



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 334 OF 2016

KIPYEGO CHELETEWON.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF BARINGO....1ST DEFENDANT

DAMATEK BUILDERS LIMITED.....2ND DEFENDANT

KIBIWOTT KANDIE.....3RD DEFENDANT

DICKSON CHEBON.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff, a co-owner of land parcel **Baringo/Sergonjun/522**, has sued the 1st to 4th Defendants through the Plaint dated 14th November, 2016 for unlawfully, and without reasonable cause removing approximately 400 metres of his barbed wire fence, cedar posts, vertical off-cuts timbers fixed along the fence, mature cypress, indigenous and eucalyptus trees on the Plaintiff's land along the fence, and thereby causing damages to his crops, to wit mango trees, pineapples, avocados, bananas, maize, beans, sweet potatoes, cassava and nappier grass along the 10 metre strip, using a bull dozer on 3rd October, 2026. That the action by the Defendants has substantially degraded the land due to the huge mounds of earth, big stumps, roots, boulders and debris removed from the road and deposited along the 10 metre strip stretching for 400 metres. The Plaintiff prays for;

- (a) Permanent injunction against Defendants, their servants or agents from interfering with the Plaintiff's quiet enjoyment of possession and use of the suit land.
- (b) Order compelling Defendants to remove all the offending mounds of earth, boulders and debris from and restoration of the said land.
- (c) Order compelling the Defendants to restore the illegally removed fence and plant cypress trees along the affected boundary.
- (d) General damages for trespass and nuisance and loss of user.
- (e) Punitive damages for trespass to goods, environmental degradation within the suit land due to the destruction of cedar, indigenous, ornamental and cypress trees and live fence.
- (f) Damages for destroyed crops, fences, and trees.
- (g) Costs of the suit.

2. The Defendants opposed the Plaintiff's claim through their defence dated the 22nd December, 2016. They denied that they acted negligently, averring that the Plaintiff's structures, crops, trees and vegetation had encroached onto the public road reserve and or way leave known as **Kasiryo-Karumon-Kapkomon-Ossen-Tiloi-Keturwo road**. That notices had been issued to all persons including the Plaintiff, to remove the structures that had encroached on the road which was being constructed. That the Plaintiff failed to comply with the said notices and his structures, fence and vegetation that had encroached onto the road reserve was removed to pave way for the construction of the road. That the Plaintiffs had encroached onto the road reserve in an attempt to grab it for private use in total disregard of the general public and future generations. That the Plaintiff's suit is bad in law, does not disclose a cause of action against the Defendants and should be

dismissed with costs.

3. The Plaintiff testified as PW1 and adopted the contents of his statement dated 16th October, 2017 and filed on the 17th October, 2017. He also called **Collins Chesang**, a Valuer, and **Laban Kipkogei Kabererin**, a Surveyor, who testified as **PW2** and **PW3** respectively. The Plaintiff among others produced a copy of the certificate of confirmation of Grant in respect of the estate of the late **Stephen Ruto Chesang** issued in **Nakuru High Court Succession Cause No. 46 of 2014**. The Certificate confirms that the Plaintiff is a co-administrator of the said estate and a beneficial joint owner of the suit land. He also produced a copy of the title deed for Baringo/Sergunjun/522 that shows it is approximately 1.3 hectares and was registered in the name of Stephen Ruto Chesang on 4th December, 1992. PW2 produced the Valuation Report by Real Appraisal Limited dated 10th November, 2016 giving a value of the costs of damages, and reinstating the land to be Kshs.362,500. PW3 produced the Report dated 5th June, 2017 prepared by the County Surveyor, Baringo pursuant to a consent order of 16th January, 2017 that directed that a visit to the suit land be undertaken to take measurement of the disputed road and find out whether it encroached onto the suit land or vice versa. That the Report found as follows;

“1. The construction of the road encroached into the land through a distance of 160 m.

