



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 202 OF 2008

STEPHEN NJUGUNA MUNIU.....PLAINTIFF

VERSUS

S. M. NYAKUNDI.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

The Plaintiff's case

The Plaintiff brought the suit against the Defendants by way of a Plaint dated 30th April 2008 seeking the following orders:-

- a. General aggravated and exemplary damages for unlawful and malicious destruction of the property known as L.R No. NGONG/NGONG/1986.
- b. Special damages of Kshs.701, 000/=.
- c. Costs of this suit.
- d. Interests on (a) and (b) until payment in full.

The Plaintiff's claim is that at all material times, he was and is still the registered owner of all that parcel of land known as LR. No. NGONG NGONG/1986 ("the suit property"). The Plaintiff contends that he has built his matrimonial home on the said suit property, wherein he has resided with his family since the 1970's. It is the Plaintiff's case that on or about 3rd May, 2007, a government tractor registration Number GK A 316N descended on his property and demolished his fence without any notice and/or without unjustifiable cause whatsoever.

The Plaintiff has alleged that during the said exercise, the government tractor was accompanied by two (2) uniformed administration police officers who kept guard while armed with guns. Further, it is alleged that the unlawful incident was being carried on instructions of the 1st Defendant, and was witnessed and supervised by the inspector in charge of the area administration police accompanied by five (5) junior officers. The particulars of loss and damage alleged to have been suffered by the Plaintiff are as follows:-

- a. Value of damaged fencing materials estimated at a market value Kshs.651,000/=.
- b. Labour to put up the damaged fenced, estimated at a cost of Kshs.50, 000/-.

The Plaintiff (PW1) gave oral evidence and called one more witness. PW1 testified that he is a retired officer who worked in the government as a driver. He informed the court that he bought the suit property measuring 3 acres from David Ole Togon in 1968. His evidence was that on 3rd May 2007, he received a

call from his wife informing him that his fence had been brought down. PW1 informed the court that he went home where he found the fence down, and the poles and chain link completely broken. It is the evidence of PW1 that he found some armed soldiers at his home who informed him that the District Officer had directed that the fence be brought down. PW1 stated that he did not find the District Officer on his land but that he found the soldiers, the area Chief and a vehicle. According to PW1, the incident was reported to Ngong Police station who started investigations.

PW1 averred that his fence was made of wooden poles, chain links and metal poles. He informed the court that he instructed Horizon Valuers to look at the damage, and that the destruction was valued at Kshs 750,000/- in a valuation report they prepared dated 11th June 2007. While stating that he had no knowledge of any road of access through his land, PW1 stated that he was given a 10-foot road to access his land from the main road by the person who sold the land to him. PW1 contended that the access road was to be used by him and the seller, and further that all other lands had access to the main road.

PW1 made reference to letters he wrote to the Attorney General and the then Kenya Anti-corruption Commission in this respect dated 2nd October 2007 and 31st May 2007 respectively, a letter from the then Kenya Anti-corruption Commission dated 17th October 2007, and letter from the Attorney General dated 12th October 2007, . PW1 also made reference to a letter dated 29th March 2007 where the District Officer was enquiring whether the disputed road was private or public. It is the averment of PW1 that the District Officer did not talk to him about the said letter and did not seek an explanation from him on the alleged blockage of the access road or request him to remove the fence peacefully. PW1 also made reference to photographs in his bundle of documents that were taken on the material day. It is the evidence of PW1 that there had been no prior notice to him that the police and grader were coming to his land.

PW1 informed the court that he had been approached by village elders to open up the road at the request of Stanley Maina Kiriro, who had bought an acre of land adjacent to his from a different person. PW1 averred that he explained to the elders the danger the road would expose his land. This witness referred the court to the mutations attached to the valuation report, and stated that the access road was not on the mutations. He maintained that Stanley Kiriro should have had access from the person who subdivided and sold him his land, which road should have been from the direction of Ololaiser Secondary School . PW1 reiterated that his access road was only to serve him and his seller.

