



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 112 OF 2017

FRANCIS GACHOKI MATU.....PLAINTIFF

VERSUS

THE KENYA RURAL MINISTRY OF ROAD

AUTHORITY KIRINYAGA REGION.....DEFENDANT

JUDGMENT

By a plaint dated 17th July 2017 sought the following orders:-

- a) That the defendant do pay the costs of the value of destroyed and damaged properties as listed in the plaint.***
- b) That the damages be paid to the plaintiff for matters delineated in the plaint as to the Court may seem just and expedient.***
- c) Costs of the suit be paid to the plaintiff.***

The plaintiff also filed witness statements and list of documents in support of his claim.

On 25th August 2017 the defendant filed a statement of defence denying the plaintiffs claim and put him to strict proof thereof. The defendant also filed a witness statement by one Douglas Kanyatta Macharia dated 25th August 2017.

PLAINTIFF'S CASE

The plaintiff contends that he is the appointed personal representative of one Susan Wakabu Matu (deceased) who was and now is the registered proprietor of land parcel number Inoi/Thaita/565. He further stated that between November 1998 and January 2015, the defendant through her employees and/or agents committed acts of destruction over his properties in the suit land and even caused him be arrested and prosecuted without justification at all.

The plaintiff further contends that sometime in October 2010, the *defendant unlawfully or without any justification committed the following atrocities:*

- a) Construction of bridge inside his land.***
- b) Uprooting and cutting trees on the land.***
- c) Digging a road along the land and widening the same on the land and destroying a house and other things on the land.***
- d) Causing the plaintiff to be arrested and arraigned in court.***
- e) Placing culverts across the land whereby changing the cause of the Kandakame river (stream).***
- f) Cutting down and uprooting coffee trees and fruits on the land.***

The plaintiff particularized the damage and destruction which was estimated to a total sum of Kshs. 1,719,174/=.

DEFENDANTS CASE

The defendant on the other hand did not call any witness during the hearing of this case.

However from the witness statement recorded by one Douglas Kanyatta Macharia who is the Road Overseer of Kenya Rural Roads Authority and the person in-charge of overseeing the road project in question, he stated that the road which is the subject of this suit is classified as E1633-C74 Kerugoya E614-RAAR19 Kiangothe.

He also stated that the road in question crosses permanent Kandakame stream and that during the improvement works, one line of 900mm diameter and 8 metres culvert was added to existing culvert at the stream.

He stated that the added culvert followed the original alignment on the existing land and not the plaintiff's land. The defendant also stated that the construction of the additional culvert did not divert the flow of the stream in anyway and that the plaintiff stopped the construction of the bridge forcing the road to remain where it was until today.

The defendant finally stated in his statement that the existing culverts and eventual improvement thereof could not in any way cause flooding to the plaintiff's land and that the culvert are on a permanent stream with a riparian reserve and as such, the culvert and the stream cannot be on the plaintiff's land. The defendant also contends that the entire road improvement by Kenya Rural Roads Authority did not involve realignment and that the existing road from Kerugoya to Kiangothe through Kandakame has been in use for over 20 years.

ISSUES FOR DETERMINATION

The issues that calls for determination are as follows:-

- 1) **Whether the plaintiff has discharged his burden of proof on a balance of probabilities?**
- 2) **Who shall bear the costs of this suit?**

LEGAL ANALYSIS

I have considered the evidence adduced by the plaintiff ex-parte. I have also considered the applicable law. This suit proceeded Ex-parte after the Court was satisfied that the defendant was duly served with the hearing notice. Even where a case proceeds Ex-parte, the burden and standard of proof expected of the claimant never shifts but shall always remain to be discharged by the claimant. The burden and standard of proof in special damages was put into perspective in the case of *Ratcliffe Vs Evans (1892) 2 QB 524* where **Bowen, L.J** held as follows:-

The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.

It is also trite law that he who alleged must prove. *Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya* are clear and states as follows:-

“107 (1) whoever desires any Court to give judgment as to any legal 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.

108 The burden of proof in a suit or proceedings lies in that person who would fail if no evidence at all were given on either side”

109 The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

The plaintiff in this suit alleged that the defendant committed serious atrocities including construction of a bridge inside his land. He has not called a surveyor to produce a map showing that the alleged bridge has been constructed on his parcel of land. He has not also adduced any evidence that the trees and the house which was allegedly destroyed was built on his land. The plaintiff could only prove his claim by calling a surveyor who could produce a report showing that the alleged destruction and damage to property was situated in his land. The plaintiff did not explain in his testimony how he arrived at the damages in the sum of Kshs. 1,719,174/=. This Court takes judicial notice that valuation of trees and damage(s) caused to agricultural produce can only be assessed by an Agricultural Extension officer or a Valuer. These experts were not called by the plaintiff as witnesses. It is not explained how the plaintiff arrived at the claim being sought in the absence of a report by an expert. In my view, the plaintiff has not proved his claim to the required standard.

In the final analysis, this suit fails and the same is hereby dismissed with no order as to costs.

READ DELIVERED and SIGNED in open Court at Kerugoya this 15th day of November, 2019.

E.C. CHERONO

ELC JUDGE

15TH NOVEMBER, 2019

In the presence of:

1. *Mbogo Court Assistant – present*
2. *Plaintiff/Advocate – absent*