



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KISII**

**E.L.C. APPEAL NO. 14 OF 2018**

**(FORMERLY H.C.C. APPEAL NO. 63 OF 2015)**

**CHRISTOPER OMBATI OMARE.....APPELLANT**

**VERSUS**

**ZEBEDEO BARONGO T/A BARIZE AGENCIES.....RESPONDENT**

**(An appeal from the Judgment of Hon. Kibet Sambu (P.M.) dated the 6<sup>th</sup> day of May 2015**

**in Kisii Chief Magistrate's Court Civil Case No. 158 of 2011)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant has filed this appeal to challenge the dismissal of his suit against the Respondent in Kisii CMCC No. 152 of 2011. He laid out the following grounds of appeal in his Memorandum of Appeal dated 26<sup>th</sup> May 2015;

- a. That the learned trial magistrate erred in law and fact by dismissing the Appellant's suit;
- b. That the learned trial magistrate erred in law and fact by failing to appreciate the evidence tendered by the Appellant and the witnesses;
- c. That the learned trial magistrate erred in law and fact by failing to appreciate the nature of exhibits produced in court;
- d. That the learned trial magistrate erred in law and fact by being swayed with non existing (sic) evidence of the Respondent;
- e. That the learned trial magistrate erred in law and fact by holding that the Appellant was not able to establish his claim for special damages; and
- f. That the learned trial magistrate erred in law and fact by holding that the Appellant had failed to prove his case on a balance of probability.

**BACKGROUND**

2. The facts of the Appellant's case as set out in his plaint dated 13<sup>th</sup> June 2011 were that on 2<sup>nd</sup> May 2011, he discovered that the Respondent had moved into his parcel of land known as Kisii/Bomariba/836 and commenced construction works by erecting temporary structures on the land without his consent. He claimed that the Respondent's illegal actions had caused him a loss worth Kshs. 422,500/= arising from the denial of access to the land, loss of user and damage to his land and the sugarcane planted thereon. The Appellant sought compensation for the loss and also prayed for a mandatory injunction directing the Respondent to remove the construction materials and structures he had erected on his land.

3. The respondent filed a defence refuting the claim that he had entered into or trespassed onto the suit land. He averred that the developments complained of by the Appellant had been undertaken by M/s Barize Agencies Limited which had been contracted by the Ministry of Roads to construct Riakige footbridge on public utility land. He contended that the Appellant's case was misconceived and urged the trial court to dismiss it.

4. At the hearing of the matter before the trial court, the Appellant testified that the Respondent had cut down his sugarcane and proceeded to construct a bridge through his land without his knowledge. He stated that he had engaged an agricultural officer to assess the value of the damage to his cane. He also informed the trial court that he had been prevented from using that portion of land as the said portion of land was still being trespassed upon.

5. During cross examination, the Appellant accepted that the reason the bridge known as Riagike footbridge was constructed was to enable people cross a river cutting across his land. He also admitted that he used the footbridge. He stated that when he questioned the Respondent about the trespass, he told him that he would be compensated monetarily. The Appellant testified that he pursued the matter with the Ministry of Public Works but was not shown any agreement. He was therefore convinced that the Respondent had been contracted to build the bridge in his individual capacity.

6. The Appellant's wife, Sabina Ombati (PW2) testified that they used to grow sugarcane and other crops on the suit land. That while she was away, she was informed that some people had offloaded materials onto their land and damaged the sugarcane that they had planted. Sabina was certain that there was no right of way through their land. She testified that they reported the matter at Gesonso Police Station and they were advised to consult an agricultural officer to assess the damage. She testified that she was not opposed to the putting up of the footbridge but it should have been subject to their consent which had not been sought. She therefore urged the court to grant the orders sought against the Respondent who she claimed was liable for trespassing onto their land.

7. The Appellant's last witness, Makori Nyangaresi (PW3) told the court that he was a registered Land Valuer. He testified that the Appellant had accompanied him to the suit land and pointed out the damaged portion of his land. He conducted an assessment of that portion and put the value of the damage caused at Kshs. 258,000/=. He produced a copy of his valuation report and a receipt of Kshs. 18,500/= being his fees for the services rendered.

8. During cross examination, PW3 testified that according to the map he relied on to conduct the valuation, there was no access road cutting across the Plaintiff's land. He also admitted that his only role as instructed by the Appellant who was his father was to assess the damage caused to the land.

9. For his part, the Respondent testified that he was a contractor engaged in Civil Works and he did his work under his company known as Barize Agencies Company Limited. He recalled that the company competitively bid and won a tender to construct a footbridge known as Riakige in Suneka Division. The company signed the contract with the Ministry of Public Works and constructed the bridge according to designs given to it by the Ministry. The Respondent confirmed that he was one of the contractors engaged by the company to construct the bridge. He testified that he had not come across the Appellant at any given time and denied that he had trespassed onto the Appellant's land as alleged. He stated that if there was any error with regard to the site, the Ministry was responsible for the damage caused as it was the Ministry that had pointed out the site for construction of the footbridge. The Respondent further testified that the orders for eviction were unenforceable as he had completed his work and was no longer at the site.