During cross examination, PW1 testified that he was a driver attached to the Ministry of Finance and further, that as at the time the fence was destroyed, he was a driver of Hon. George Saitoti at the office of the President. PW1 averred that he was seeking Kshs 750,000/- as damages and that at the police station, he had recorded a damage of Kshs 651,000/-. PW1 confirmed that he did not find the 1st Defendant on the ground and that the administration policemen told him that the said Defendant had instructed the police and the grader. This witness could however not remember the name of the administration police officers, and could also not remember the Occurrence Book number at the police station where he reported the incidence. He could also not remember the number of poles used in his fence and the cost of the chain link. His averment was that he valued the fence at the market value.

PW1 informed the court that there had been previous disputes about the boundary, and averred that there had been a dispute between him and Mr. Stanley Kiriro who wanted to pass through his land. Further, PW1 informed the court that he had been involved in a case of assault against Mr. Kiriro's son but denied having assaulted him.

It was the testimony of PW1 that he constructed his fence in 1970 and that Mr. David Ole Togon who sold him the land had no access from the land to the main road. PW1 asserted that they were given the access road by the Land Control Board in the 1970's and maintained that the land was privately owned. He denied having blocked any public road and contended that the part that was graded is now being used by other people.

In re-examination, PW1 averred that the 1st Defendant destroyed part of his fence when opening the

access road. It was his evidence that when he bought his land, the land where they access road was had not been subdivided. PW1 maintained that after subdivision, Mr. Kiriro bought the adjacent land and was also given an access road. PW1 informed the court that he complained to the Kenya Anti-corruption Commission because the complaint was about District Officer and his fence. Lastly, PW1 testified that the figure of Kshs 650,000/- was what he thought was the value of the fence when he reported the matter to the police station, before valuation was done.

Veronica Njeri (PW2) testified that she was the Plaintiff's wife. Her testimony was that they stay in Ngong' in the area of Kibiko B. PW2 averred that their matrimonial home is built on the suit property where she stays with her husband and children. She informed the court that they bought a portion of 3 acres from Mr. David Ole Togon who gave them a road through his land. According to PW2, there was no public land on the upper part of their land because the land had not been subdivided or sold. Further, PW2 informed the court that Maina Kiriro bought the upper part and was given the road from the upper side by the person who sold the land to him.

In further testimony, PW2 stated that on the material date, she was at the farm at 10:30am when she heard some noise, and her daughter called her requesting her to go home urgently. PW2 averred that when she got home, she found that a tractor had dug up her k-apple fence. It was the testimony of PW2 that there was a government officer, two policemen and a driver of the tractor and further, that she had neither received notice nor had anyone informed her about the road. According to PW2, one of the policemen who informed her that he was acting from an order from above but declined to reveal who had sent him. PW2 stated that she did not prevent them in any way since she found that they had already demolished the fence.

During cross examination, PW2 maintained that Mr. Kiriro was given an access road by the person who sold the land to him. She reiterated that the road was not government land and further, denied having closed any government road. In re-examination, PW2 testified that the access road was later inserted in the maps because it was not there when they bought the land. The Plaintiff closed his case at this point.

The Defendants' Case

The 1st and 2nd Defendants filed a statement of defence dated 19th June 2008, wherein they denied the Plaintiff's claim in its entirety. The Defendants denied the particulars of malice as well as the particulars of loss and damage pleaded in the Plaintiff, and the Plaintiff was put to strict proof of his allegations.

The defence called Bernard Sendei Meru (DW1) as the first witness. His evidence was that he was the chief at Kibiko in Ngong since 1993. DW1 stated that he knew the Plaintiff as a resident of Kibiko even before he became a chief. It is the evidence of DW1 that he was informed of the incident at the Plaintiff's house by the wife of Hon. George Saitoti, whom the Plaintiff was serving as a driver at the time. DW1 informed the court that when he went to the Plaintiff's house, he found that it was a road which had been closed that was being opened by a tractor.

DW1 confirmed that a complaint that the access road had been closed had been lodged by Stanley Kiriro. According to the witness, the road was on the maps and further, that this was a case that had been handled before by other chiefs. DW1 stated that he referred the case to the District Officer and when he visited the site, he found that the fence that had been on the road had been removed. DW1 reiterated that the road had always been there and was in the maps and was therefore a public road. According to DW1, what was removed was the blockage on the road and the stones which had been put on the road and further, that the Plaintiff's boundary was not touched.

