



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ELC CASE NO.472 OF 2017**  
**(FORMERLY NAIROBI ELC SUIT NO.590 OF 2015)**

HANNAH NYAMBURA NJOROGE.....1<sup>ST</sup> PLAINTIFF

STEPHEN M. NJOROGE..... 2<sup>ND</sup> PLAINTIFF

VERSUS

KIAMBU COUNTY GOVERNMENT..... DEFENDANT

**JUDGMENT**

By an **Amended Plaintiff** dated 22<sup>nd</sup> July 2016, the Plaintiffs herein sought for Judgment against the Defendant for:

- a) ***A declaration that the alleged Temporary Occupation License dated 27<sup>th</sup> November 2015 by the 1<sup>st</sup> Defendant to the Plaintiff is illegal, unenforceable and null and void for all intents and purposes.***
- b) ***An order of permanent injunction restraining the Defendant either by themselves, their employees, servants and/or agents from interfering on, continuing being in occupation, erecting structures and/or in any other manner interfering with the Plaintiffs' quiet enjoyment and possession of LR.No.Gatamaiyu/Nyanduma/143 situated within Kiambu County.***
- c) ***Costs of the suit and interest thereon at commercial rates.***
- d) ***General damages for trespass.***
- e) ***Special damages Kshs.8,045,000/=.***
- f) ***Further or other relief as may be just and expedient in the circumstances of the case.***

The Plaintiffs averred that they are the registered owners of all that parcel of land known as **LR.No.Gatamaiyu/Nyanduma/143** situated in **Kiambu County**. Further that on 22<sup>nd</sup> June 2015, the Defendant without any colour of right and through its employees, Servants and/or agents, commenced construction of a bridge that traverse through **LR.No. Gatamaiyu/Nyanduma/143**, which is a private property and without any consent and/or authority from the Plaintiffs. It was their contention that the commencement of the said construction of the said bridge by the Defendant amounted to trespass upon private land to the detriment of the Plaintiffs. The particulars of the said trespass were set out in paragraph 6 of the Plaintiff and among the said particulars was the cutting down of the forty mature assorted trees including blue gum and eucalyptus trees and clearing approximately 200 tea bushes by the Defendant.

The Plaintiffs also alleged that they suffered special damages which they particularized as **Kshs.8,045,000/=**. Further that by virtue of the Defendant's acts of trespass to the suit property, the Defendant has misused, wasted, damaged and or destroyed the suit property. Therefore the intended move to construct the bridge is likely to cause logging on the lower and fertile part of the aforesaid parcel of land. That the Defendant has threatened and intends to continue with the acts of trespass unless restrained by the court. The particulars of loss and damage were stated in paragraph 9, of the Plaintiff among them being that the Defendant's actions have resulted to low agricultural yields from the land and therefore the Plaintiffs' claim damages.

Further that despite demand and Notice of Intention to Sue, the Defendant has refused, ignored and/or neglected to make good the Plaintiffs' claim and thus this suit.

The suit is contested and the Defendant filed its Defence on 15<sup>th</sup> December 2015 and denied all the allegations made by the Plaintiffs in their claim. The Defendant contended that the alleged bridge was constructed in 1967, and the same has been in use by the residents in the area

since then. It was contended that in **June 2015**, the County Government of Kiambu did undertake a reinforcement of the already existing bridge to make it safe for use by both the Plaintiffs and the area residents. Further that the area residents have been in use of the said land for well over **30 years** and as such the Defendant relied on the existing land usage to improve accessibility.

The Defendant also claimed that the suit is time barred by virtue of **Limitation of Actions Act**. Therefore the Defendant urged the Court to dismiss the Plaintiffs suit with costs.

The matter proceeded via *viva voce* evidence and only the Plaintiffs called one witness to support its claim. The Defendant did not call any witness but cross-examined the Plaintiffs' witness and also filed written submissions.