10. The Respondent admitted, during cross examination, that he was a director of Barize Agencies Limited. He also admitted that he had not produced the Certificate of Incorporation of the company. He however denied ever seeing any cultivated crops on the site and stated that his company had found the site prepared and ready for construction. He further testified that once the tender was awarded, he executed the confirmation on 12<sup>th</sup> May 2011. He stated that the Company's failure to seal the confirmation was an oversight.

11. Upon conclusion of viva voce evidence, the trial court analyzed the evidence before it and deduced the main issue in controversy as whether the footbridge had been constructed on the Appellant's land. The court found that in the absence of evidence from a Land Surveyor, it could not tell whether the portion of land on which the bridge had been erected belonged to the Appellant. The court also found that the Appellant had not specifically proven his claim for special damages and dismissed his suit. It is this decision of the trial court that triggered to the instant appeal.

## **PARTIES' SUBMISSIONS**

12. Learned counsel for both parties canvassed the appeal by way of written submissions as directed by this court. In his submissions, the Appellant's counsel argued that having demonstrated that he was the registered owner of the suit land and having also shown that there was no road of access over his land, the Appellant was entitled to compensation for the damage to his property. He faulted the trial court's finding that the evidence of a Land Surveyor was necessary as there was no access road marked on the RIM map produced in court. Counsel contended that the documents placed before the court proved that the construction of Riakige Footbridge was undertaken by the Respondent and he was therefore liable to compensate the Appellant for the damage he occasioned to his land when he carried out the construction without his consent.

13. In response, the Respondent's counsel submitted that much as the Appellant had produced proof of ownership of the suit land, the dispute between the parties concerned the ownership of the portion of land where the footbridge had been built. He argued that that portion of land comprised of riparian land and was identified by the Ministry of Works through the District Works Officer, Kisii for construction of the footbridge. Counsel supported the trial court's finding that it was necessary to engage a Surveyor to identify what portion of the land comprised of the Appellant's land and what portion was the riparian reserve.

14. It was also submitted for the Respondent that the Appellant should have made his claim against the Attorney General as the portion of land where the bridge was built had been pointed out by an officer of the national government. It was further submitted that it was M/s Barize Agencies Limited and not the Respondent which was contracted to build the footbridge and therefore the Appellant had sued the wrong party.

15. Counsel also submitted that the Appellant had failed to prove the claim for special damages. He argued that it was incumbent upon the Appellant to call the expert who had prepared the agricultural assessment report but having failed to do so the report lacked any probative value. He submitted that the witness called by the Appellant tendered contradictory evidence and was not able to convince the court of his

expertise.

## ISSUES FOR DETERMINATION

16. The issues arising for determination from the record of appeal, the evidence and the parties submissions are as follows;

- a. Whether the suit land belonged to the Appellant;
- b. Whether the Respondent encroached upon the Appellant's land by constructing a footbridge thereon;
- c. Whether the Appellant properly pleaded and proved his claim for special damages.

## ANALYSIS AND DETERMINATION

17. The Appellant's case against the Respondent was that the Respondent erected temporary structures in his property thereby denying him access to his land and causing him great loss and damage to his property. It emerged from the evidence of both parties that the temporary structure complained of by the Appellant was in fact a foot bridge constructed over a river running adjacent to the Appellant's land. The Appellant also claimed that an access road had been created through his land to the bridge. In his statement of defence, the Respondent averred that the bridge had been constructed on a road reserve.

18. The Appellant sufficiently proved ownership of land parcel No. Kisii/Bomariba/836 by producing a copy of the title and official search. The certificate of title issued to the Appellant conferred upon him absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. While both the legal and evidential burdens initially rested upon the Appellant to prove ownership of the land, the burden shifted to the Respondent to prove his claim that the land was a public utility land upon production of the certificate of title by the Appellant. Having perused the evidence adduced before the trial court, I found nothing to show that the bridge had been constructed on a road reserve.

19. The Respondent's counsel, in his submissions before this court, argued that the footbridge was constructed on riparian land. The record shows that this issue was not pleaded or canvassed at any point in the course of the proceedings before the trial court. It appears to me that the question of whether the bridge was constructed on riparian land was an afterthought as it was only raised for the first time at appeal stage. Moreover, no evidence was led to show what portion of the Appellant's land comprised of riparian reserve. I associate myself with the sentiments of the Court of Appeal in **Chairman, Kenya Veterinary Association Central Region v Renson Maina Kimindi Civil Appeal No. 65 of 2010 [2013] eKLR** that an issue raised for the first time on appeal cannot be determined by the appellate court. In that case, the Court of Appeal held as follows;

*12. From the above analysis and observations made by the learned trial Judge, he systematically addressed all the issues that were raised in the appeal before the High Court and went on to cite the case of **Openda v Ann (1983) K L R** to respond to the issue of capacity of the appellant to be sued. This Court held on page 296: "The Court of Appeal cannot consider or deal with issues that were not canvassed, pleaded and or raised at the Lower Court. For a matter to be a ground of appeal, it has to have been sufficiently raised and succinctly made an issue at the trial....." From our own reading of the proceedings before the trial court and also the pleadings especially the defence, we are in agreement with the learned trial Judge, the issue of capacity was raised for the first time in the High Court and perhaps only as an afterthought.*

20. Having answered the first issue in the affirmative, I turn to the second matter which is whether the Respondent encroached upon the Appellant's land by constructing a footbridge thereon. The Respondent's defence is that he was not involved in the construction in an individual capacity. He stated that the bridge had been built by M/s Barize Agencies Limited which was contracted by the Ministry of Roads to construct it.