In further testimony, DW1 informed the court that the Plaintiff found him on the land on the material day and that since the Plaintiff was very angry, DW1 could not talk to him. It was the evidence of DW1 that he had asked the Plaintiff to open the road before the material date. This witness averred that a wire and k-apple fence was blocking the road, and that it was after confirming from the survey maps that a tractor was brought to demolish the said fence.

DW1 made reference to sketch map in the Defendants' bundle of documents and stated that the shaded road was what was demolished, and that the lower boundary of the Plaintiff's land was not touched. DW1 confirmed that other than the road, there was no other problem with the Plaintiff. According to DW1, the road is now open and is used by the public to access a community borehole in the nearby school. DW1 stated that the Plaintiff is not entitled to compensation because he blocked a public road.

During cross examination, DW1 stated that he was born in Kibiko and was in standard 6 in 1968. He averred that before the complaint by Mr. Kiriro, he had not seen the government constructing a road on the land. While stating that he knew the person who sold the land to the Plaintiff, DW1 informed the court that he had not talked to him or any of his family members or to the person who sold the land to Mr. Kiriro to find out if there was a road allocated to him. This witness informed the court that he did not have the land surveyed since he referred the case to the District Officer.

He informed the court that he did not see the District Officer bringing a surveyor to establish the position, and averred that it is for the District Officer to state who showed him where to demolish. However, DW1 contended that the boundary must have been established but confirmed that he did not do it. It was the evidence of DW1 that the tractor used to demolish the fence was from the ministry of public works and that the policemen had been sent by the District Officer, the 1st Defendant herein. DW1 could not tell whether the Plaintiff had been given notice of the demolition. DW1 informed the court that the survey maps were shown to him by Mr. Kiriro.

While stating that he had asked the Plaintiff to remove the blockage on the public access road, DW1 testified that he could not remember the response. Further, DW1 stated that the community borehole on the school had been constructed in 2008 after the demolition. This witness maintained that he came to court establish that there was a public road owned by the government.

In re-examination, DW1 stated that the borehole was not in the Plaintiff's land but was on the school compound. According to DW1, although the Plaintiff insists that there is no road, a road actually exists and further, that the Plaintiff failed to bring any map showing that there was no road. DW1 reiterated that he referred the matter to his immediate boss because the matter had been handled several times by the chief. DW1 maintained that the road in question was a public road open for all community members to use peacefully and asserted that the Plaintiff also uses the road.

The 2nd defence witness was Stephen Nyakundi (DW2). He stated that he was a District Commissioner, and has previously worked in many parts of Kenya. He informed the court that he worked in Ngong as a District Officer from 2006 to 2008. DW2 averred that he knew the Plaintiff as a government driver and as a resident of Ngong. His evidence was that Mr. Kiriro who was the Plaintiff's neighbour wrote to him on 16th February 2007 complaining that a neighbour had blocked a public access road.

DW2 informed the court that he verbally contacted the area chief to ascertain if it was a public road. DW2 made reference to a letter dated 29th March 2007 in the Defendants' bundle of documents which he wrote to the District Surveyor. It is the evidence of DW2 that the District Surveyor sent him a copy of the map which was annexed in the Defendants' bundle of documents ascertaining that the road was a public road. DW2 contended that he wrote to the Plaintiff through the chief in a letter dated 18th May 2007 which he produced as the Defendants' Exhibit 1, and further, that the Plaintiff said that he was too busy to attend his office .

According to this witness, neighbours who had planned to open up the road feared to do so, probably because of the officer the Plaintiff was working for at the time. DW2 averred that the neighbors were as a result forced to go through six (6) kilometers instead of one-hundred and fifty (150) meters to get to the main road to Ngong' town. DW2 informed the court that the beacons were very clear at the site after he had asked for the survey map. It is the evidence of DW2 that he asked a grader to re-open the road. DW2 contended that he opened up the road to access the area since the security situation in the area was bad and further, because the blockage was causing a lot of inconvenience. This witness confirmed that the grader was provided by the ministry of public works and the road was re-opened.

DW2 contended that after the road was re-opened, there was no further dispute until he received notice of the current case. According to DW2, the Plaintiff should be the one to pay the public for inconveniencing them. DW2 averred that they only re-opened the road, and did not maliciously damage or destroy the Plaintiff's property as they did not touch his land.

