



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 8B OF 2012

KANGANGI GATOGONI

MOSES MWANGI GATHUA

MWANGI NGURU

BENSON KARIUKI KITHOME

GICHIRA SAMSON MIANO

WARUI KIMENJU

KANGATA KIMUNYU

CHARLES NJANJA ZAKARIA

GRACE WAMBURA KIMEMIA

CYRUS KATHIACA KANGARA.....PLAINTIFFS

VERSUS

ATTORNEY GENERAL.....1ST DEFENDANT

SAGANA/KAGIO TOWN COUNCIL.....2ND DEFENDANT

BENSON MURAGE MINDO.....3RD DEFENDANT

LAZARUS MURIITHI NJANJO.....4TH DEFENDANT

JEREMIAH MAKIMI.....5TH DEFENDANT

JUDGMENT

The plaintiffs vide a plaint dated 22nd December 2011 and amended on 13th November 2015 sought judgment against the defendants jointly and severally for a sum of Ksh. 6,780,804 plus costs and interest being compensation for losses occasioned to their land and developments as contained therein. At paragraph 5 & 6 of the amended plaint, they gave the particulars of the individual registered owners and the acreage of land including other properties damaged.

The 1st defendant filed a statement of defence dated 5th March 2012 in which she denied the plaintiffs claim and sought to have the suit dismissed with costs. The 2nd, 3rd, 4th and 5th defendants also filed a joint statement of defence denying the plaintiffs claim and put them to strict proof. Whereas the 2nd, 3rd, 4th and 5th defendants admitted that the extension of Tuthamba – Thiya Road in Kirinyaga District started on or about January 2011, they deny having encroached on the plaintiff's parcels of land but contend that it was the plaintiffs who had encroached on a road reserve. They therefore sought to have the suit as against them dismissed with costs.

PLAINTIFFS CASE

The 2nd plaintiff Moses Mwangi Gathua who is the registered proprietor of land parcel No. MWERUA/KITHIMBU/215 stated that the defendants took away his land measuring 108 X 1.5 which is equivalent to 162 square metres. He also stated that his barbed wire, hedge, 15 cedar posts and 2 gates culverts, 8 flowers, 6 water pipes PVC ¾ and 11 Mikima trees were destroyed. He said that the total value of the properties destroyed/damaged were as follows:

- Value of land	- Ksh. 28,000/=
- Value of wire	- Ksh. 5,000/=
- Value of hedge	- Ksh. 10,800/=
- Value of posts	- Ksh. 3,000/=
- Costs of fixing date	- Ksh. 2,000/=
- Costs of fixing culverts	- Ksh. 20,000/=
- Water pipes	- Ksh. 5,000/=
- Trees	- <u>Ksh. 145,750/=</u>
Total	Kshs. 219,500/=

PW2

The second witness was Mwangi Nguru who is the 3rd plaintiff. He testified on oath and stated that he lost part of his land parcel No. MWERUA/KITHIMBA/1210 measuring 58 m X 1.5 m making a total of 0.0215 acres. He also stated that he lost 10 mibariti trees, 30 cypress trees, 6 barbed wires, 15 cedar post, 6 water pipes, PVS ¾, labour for fixing gate and kariaria hedge as follows:

- Value of land	- Ksh. 15,000/=
- Value of trees	- Ksh. 206,000/=
- Value of barbed wire	- Ksh. 5,000/=
- Cedar posts	- Ksh. 3,000/=
- Costs of fixing gate	- Ksh. 2,000/=
- Water pipes	- <u>Ksh. 5,000/=</u>
Total	Ksh. 236,000/=

PW3

The third witness was Benson Kithome who is the registered holder of land parcel Number MWERUA/KITHUMBU/207. The witness also stated that he lost properties as follows:

Land 131 m X 1.5 m = 197 square metres or 0.49 of an acre. He stated that he lost 70 mibariti trees, kariaria hedge and 0.05 acre of maize. The estimated value of properties lost is as follows:

- Value of land	- Ksh. 35,000/=
- Value of maize	- Ksh. 5,000/=
- Value of hedge	- Ksh. 13,100/=
- Trees	- <u>Ksh. 1,142,400/=</u>
Total	Ksh. 1,193,500/=

PW4

PW4 was Warui Kimenju who is the proprietor of land parcel No. MWERUA/KITHUMBU/1021 and 205 measuring 3.91 and 10 acres respectively. He stated that he lost land measuring 131 m X 1.5 m adding upto 0.049 of an acre. He also lost 0.00474 acres of maize, 0.00474 of beans, 59 mibariti and 3 mikinduri. In addition, he stated that he lost land measuring 310 m X 1.5 m which is approximately 0.114 of an acre plus 0.115 acres of maize, 0.115 acres of beans, 70 mibariti, 19 mikinduri and hedges valued as follows:

- Land	- Ksh.	80,000/=
- Maize	- Ksh.	6,000/=
- Beans	- Ksh.	3,500/=
- Trees	- Ksh.	1,276,250/=
- Hedge	- Ksh.	<u>46,500/=</u>
Total	Ksh.	1,412,680/=

The witness stated that from land parcel No. MWERUA/KITHIMBU/1021, he lost land measuring 310 m X 1.5 m = 0.465 square metres. He also lost 0.115 acres of maize, 0.115 acres of beans, 70 mibariti trees, 19 mikinduri trees, a hedge and a fence. The estimated value of damage is as follows:

- Land	- Ksh.	33,180/=
- Maize	- Ksh.	3,000/=
- Beans	- Ksh.	1,500/=
- Trees	- Ksh.	<u>1,005,493/=</u>
Total	Ksh.	1,123,493/=

PW5

PW5 was Peter Gitau Ngugi who is a valuer under certificate No. 267. He stated that he received instructions from the plaintiffs to value several parcels to establish the value of land taken by Sagana/Kagio Town Council while they were extending the size of the road. He stated that he inspected the following parcels of land:

- Mwerua Kithumbu/215 belonging to Moses Mwangi Gathua which was approximately six (6) acres.
- Mwerua/Kithumbu/1210 registered in the name of Mwangi Gakuru measuring 2.52 acres.
- Mwerua/Kithumbu/207 owned by Benson Karoki Kithome measuring six (6) acres.
- Mwerua/Kithumbu/1021 owned by Warui Kimendu measuring 3.91 acres.
- Mwerua/Kithumbu/205 owned by Warui Kimenju measuring 10 .0 acres.
- Mwerua/Kithumbu/623 owned by Kangata Kimunyu measuring approximately 3.0 acres.
- Mwerua/Kithumbu/658 owned by Kangata Kimunyu measuring approximately 13.0 acres.
- Mwerua/Kithumbu1738 owned by Cyrus Kathaka measuring approximately 3.9 acres.

The witness stated that he also bought maps from the survey of Kenya in Nyeri Sheet No. 7, 9 & 10 and that he scaled the same to get the size of the road in dispute. He said that the size of the road was 6 metres wide but the Town Council was expanding to 9 metres wide. They were expanding 1.5 metres on each side. In the process, they caused damage to the parcels of land and properties contained therein. He compiled a report for the damage caused and produced the same as Plaintiffs Exhibit No. 3. The witness was cross-examined by Mr. Maina Kagio for the defendants. In his reply, the witness stated that he did not take the area of the whole land but only took the affected area. He also said that he was not present when the road was being extended.

PW6

PW6 was Kangata Kimunyu. He is the owner of land parcel No. MWERUA/KITHUMBU/65 and 623 measuring 3½ acres and 3 acres respectively. He stated that on 17th January 2011, the defendants through their employees came to his land with pangas and started cutting down trees, maize, etc. He engaged a valuer who came and assessed the damage he sustained at Ksh. 216,313.

DEFENDANTS CASE

The defendants offered no evidence in defence and closed their case.