### **PLAINTIFFS' CASE**

**PW1 – Stephen M. Njoroge** from **Kwa-Wanjenga Village** adopted his witness statement which is dated **25<sup>th</sup> June 2016**. He testified that the land parcel **No.Gatamaiyu/Nyanduma/143**, is registered in the name of his mother **Hannah Nyambura Njoroge** and himself. He produced the Certificate of title which was issued on **11<sup>th</sup> November 1982**. He further stated that on **22<sup>nd</sup> June 2015**, the **County Government of Kiambu** commenced construction of a bridge on their piece of land through its workers and/or employees. He identified the photographs of the said bridge as **exhibit No.2**. It was his further testimony that the said bridge encroached on their land and the said encroachment caused a lot of damages on the ground. That the Defendant cleared about **200 tea bushes** and several coffee trees. That after a valuation was done, the damaged crops and loss of earning came to **Kshs.8 million**. He further stated that the family used to earn about **Kshs.50,000/=** per month from horticultural farming. He produced the Valuation Report as exhibit 3. He denied that the first bridge was built in **1967** but contended that it was first constructed in **1998**. However in **2015**, the Defendant expanded the said bridge which encroached on their land and the said encroachment affected the production on their farm.

That even after sending Demand Letter to the Defendant, the said demand did not elicit any response from the Defendant. He produced Demand Letter as **exhibit No.4** and Sketch Plans as **exhibit No.5**. He urged the Court to allow his claim.

On cross-examination, he admitted that he is not a Valuer by profession. However, he stated that the road in question passes through their land parcel. He also confirmed that he had no evidence that he had planted **200 tea bushes** and did not have a statement of account to show that he earned proceeds from **200 tea bushes**. He also did not have any bank slips to show that he received any proceeds from the **200 tea bushes** and had no evidence to show the loss of **Kshs.50,000/=** per month as **Kshs.5400,000/=** for **9 years**. He also admitted that from the photographs, he could not tell who damaged his property. He further admitted that the trespass in issue stated in **1977** and that the road is not marked on the **Sketch Plan** and the road has passed where it was not supposed to exist.

In re-examination, he stated that the road was constructed with the help of the area Councilor and they were not compensated when the road passed through their land though some other people were compensated. Further that the said road is an encroachment to their land. He confirmed that his claim is for trespass since **1977** but the bridge herein was expanded on **22<sup>nd</sup> June 2015**.

After the close of the Plaintiffs' case and after the Defendant intimated that they would not call any witness, the parties were directed to file their written submissions which rival submissions were duly filed. This Court has now carefully considered the respective written submissions and make the following finding;

There is no doubt that the suit land **No.Gatamaiyu/Nyanduma/143** is registered in the favour of **Stephen M. Njoroge** and **Hannah Nyambura Njoroge** as is evident from the land Certificate issued in their favour on **11<sup>th</sup> November 1982**. They are therefore prima-faciely the **absolute** and **indefeasible** proprietors of the said suit property.

There is also no doubt that there is a road that has passed through the said parcel of land which is maintained by the **County Government of Kiambu**. The Plaintiffs alleged that the said road is not supposed to exist thereon and it is an encroachment on their land. That the said trespass began in **1977**, but became worse on **22<sup>nd</sup> June 2015**, when the Defendant decided to expand the bridge on the suit land. However, the Defendant in its defence averred that the said bridge was constructed in **1967**, and the same has been used by the area residents, the Plaintiffs included since then. The Defendant alleged that they only reinforced the already existing bridge and did not trespass on the Plaintiffs' land. It is therefore evident that on or about **June 2015**, the said bridge that has been in existence was reinforced by the Defendant. The Plaintiffs alleged that the said works of reinforcement or expansion of the bridge caused damages to their crops specifically the **200 tea bushes** and **coffee trees** and due to the said damages, they have suffered loss of earning.