During cross-examination, DW2 informed the court that he had received complaints from other neighbours other than Mr. Kiriro, but could not tell their names. It is the evidence of DW1 that he met Mr. Kiriro after he had written the complaint letter. Further, this witness testified that the immediate neighbours of the Plaintiff are the family of Alexander, Ololaiser School and Mr. Kiriro. DW2 could however not tell when Mr. Kiriro settled in the area or when the boundaries were demarcated. DW2 admitted that the map of the area had no Land Reference number, but maintained that the letter of 29th March 2007 identified the road that was in dispute, and made reference to the map of the area which is sheet No. 57. DW2 averred that the letter was signed on behalf of the District Surveyor and stated that the comments on the letter of 19th March 2007 were an official way of communicating.

According to DW2, although the letter dated 18th May 2007 was sent to the chief (DW1), the communication was to be relayed to the Plaintiff. DW2 informed the court that he did not personally speak to the Plaintiff who did not go to his office despite sending for him. DW2 stated that he has never seen the mutation of the disputed land. He confirmed that he wrote a statement at the time the defence was filed. While stating that the complainant did not mention anything about security in his letter, DW2 was emphatic that the complainant was not a security person.

DW2 admitted having sent the District Surveyor, a Mr. Adongo, to show the tractor and police where to demolish. This witness could however not tell whether the chief who went to the site found the surveyor thereon, or whether the surveyor was at the site on the material day. DW2 averred that he has not since visited the place or ascertained the position having since been transferred from Ngong' District.

In re-examination, DW2 informed the court that at a personal level, he had no interest to go and see the destruction since he was doing a public duty. He reiterated that once his transfer was effected, he had no business going back to Ngong' as he is undertaking his duties where he was posted. According to DW2, the letter of 18th May 2007 was delivered to the Plaintiff through the chief. While stating that it was not his responsibility to determine the location of the disputed road, DW2 averred that he referred the same to the technical person who is the District Surveyor who confirmed that there was a public road in the area.

Stanley Maina Kiriro (DW3) testified as the 3rd Defence witness. He stated that he was a retired public servant who worked as a quantity surveyor. He informed the court that he lives in Ngong', Kibiko Division where he bought a land bordering the Plaintiff's in 1986. DW3 stated that he built his house in 1989-1990 and that he moved therein in 1991. It was the evidence of DW3 that his piece of land bordered a public road separating them from Ololaiser Secondary School. Further, DW3 stated that the road in question serves five (5) parcels of land and that his land was the fifth parcel.

According to this witness, the dispute started in 1992 and at the time, the Plaintiff was a government driver attached to the family of the Vice- President. It is the testimony of DW3 that the Plaintiff put a heap of stones on a public road that they were using. Although DW3 could not tell when the road was demarcated, his testimony was that it had been there for a long time. His evidence was that when he moved there, the road had not been developed, and that vehicles were using the school's land as access since the school had not fenced its property.

In further testimony, DW3 stated that when he was building, he had hired a government tractor which cleared the road without the Plaintiff raising a complaint. It is the evidence of DW3 that in 1993, the Plaintiff became very hostile to his family and at one time, assaulted his son who was a student at Chogoria. Further, DW3 stated that they obtained a P3 form after reporting the matter to the police, but that because of the Plaintiff's proximity to authority, it took them 9 months to have the case taken to Kibera Law Courts. According to DW3, the Plaintiff was convicted and given a 6 months suspended sentence. It is the evidence of DW3 that he did not use the road for sixteen (16) years because of the

blockage, and that further, that he complained continuously by raising the matter with every new District Officer.

DW3 confirmed that he raised the matter with DW2 and sought assistance through a letter dated 16th February 2007 which he produced as Defence Exhibit 2. His evidence was that DW2 visited the site, saw the road and asked the Plaintiff to show his beacons. According to DW3, the Plaintiff said that the road was given to him by the person who sold him the plot. Further, DW3 stated that DW2 wrote to the District Surveyor who confirmed that the road was a public road. DW3 informed the court that his neighbours have benefitted a lot by using the road, which is used to access the Kibiko Water Project which was installed by the government.

