual annual production may vary depending on the weather, the length of the log hive and the size of the colony. He maintained that he based his estimates on what he could see in the hives at the time of the assessment. He also stated that in his knowledge as the area extension officer, the plaintiff has been a consistent beekeeper.

6. **PW3, Professor Balozi Bekuta**, testified on **27/11/2018**. He stated his academic qualifications. His evidence is that he is a professor of forestry at the University of Eldoret. Giving his definition of terms as hereinafter parenthesized, he stated that his area of specialization is inventory, forestry mensuration (measurements) forest inventory (stock taking) growth and yield modelling (how trees grow and value increases with age). He has worked in that area of specialization since **1990**. He worked for KEFRI first before joining the university. He was called upon by the plaintiff to assess the value of the trees that had been cut. He visited the site on **8/6/2016** accompanied by **2** foresters and one ICT officer. They took measurements. Some of the trees were not there and they had to rely on the tree stumps size to estimate their size, width and height upon which to base their estimates. They assigned the destroyed trees the value of **Kshs. 1,021,028.58**. He then wrote a report of his findings which he produced as **P.Exh 2**. According to his evidence the plaintiff lost value in terms of timber and poles, and improvement of the microclimates of the area, stemming of rainwater and carbon sequestration.

7. On **17/10/2019**, hearing of defence case was slated for **12/3/2020**. On **12/3/2020** the state counsel representing the defendants in this matter was absent. The plaintiff's counsel prayed that the defence case be deemed as closed. The court ordered that the defence case be deemed as closed.

#### **Submissions of Counsels**

8. The plaintiff filed his written submissions on **18/5/2020**. I have perused through the court file and found no submissions filed on behalf of the defendants. I have considered the amended plaint, the evidence and the submissions.

### **DETERMINATION**

9. The defendants never gave any evidence and therefore the evidence given by the plaintiff and his witnesses was uncontroverted.

10. I have considered the evidence tendered in the prosecution of this case and in my view in the absence of any contrary evidence, the plaintiff has established his claim on a balance of probabilities.

11. I therefore enter judgment for the plaintiff as prayed in the amended plaint in terms of **Prayer Nos. (a), (b), (c) and (e)**. I also award the plaintiff general damages under **prayer (d)** in the sum of **Kshs. 100,000/=** for trespass.

It is so ordered.

**Dated, signed and delivered via teleconference at Kitale this 30<sup>th</sup> day of July 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**