ISSUES FOR DETERMINATION

The issues appropriate for determination arising from the pleadings can be framed as follows:

- (1) Whether the defendants extended a road from Tuthamba – Thiya Road in Kirinyaga District of 1½ metres on each side?**
- (2) If the answer to paragraph (1) above is in the affirmative, whether the defendant encroached on the plaintiffs parcels of land?**
- (3) If the answer to paragraphs (1) & (2) above is in the affirmative, whether the plaintiffs suffered damages in land and other properties?**
- (4) Who is liable to pay costs of this suit?**

ANALYSIS AND DECISION

The claim by the plaintiffs is for compensation of land compulsorily acquired by the defendants illegally and un-procedurally. The plaintiffs alleged that on 11th January, 2011, officers of the 1st defendant started extending a road from Tuthamba – Thiya Road in Kirinyaga by 1½ metres on each side of the road thereby encroaching on their parcels of land. In order to determine whether the alleged road was really extended by 1½ metres on each side, the plaintiff must show the size of the original road before extension. Peter Gitau Ngugi (PW5) who was called by the plaintiffs is a registered practicing valuer under certificate No. 267. He stated that he was instructed to do valuation of land taken by Sagana/Kagio Town Council. He produced the valuation report as Plaintiffs Exhibit No. 3. In his report, the witness did not give the survey map of the road prior and after the extension had been done. There is also no evidence produced showing that the plaintiffs' parcels of land was reduced in size after the extension of Tuthamba – Thiya Road. It has not been explained how the witness concluded that the plaintiffs lost parcels of land when he did not even carry out a survey of their individual parcels of land on the ground vis-a-vis the size indicated on the certificate of title. As we speak, there is no evidence adduced by the plaintiffs that the size of their individual parcels of land as shown in their title deeds has been taken away by the defendants. That can only be proved by conducting a survey on the ground to confirm whether it corresponds with that in the title. Since no such survey was conducted by the plaintiffs, their claim therefore cannot sustain. The only way to prove with a degree of certainty that the plaintiffs have lost any land is to conduct a survey on their respective parcels on the ground to determine whether they are less than what is reflected in the title. It is only then that the plaintiffs can ascertain whether their land has been encroached or not. The plaintiffs did not call a surveyor to conduct a survey of parcels and determine whether their land is less in acreage than what is indicated in the register. The felling of trees and destruction of maize and beans and other properties is not evidence of encroachment. The plaintiffs need to show that those trees, maize and beans were on their portions of land and not the road reserve. Their claim is of a nature of special damage which must be pleaded and proved on the required standard. The standard of proof in special damages was aptly stated in the case of *Richard Okuku Oloo Vs South Nyanza Sugar Co. Ltd (2013) e K.L.R* wherein it was observed:

“We agree with the learned Judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of. In the Jivanji Case (supra), a decision of this Court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which party quotes Coast Bus Service Limited Vs Murunga & others Nairobi C.A No. 192 of 1992 (UR) appears in the Jivanji case:

“It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council Vs Nakaye (1972) E.A 466, Ouma Vs Nairobi City Council (1976) K.L.R 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another Vs Chebon Civil Appeal Number 22 of 1991 (UR). In the latest case, Cockar J.A. who dealt with the issue of special damages said in his judgment:

“It has time and again been held by the Courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma Vs Nairobi City Council (1976) K.L.R 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages.....”

My humble view is that the plaintiffs' case fails and the same is hereby dismissed. On the issue of costs, the law is that the same usually follows the event. In the circumstances of this case, I order each party to bear his/her own costs.

It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20th day of September, 2019.

E.C. CHERONO

ELC JUDGE

20TH SEPTEMBER, 2019

In the presence of:

1. *Mr. Maina Kagio for the 2nd Defendant*
2. *Mwangi Nguru - present*
3. *Benson Kariuki Kithome - present*
4. *Warui Kimenju - present*
5. *Cyrus Kathiaka Kangara - present*
6. *Mbogo – Court clerk - present*