DW3 was emphatic that he had never met DW2 before, and that when he went to him as a complainant, DW2 directed him to put his complaint in writing. According to the witness, the impunity that persisted for 16 years should not be compensated since what was removed was a blockage of part of the road.

During cross-examination, DW3 stated that the District Commissioner at Kajiado sent the chief to inform him that he was required at the District Commissioner's office. DW3 averred that he wrote his statement on 24.11.2011 and that he did not see any need to disclose that he had filed a case against the Plaintiff on a boundary issue. In further testimony, DW3 averred that he was given an access road which ended at his gate by the person who sold him the land. According to this witness, the said access road was not facing the Plaintiff's land and did not pass through the place that had been closed.

Further, he confirmed that his statement did not identify the land that he was talking about and also, did not attach any maps. DW3 stated that he drew the map in the Defendants' bundle of documents to clarify the position on the ground. He also confirmed that the Land Reference numbers were not indicated in the document. While stating that a 9-meter government road was there when his land was subdivided, DW3 averred that he was not involved in the demarcation of the parallel road to his land whose history he could not tell.

DW3 informed the court that the boundary dispute was between the Plaintiff and the government whose public land the Plaintiff had encroached, and stated that he was an affected party for 16 years. DW3 stated that the person who sold the land to the Plaintiff was deceased, but that he had talked to the deceased's grandchildren who insisted that there was always a road on their land. While making reference to the mutation which was attached to the Plaintiff's valuation report, DW3 confirmed that the said mutation did not show a road.

In re-examination, DW3 stated that he and the Plaintiff did not buy land from the same person but were comfortable with their boundaries, and that the dispute was about the road. He further stated that he got a copy of the letter written by the surveyor from DW2 because he was an affected party. Lastly, he maintained that the public road was also being used by the Plaintiff.

The fourth defence witness was Robert Maina Wachira (DW4). His evidence was that he is a surveyor, currently working as the District Surveyor in Kajiado County, where he was posted in 2009. DW4 informed the court that there was communication from the office of the Attorney General to the Director of Survey requiring him to produce 2 maps showing that an access road exists on the frontage of parcel no. 1986. Further, DW4 stated that since the general boundary maps for the whole of Kajiado County were held in Kajiado, he was requested to make copies of the same.

It was the evidence of DW4 that he went to the archives and produced photocopies of the existing mutation for subdivision of Ngong'/Ngong'/45 which gave rise to Ngong'/Ngong'/1986 and Ngong'/Ngong'/1987. DW4 stated that he also did a photocopy of the Registry Index Maps Sheet No. Ngong' 13/NE which contained the suit property and forwarded the documents through a letter dated 6th February 2012.

In further evidence, DW4 stated that he visited the site on 27th February 2012 and further, that there was a 6m access road on Sheet No. 143/13 /3/NE which he confirmed existed on the ground when he visited the

site. It was the evidence of DW4 that the access road meets the main road at Oloilaser School. He contended that mutations he attached used to be drawn by the Land Registrar who would go with the land owner and the buyer as per what was agreed in their sale agreement, and would make a sketch showing the parties where the boundaries were on the ground.

According to the witness, the remarks on the said sketch indicated that a surveyor was to survey as per the agreement of the buyer, vendor and Land Registrar. Further, that the sketch plans shows that the Land Registrar cancelled title number Ngong'/Ngong'/45 and created two titles namely Ngong'/Ngong'/1986 and Ngong'/Ngong'/1987 whose acreage was indicated as 1.21 and 24.5 respectively. DW4 confirmed that the access road was not shown on the sketch but that other access roads marked 'X' in the sheet and a water point marked 'O' which is served by the main access road were shown..

During cross examination, DW4 stated that his letter of 6th February 2012 was a response to a letter addressed to him by the Attorney General which required him to show whether there was an access road and not the boundaries. DW4 could however not tell which party had marked the boundaries in the "Form A" that was attached to his letter dated 6th February 2012, and whether the form was signed for parcel number Ngong'/Ngong'/1986 or Ngong'/Ngong'/1987. Further, DW4 informed the court that the sketch on the said "Form A" did not have a road of access. According to the witness, the normal procedure where there is no road of access is that parties appeal to the Land Registrar to produce an access of the person who is land-locked, after which the Land Registrar would know what to do next.