The above allegations have been denied by the Defendant. It is trite that **'he who alleges must prove'**. It is the Plaintiffs who alleged and they therefore had the onus of calling sufficient evidence to prove their case on the required standard. See **Section 107** of the **Evidence Act**, which provides:-

**(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.**

After gleaning at the pleadings, and the available evidence, the Court finds the issues for determination are:-

**i. Did the Defendant trespass on the Plaintiffs' parcel of land?**

**ii. Is the Plaintiffs' claim time-barred?**

**iii. Are the Plaintiffs' entitled to prayers sought?**

**iv. Who will bear the costs of the suit?**

**i. Did the Defendant trespass on the Plaintiffs' parcel of Land Gatamaiyu/Nyanduma/143**

As the Court observed earlier, the Plaintiffs are the registered owners of the suit property herein **No.Gatamaiyu/Nyanduma/143**. **Black Law Dictionary 10<sup>th</sup> Edition** defines 'trespass' as:-

***“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.***

The Plaintiffs alleged that the Defendant did encroach on their suit property since 1977, but the encroachment became worse in **June 2015**. The Plaintiffs further alleged that after the constructing of the bridge on the said area, some people were compensated but the Plaintiffs were not compensated. If the said road and bridge were constructed in 1977, or 1967 as alleged by the Defendant, then it is clear that the Defendant did use the said suit land with the knowledge of the Plaintiffs. The Plaintiffs did not complain in the year 1977, but only did it in the year 2015. The Plaintiffs alleged that some people were compensated for the use of the land but they were not compensated themselves. If the Plaintiffs' claim is for non-payment of compensation, then they should have brought a claim to that effect but not to allege trespass when the Defendant decided to reinforce the existing bridge. The Court finds that from the available evidence, it is not evident that the Defendant did trespass on the Plaintiffs' suit property but it is clear the Defendant was only carrying out works on an existing bridge.

**ii. Is the Plaintiffs' claim time-barred?**

The Plaintiffs' claim is based on the actions of the Defendant and/or their servants, employees or agents which action was allegedly done on **22<sup>nd</sup> June 2015**. Though in his evidence PW1 alleged that the Defendant got into the suit property in 1977, the actions that are being complained about were allegedly committed on **22<sup>nd</sup> June 2015** and the suit herein was filed on **26<sup>th</sup> June 2015** a few days after the alleged acts of trespass was committed by the Defendant and/ or its employees. The act of trespass is newable each time such an act is committed and cannot be said to be time-barred. See the case **Gladys Koskey ...Vs... Benjamin Mutai [2017] eKLR** where the Court held that:-

***“On the first issue, the suit is founded on trespass which is a tort. Under section 4 of the Limitation of Actions Act, an action founded on a tort must be instituted within three years. However, as the Plaintiff indicates, the trespass is continuous and the Limitation of Actions Act does not come into play. This is supported by the case of Nguruman Limited V Shompole Group Ranch & 3 Others Civil Appeal No 73 of 2004 reported in 2007 KLR. Citing Clerk and Lindsel on Torts 16<sup>th</sup> Edition, paragraphs 23-01 the Court of Appeal stated that:***

***“Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues”***

Therefore the Court finds that the suit herein is not time-barred and has not been caught by Limitation of Actions.

**iii. Are the Plaintiffs entitled to prayers sought?**

The Plaintiffs have sought for various prayers among them a declaration that the alleged **Temporary Occupation Licence** dated **27<sup>th</sup> November 2015** by the 1<sup>st</sup> Defendant to the Plaintiffs is illegal, unenforceable and null and void for all intents and purpose.

There was no evidence adduced on the alleged **Temporary Occupation Licence** dated **27<sup>th</sup> November 2015**, issued to the Plaintiffs by the 1<sup>st</sup> Defendant. There is even no 1<sup>st</sup> Defendant herein. ***‘He who alleges must prove’***. The Plaintiffs did not produce the said **Temporary Occupation Licence** and therefore this Court finds that no evidence of issuance of such **Temporary Occupation Licence** to the Plaintiffs by the Defendant and therefore the Plaintiffs are not entitled to that prayer.