2. The area encroached is 400 m² (0.04 Ha Approximately).”

4. That for the Defendants, **Elijah Chemjoi**, the Ward administrator of Kabartonjo, testified as **DW1**. He testified that he was involved in the construction of the road and he took the court through the meetings held to sensitize the public, and ask those who had encroached onto the road like the Plaintiff’s to remove the materials thereon. That the son of the Plaintiff had attended the meeting of 2nd November, 2016. That one Dickson had been sent to ask the Plaintiff to remove the fence, mature cypress and blue gum trees from the road reserve. That however the Minutes of 2nd November, 2016 did not indicate that the Plaintiff was to remove the fence. That after the Plaintiff failed to remove the materials on the road reserve, the contractor’s tractor was deployed to remove the materials. That due to the electricity power line running along the road, the tractor had to enter onto the Plaintiff’s land so as to remove the trees on the road reserve. That the tractor pushed the uprooted trees towards the Plaintiff’s land and in the process removed the fence running for about 100 metres on one section, and 20 metres on another section. That the fence was made of timbers, posts and barbed wires. That the **“Plaintiff’s fence was not on the road or road reserve, but the trees that were removed were on the road.”** The witness ended his testimony by saying that the debris that had been pushed onto the Plaintiff’s land were later removed by the 2nd Defendant, the contractor.

5. The learned Counsel for the Plaintiff and Defendants filed their written submissions dated the 15th June, 2020 and 27th May, 2020 on the 24th June, 2020 and 3rd June, 2020 respectively.

6. The following are the issues for the Court’s determinations;

(a) Whether the cause of action is based on trespass to land or boundary dispute.

(b) Depending on the answer to (a) above, whether the court has jurisdiction in this suit.

(c) Whether the Plaintiff is entitled to any of the prayers sought.

(d) Who pays the costs of the suit.

7. The Court has carefully considered the parties’ pleadings, oral and documentary evidence by PW1 to PW3 and DW1, learned Counsel’s submissions, the superior court’s decisions cited thereon and come to the following conclusions;

(a) That paragraphs 8 to 12 of the Plaint dated 14th November, 2016 and the prayers thereof, clearly shows that the Plaintiff’s claim was over the damage done on the fence separating his land from the road, and the growing trees and other crops on his land. That paragraph 7 of the said Plaint shows that the Plaintiff had adhered to the 4th Defendant’s directions and removed the **“3 cypress and 1 eucalyptus tree which fell outside the fence”** along the road. That though the Defendants had at paragraphs 6 to 10 of the defence dated the 22nd December 2016, fronted a claim that the materials removed had encroached onto the road reserve, the evidence tendered by the parties especially PW3, a Surveyor at the County Offices, and confirmed by DW1, the Ward administrator, was that the 2nd Defendant’s tractor had brought down sections of the Plaintiff’s fence that was not on the road reserve. That as no evidence was adduced by the Defendants to suggest or confirm that the Plaintiff was claiming any portion of the road reserve to be part of his land, or by the Plaintiff alleging that the Defendants were claiming any portion of his land to be part of the road reserve, then obviously, this suit is not about a dispute over the position of the boundary. The dispute before the Court is whether or not the Defendants unlawfully, without reasonable notice trespassed, onto his land and caused the particularized damages. That is not a matter that falls under **Sections 18 and 19 of the Land Registration Act, No. 3 of 2012**. That the Court is with jurisdiction to hear and determine the suit as provided for under **Article 162(2) (b) of the Constitution, 2010 and Section 13 of the Environment and Land Court Act No. 19 of 2011**.

(b) That the 1st Defendant has legal mandate and duty on the road infrastructural developments within the County. That the 1st Defendant has through the Minutes availed by DW1 confirmed that it engaged the public before embarking on the road works. That has not been disputed by the Plaintiff and the public engagements appears to have been extensive. That in the case of **Robert N. Gakuru & Others Vs Governor, Kiambu County & 3 Others [2014] eKLR**, the Court said the following about public participation;

“In my view, public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of the constitutional dictates.”

That the Minutes shows the members of the public in attendance were informed of the road construction and their obligations to remove the trees and other structures that were on the road reserve. That the members of the public agreed and though the Plaintiff was initially reluctant, he finally removed the trees on the road reserve as advised. That the subsequent entry by the 2nd Defendant's tractor under the supervision of agents/servants of the 1st Defendant including DW1, onto the Plaintiff's land felling down sections of his fence, and other vegetation as detailed by PW1, and confirmed by DW1 without prior written notice, and permission amounted to trespass. That the Defendants should have offered to make good by removing the materials deposited on the land and compensating him for the damages if demanded but did not do so.