Further, DW4 averred that the Land Registrar had indicated in the said "Form A" that the access to the water point would be created where necessary. DW4 however indicated that he could not clarify what the Land Registrar meant. While stating that the blank space on the map was occupied by many people who had been allocated land by the government, DW4 averred that Oloilaser School was one of the allottee and that the water point was inside that land.

The last defence witness was Julius Kivuva (DW5). He testified that he was a surveyor with the Ministry of Lands and was based at Kajiado as the County Surveyor. DW5 testified that with regard to parcel number Ngong'/Ngong'/1986, there was a portion of a road between the said parcel and the lower side of Ngong' Township. He produced the Registry Index Map as Defence Exhibit 3. During cross examination, DW5 stated that restrictions and caveats are not included in the maps but are indicated on the title. Further, DW5 contended that roads are indicated on the maps by drawings, and his evidence marked the close of the defence case.

The Issues and Determination

It is not disputed that the Plaintiff is the registered owner of the suit property. His claim that his fence was destroyed by the Defendants has also been conceded by the Defendants who admitted having destroyed the fence in a bid to open a public road which had been allegedly closed by the Plaintiff. There are thus two issues for determination:

1. Whether there was a public access road at the location where the Plaintiff's fence was destroyed.
2. Whether the Plaintiff is entitled to the remedies sought

Whether there was a public access road at the location where the Plaintiff's fence was destroyed.

The Plaintiff's counsel in submissions dated 30th October 2013 argued that the Plaintiff is the owner of the suit property as evidenced by his title, and that one of the issues for determination was whether there was any compulsory acquisition of part of Plaintiffs property hived for road. Counsel for the Plaintiff referred the court to the case of **Sheema Co-operative Ranching Society and 31 others –vs- the Attorney General, (2013) UGHC 35** and the treatise **Elements of Land Law, 5th Edition** by Grey and placed reliance on Article 40(3) of Constitution of Kenya 2010 which prohibits deprivation of private property by the state unless the same is carried out in accordance with the Constitution and any Act of Parliament.

It was argued for the Plaintiff that Article 40 of the Constitution only allows government to use its coercive power to force a transfer in public interest upon fair, prompt and adequate compensation. Counsel referred the court to the case of **Bhatt & another –vs- Habib Rajani (1958) EA** and submitted that in **Sheema Co-operative Ranching Society and 31 others –vs- the Attorney General,(2013) UGHC 35**, the court held that the government corporation could not just enter on anybody's land without first acquiring it and paying compensation and the court found that Article 26(1) (2) and Article 237 of the Ugandan Constitution had been violated.

Counsel contended that the authenticated copies of the original Registry Index Map of the area where the Plaintiff's land is situate clearly shows that there existed no road in the part where the government purports to create one. It is the Plaintiff's submission that the Registry Index Map produced by the Defendants is not the original map as it was before the year 1991 but that the same is a copy of a mutated Registry Index Map from the year 1991 as is evident on the "the amendment section" which shows subdivision of the area that also covers the suit property. It is argued that the Defendants have included the disputed road which was not in the original Registry Index Map. Further, it was submitted that the Plaintiff acquired the suit property in 1973 and by then, the land had not been mutated to the extent of the Registry Index Map produced by the Defendants.

In further submission, Counsel stated that the Defendants hived off the Plaintiff's land and created a road for public use without informing the Plaintiff and without compensating the Plaintiff as required by law. It was submitted that in the Defendants' quest to create a road reserve out of the Plaintiffs land, the Plaintiff's fence was destroyed thereby causing him damages. Counsel argued that the Plaintiff's land was compulsorily acquired by the Defendants without following the procedure laid down by law in regards to compulsory acquisition and was therefore not in conformity with the Constitution and the Land Act. It was argued for the Plaintiff that the Defendants acts are arbitrary, ruthless, violent and an abusive affront to the Plaintiff right to property as envisaged under Article 40 of the Constitution of Kenya 2010.