On **prayer No. (b)** of permanent injunction to restrain the Defendant and/or their employees, servants and/or agents from interfering with the Plaintiffs' quiet possession of **Gatamaiyu/Nyanduma/143**, it is evident that the bridge in question has been in existence since 1977 as alleged by the Plaintiff or 1967 as per the Defendant's averments. The said bridge is being used by the area residents and Plaintiffs are included. The reinforcements of the bridge only affected the area where the bridge is constructed. The said reinforcement did not affect the whole of **LR.No. Gatamaiyu/Nyanduma/143**, and so the Plaintiffs cannot be heard to allege that the act of reinforcement of the existing bridge has interfered with their quiet enjoyment and possession of the suit land. There is no justification in seeking for permanent injunction against the Defendant in relation to the whole of **Gatamaiyu/Nyanduma/143** since the Defendant has not encroached on the whole parcel of land but only carried reinforcement works on the existing bridge. The Plaintiffs are not entitled to this prayer.

On General Damages for trespass, the Court found and held that there was no evidence that the Defendant had trespassed on the Plaintiffs parcel of land. What is evident is that the Defendant carried works on the existing bridge and therefore the Plaintiffs are not entitled to this prayer of General Damages.

On Special Damages of **Kshs.8,045,000/=** it is evident that special damages must be specifically proved. See the case of **Hahn ...Vs... Singh, Civil Appeal No.42 of 1983 (1985) KLR 716**, where the Court held that:-

***“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or***

***probable consequence of the act complained of and may not be interred from the act. The decree of certainty and particularly of proof required depends on the circumstances and nature of the acts themselves”.***

The Plaintiff alleged that **40 assorted trees** were damages and the **Valuation Report** gave the value of each tree as **Kshs.60,000/=**, there was no evidence produced by the Plaintiffs to confirm that prior to the said bridge reinforcement, there were **40 assorted trees** on the suit land and later evidence of the destroyed **40 assorted trees**. The photographs attached to the Valuation Report shows a few stumps of cut trees and the value was not a witness in court to confirm how he arrived at a value of **Kshs.60,000/=** per tree. On the loss of **200 tea bushes**, the Plaintiff was categorical in cross-examination that he did not have evidence of having planted **200 tea bushes**. However, it is evident that the area next to the reinforced bridge was cleared and some tea bushes were cleared and thus damages. The Court will indeed find that about **200 tea bushes** were destroyed during the reinforcement of the bridge. The **Valuation Report** gives the value of each tea bush at **Kshs.1000/=**. Consequently, the Court finds that the Plaintiffs are entitled to **Kshs.200,000/=** as Special Damages for the damaged tea bushes.

On loss of earnings, at **Kshs.50,000/=** per month for **9 years**, there was no evidence of such earnings per month and it was also not clear why the Plaintiffs backdated the claim to **2006** given that they only complained of the acts of **22<sup>nd</sup> June 2015**. The Plaintiffs are not entitled to that prayer of loss of earning.

On **Valuation Report**, the Plaintiff did not attach a receipt of payment of **Kshs.45,000/=** to the valuer and the said valuer did not come to court to produce the said report. Consequently the Plaintiffs are not entitled to that prayer of **Kshs.45,000/=** as payment to the valuer.

Having now carefully considered the available evidence, the Court finds that the Plaintiffs are only entitled to **Kshs.200,000/=** as Special damages for loss of **200 tea bushes** occasioned by the reinforcement of the bridge.

**iv. Who is to bear costs of the suit?**

Ordinarily costs do follow the event. The Plaintiffs have only partially succeeded in a claim of **Kshs.200, 000/=** for loss of their tea bushes. The Plaintiff is entitled to costs only on the successful prayer on amount of **Kshs.200,000/=** from the date of filing of this suit to payment in full.

In the final analysis, the Court finds that the Plaintiffs’ suit is not merited in terms of **prayers no.(a), (b), (d)** and the said prayers are dismissed entirely. However, on **prayer no.(e)**, the Plaintiffs are entitled to Special Damages of **Kshs.200,000/=** only with costs only on the successful amount and interest at Court’s rate from the date of filing of the suit to payment in full.

It is so ordered.

**Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of July 2019.**

**L. GACHERU**

**JUDGE**

**12/7/2019**

In the presence of

Ms.Kilonzo Holding Brief for Mr. Kebue for Plaintiffs

Mr. Muthomi Holding Brief for Mr. Ranja for Defendant

Lucy Court Assistant.

**Court** -Judgment read in open Court

**L. GACHERU**

**JUDGE**

**12/7/2019**