(c) That the Defendants were obligated to serve the Plaintiff with a prior 30 days written notice under **Section 49(1) of the Kenya Roads Act of 2007** as was held in the case of **Mike Maina Kamau Vs Attorney General [2017] eKLR**. That further **Section 152 (c) of Land Act No. 6 of 2012** also requires the National Land Commission by notice in the Gazette, and in one newspaper with nationwide circulation, and by radio announcement in a local language, where appropriate, to give at least three (3) months' notice before eviction from public land. That even assuming that the Plaintiff still had materials on the road reserve, which is part of public land, the Defendants would have been required to issue him with the appropriate written notice before carrying out any eviction. That the Defendants did not do so and no copy of such written notice that issued and served upon the Plaintiff was availed by DW1.

(d) That the Plaintiff's learned Counsel submitted for Kshs.1,500,000 as general damages for trespass, Kshs.100,000 exemplary damages, Kshs.362,500 as special damages and reinstating the damages, Kshs.15,000 and Kshs.10,000 for the valuation and surveyor's fees respectively. That the learned Counsel also submits that the Plaintiff be awarded Kshs.50,000 for loss of user and the permanent injunctive orders sought. That upon perusing the Plaintiff dated the 14th November, 2016, it is apparent prayers (a) to (c) are for injunctive orders while prayers (d) to (f) are for general damages. That special damages were pleaded at paragraph 18 being Kshs.362,500 as particularized in the valuation Report, Shs.15,000 valuation fees and Shs.10,000 surveyor's fees. That during the hearing, it became apparent that the valuation report had been prepared and produced by a person who was not licensed and under **Section 21 of the Valuers Act**, he was not authorized to carry out such business. That as was held in the case of **Thomas Kimagut Sambu Vs National Land Commission & 2 Others [2018] eKLR**, the Valuation Report produced by PW2 is definitely "**incurably defective and inadmissible for contravening section 21 of the Valuation Act...**". That there being no further evidence of the value of the alleged crops damaged, the Court finds that the Plaintiff has failed to tender evidence of special damages suffered. That it follows that the Shs.15,000 fees incurred procuring the valuation report that has been declared inadmissible is not recoverable in the suit. That the Shs.10,000, surveyor's fees is not supported by any documentary evidence and is not allowed.

(e) That unlike the situation in the case of **Thomas Kimagut Sambu Vs National Land Commission & 2 Others [2018] eKLR**, which collapsed after the Court declared the valuation Report inadmissible, this suit remains alive for consideration of the general damages and injunctive prayers contrary to the Defendants' Counsel's submissions. That as already seen above, the Defendants trespassed onto the Plaintiff's land affecting the area particularized by the County Surveyor's Report produced by PW3 as exhibit. That the Court having considered the awards made in the superior Court's decisions cited by the learned Counsel for the Plaintiff is of the view that an award of Kshs.1,000,000 as general damages for trespass and Kshs.100,000 for exemplary damages would be fair and just in the circumstances of this case.

(f) That there is no evidence adduced that the Defendants are likely to further trespass onto the Plaintiff's land and the prayers for permanent injunction are not granted.

(g) There is no prayer for loss of user and none is granted.

(h) That pursuant to **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, the Plaintiff having substantially succeeded in his prayers is entitled to costs.

8. That flowing from the foregoing, the Court finds that the Plaintiff has proved his claim against the Defendants and judgment is entered in his favour in the following terms;

(a) That the Defendants pay the Plaintiff Kshs.1,000,000 [One Million] as general damages for trespass.

(b) That the Defendants pay the Plaintiff Kshs.100,000 [One Hundred Thousands) as exemplary damages.

(c) The Defendants pay the Plaintiff costs of the suit.

Orders accordingly.

Delivered virtually and dated at Eldoret this 4th day of November, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Mwetich for Plaintiff.

Mr. Kibii for Defendants.

Court Assistant: Christine and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.