The Plaintiff also submitted that no notice was issued as envisaged by Section 3 of the Repealed Land Acquisition Act Cap 295 and section 107 of the Land Act and further, that the Plaintiff was subjected to the unlawful arbitrary acts of the Defendants as there was no fair hearing as required by Articles 47 of the Constitution. It was submitted that the 1st Defendant being an administrator of the government in the District, exercises administrative authority and therefore, ought to have adhered to the principle of fair administrative action and/or principles of natural justice as envisaged under Article 47 of the Constitution of Kenya. Counsel argued that the Plaintiff was not subjected to a fair administrative action when the Defendants made a decision to acquire part of his land compulsorily without giving any reasons. It was contended that in the absence of notice, the Defendants' acts were illegal unlawful and *ultravires* their powers.

While submitting that the demolition was ordered by the District Officer, Counsel for the Plaintiff argued that the District Officer did not have powers to order demolition and therefore, that he acted *ultravires* his authority and or powers. It is the Plaintiff's submission that the power to make an order for demolition is a preserve of judicial authority and/or courts of law whose order the Defendants did not seek and as such, purported to usurp the powers of a court.

The Defendants in submissions dated 30th October 2013 stated that although the Plaintiff testified that the road terminated at his land, during cross-examination, he could not explain how the public road could end at his land and behind his land there is a through road. Counsel for the Defendants' argued that the Plaintiff admitted during cross examination that he was summoned on several occasions by the area security agencies to explain why he had closed the public road and failed to offer an explanation for reasons that it was his land.

Further, the Defendants' submitted that when shown the maps from Kajiado Survey Office showing clearly that there existed a public road on the point at which he had blocked and closed the road, the Plaintiff failed to offer any explanation and therefore, that this was an admission that there was a public road which he had blocked intentionally. It was further submitted for the Defendants' that PW2 acknowledged that there is currently a clear public road accessible by the public.

In further submission, Counsel for the Defendants contended that the Plaintiff never claimed for compensation of the land upon which the fence was constructed in the Plaintiff nor during oral testimony in court. It is the Defendants case that after the government re-opened the road, the Plaintiff moved and set up his fence on the position where his land beacons are. The Defendants submit that the Plaintiff's failure to claim for the compensation of the land which the government uses as the road is an admission that the Plaintiff is an encroacher and could therefore not claim that which did not belong to him.

Counsel for the Defendants further submitted that since the reopening of the road, the same is being used by the public and the Plaintiff never fenced the portion again. It was submitted that the Plaintiff has not sought for an order that the Defendants reinstate the fence nor has he sought to be declared the absolute and indefeasible owners of the portion of the property which the government avers is a public road since it is within the Plaintiff's knowledge that all roads used by the public belongs to the government.

While reiterating the testimony of the defence witnesses, Counsel for the Defendants submitted that there existed a public road which had been blocked and closed by the Plaintiff and which after re-opening, has remained open for public use to date. Further, it was submitted that DW4 testified that after receiving complaints from the public on closure of the public road, he wrote to the Surveyor Kajiado Lands Office who confirmed that there was public road before authorizing the re-opening. It is the Defendants' submission that all procedures were followed administratively and therefore, that there was no wrong doing.

It is my finding in this regard that the Plaintiff did produced any maps, survey report or called expert evidence to show that the fence was not encroaching on public land, and that his land was therefore compulsorily acquired by the government. In particular he did not bring any evidence to show that the beacons and area of his land as shown in his title which he produced as his Exhibit 8 included the portion upon which the fence which was destroyed by the Defendants was erected. In addition the Plaintiff never pleaded nor did he bring any evidence to show that his land was compulsorily acquired to create a public road.

The bulk of the evidence relied upon by the Plaintiff namely his Exhibits 1-7 and Exhibit 9 only served to show that he made complaints about the Defendants' actions and that the said destruction of his fence actually did take place, which fact is not in dispute. This evidence was therefore not relevant to the issues at hand.

I also find that the Defendants have brought sufficient evidence to show that the Plaintiff's fence was erected on a public access road. The Defendants brought evidence of correspondences exchanged in respect to the Plaintiff's closure of a public land. Through a letter dated 18th May 2007, the DW2 after making enquiries with the Kajiado District Surveyor on whether the portion of land blocked by the Plaintiff was a private or public road, wrote to the chief of the area confirming that it was a public road in existence. DW4 testified that he visited the site and confirmed that the said road which was provided on the maps exists.