21. The Respondent produced letters between the District Works Officer, the Ministry of Public Works and M/s Barize Ltd regarding the construction of the footbridge. In a letter dated 11<sup>th</sup> April 2011, the District Works Officer notified the director of M/s Barize Agencies Limited that the entity had been awarded a tender to construct Riakige footbridge. The Respondent wrote a letter dated 15<sup>th</sup> April 2011 to the District Commissioner as managing director, acknowledging receipt of the award. On 12<sup>th</sup> May 2011, the District of Works Officer, Kisii South and M/s Barize Agencies Limited entered into a contract for construction of the footbridge.

22. A limited liability company is a legal person capable of entering into agreements and suing and being sued in its own capacity. Normally, a certificate of incorporation issued by the registrar of companies is the most reliable proof that a company is duly registered and is a body corporate capable of suing and being sued. In this case, no certificate of incorporation was produced by the Respondent to show that M/s Barize Agencies Limited was a duly registered company. Having said that, the correspondence and the agreement between the District Works Officer and M/s Barize Agencies Limited dated 12<sup>th</sup> May 2011 create doubt in the mind of this court that the Respondent was engaged in an individual capacity to construct the bridge.

23. During cross examination, the Appellant admitted that he had produced a photograph of a board erected on the land showing that the construction of the footbridge was financed by the Ministry of Public Works and the main contractor of the project was M/s Barize Agencies Limited. These facts lead me to the conclusion that it was in fact M/s Barize Agencies Limited and not the Respondent that was contracted to build the bridge.

24. But even assuming that the Respondent was engaged in his own capacity to construct the footbridge, the Appellant's case against the Respondent would still not succeed for various reasons. The Appellant sought a mandatory injunction compelling the Respondent to remove the construction materials and structures placed on the suit land or in the alternative an order of eviction. An appraisal of the evidence before

the trial court reveals that these orders cannot issue against the Respondent.

25. The agreement and various letters produced by the Respondent demonstrate that the Ministry of Public Works through the District Works Office, Kisii South engaged M/s Barize Agencies Limited to construct the foot bridge on its behalf. The Respondent testified they had completed the construction of the footbridge and had since left the site. It is apparent from the evidence, that the footbridge belongs to the government and not the Respondent. As a general rule, an order cannot issue against a person or entity who is not a party to a suit. The Appellant was required to enjoin the government to his suit otherwise, the orders sought for removal of the bridge cannot issue against the Respondent who does not own the bridge.

26. The other issue raised relates to whether the Appellant properly pleaded his claim for special damages. The Appellant sought Kshs. 22,500/= for damage to his sugarcane and Kshs. 400,000/= as compensation for the destruction of his land in his plaint. To support his claim, the Appellant called PW3 who testified that he was a registered land valuer. PW3 told the trial court that based on a valuation he had conducted, the damage caused to the Appellant's land was worth Kshs. 258,000/=. PW3 also indicated that when he visited the suit land he noted that an access road to the metal bridge had been created on the land in effect, cutting the lower portion of the land into two. He annexed a letter to his report which stated that the access road of an approximated acreage of 0.06 Ha. was illegal because it was not surveyed. According to his assessment, the open market value of the land and the disturbance allowance due to the Appellant was a total of Kshs. 233,750/=.

27. It is an elementary principle of law that special damages must not only be pleaded but must also be strictly proved. It is also well settled that parties are not allowed to adduce evidence that departs from the averments made in pleadings. In **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** the Supreme Court held;

*“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”*

28. A cursory look at the Appellant's plaint shows that he did not specify the nature of the destruction to the suit land. He simply stated that the Respondent had moved into his land and commenced construction of temporary structures. There was no mention of the footbridge or the access road created through his land. Consequently, the Appellant's evidence concerning the access road and the resulting disturbance had no basis in the pleadings. There was a clear disparity between the Appellant's pleadings and the evidence.

29. The Respondent was convinced, by the pleadings as drafted, that the dispute related to the encroachment of the portion of land where the footbridge had been built while in actual fact the Appellant was seeking compensation not only for the portion occupied by the footbridge but also the land occupied by the access road. The Appellant's failure to give particulars of the trespass to his land denied the Respondent the opportunity to prepare adequately for the case. I therefore find that his claim for special damages was not properly pleaded.

30. The upshot is that, I find this appeal to be lacking in merit. Accordingly, I dismiss it with costs to the Respondent.

**Dated, signed and delivered at Kisii via video link this 17<sup>th</sup> day of September, 2020.**

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**J.M. ONYANGO**

**JUDGE**