More importantly, I have perused the certified copy of the Registry Index Maps Sheet No. Ngong'148/3 13/NE dated 22nd May 2012 and produced as Defence Exhibit 3 by DW5 and it is evident that there is provision for a road starting from alongside the boundaries of land parcels Ngong'/Ngong'/6197, 5476,1986, and that proceeds on to alongside parcels Ngong'/Ngong'/ 6820 and 32513 without any break. This corroborates the evidence by DW2, DW3, DW4 and DW5 that there was a public access road fronting the Plaintiffs land. The Defendants' evidence that the Plaintiff had erected his fence on a public road therefore remains uncontroverted.

On the allegation that the Plaintiff's right to fair administrative action was violated for failure to accord him a fair hearing, the Plaintiff admitted having previously attended meetings on the boundary dispute. DW1 testified that before the material day, he had asked the Plaintiff to open the road. On his part, DW4 testified that the Plaintiff declined to attend a meeting in his office despite being asked to do so. The Plaintiff can therefore not allege a violation of his right to fair administrative action when he was accorded the opportunity and refused to participate in the decision making process.

Whether the Plaintiff is entitled to the reliefs sought

The Plaintiff sought general, exemplary as well as special damages, and it was submitted by the Plaintiff's counsel that the cost of the damaged fencing materials is estimated at a current market value of Kshs.651,000/-. It was also argued that labour to put up the damaged fence is estimated at Kshs. 250,000/=. The counsel averred that a valuation report presented before court with the aforesaid values was not formerly produced since the author did not appear in court for production. Counsel urged the court to appoint an independent valuer to carry out fresh valuation to determine the market value of the destroyed property.

It was argued on the part of the Defendants that the Plaintiff never proved his case on liability and did not deserve any payment of damages. It was submitted that since the suit on liability has not been proved, the doctrine of liability follows damages is applicable in the present case. On special damages, it was submitted the Plaintiff never tabled any receipt of special damages incurred and further, that no valuation report was produced to prove the claim of Kshs.750,000/=. Counsel for the Defendants contended that the claim should fail for failure to produce any receipt or valuation report. Lastly, the Defendants argued that were the court to be inclined to award any damages, an award of Kshs.100/= is fair compensation.

I find that I must agree with the Defendants' submissions that as no liability was found on their part, and as the portion of land on which the fence was erected was shown to be a public access road, the Plaintiff is not entitled to any general damages as there were no proprietary rights of his that were infringed. In addition, exemplary damages are not awarded as compensation but are awarded in order to punish the defendant. In the case of **Obongo -vs- Municipal Council of Kisumu [1971] E A 91**, the court cited with approval the decision in **Rookes -vs- Barnard, [1964] A C 1129** which defined the circumstances in which exemplary damages may be awarded.

It was held in that case that exemplary damages for tort may only be awarded in two classes, apart from any case where it is authorized by statute. These are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. Since the Plaintiff herein has not proved that the actions of the Defendants were arbitrary and unconstitutional, his claim for exemplary general damages ought to fail.

The court in the case of **Obongo & Another -vs- Municipal Council of Kisumu [supra]** also stated that aggravated damages constitute damages enhanced on account of factors such as malice or arrogance on the part of the defendant, which is regarded as increasing the injury suffered by the plaintiff. In my view, there is no evidence that the 1st Defendant was motivated by malice when he ordered the fence to be brought down. DW3 testified that he complained against the closure of a public road and his letter dated 16th February 2007 in this respect was produced as evidence as the Defendants' Exhibit 2. The Plaintiff is therefore not entitled to aggravated damages.

On the claim for special damages, the maker of the valuation report relied upon by the Plaintiff was not called to produce the report. The said report was therefore not admitted in evidence in light of the provisions of section 35 (1) of the Evidence Act which provides as follows:

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are

not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.”

The Plaintiff's claim in this regard therefore fails in light of the requirement by the **Court of Appeal** in its decision in **Hahn -vs- Singh , (1985) KLR 716 that special damages must not only be pleaded but must also be strictly proved.**

I accordingly find that the Plaintiff has not proved his case on the balance of probabilities and dismiss the suit filed herein. Each party shall bear their own costs of the suit as the suit herein involved a public access road which is a matter of public interest.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 14th day of May , 2014.

P. NYAMWEYA

JUDGE