



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 27 OF 2015**

**BENSON MAIYWA REBER.....PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF WEST POKOT.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a plaint dated 2/3/2015 and filed in court on 4/3/2015 the plaintiff herein sued the defendant for the following orders:-

- a. A declaration that the defendant has no proprietary rights whatsoever over Land Parcel No. West Pokot/Keringet 'A'/2800.
- b. Value of the trees: Kshs.226,861/=.
- c. General damages for trespass and mental torture.
- d. A permanent injunction restraining the defendant, its servants and/or agents from trespassing upon and/or in any other way interfering with the plaintiff's peaceful use and possession of Land Parcel No. West Pokot/Keringet 'A'/2800.
- e. Costs of the suit.
- f. Any other relief the court deems fit and just to grant.

**PLEADINGS**

**The Plaintiff**

2. In the plaint the plaintiff he is the registered proprietor of Land parcel No. **West Pokot/Keringet 'A'/2800** measuring or thereabouts; that his parcel of land is arable and no public or access road exists thereon; that on **12<sup>th</sup> February, 2015** the defendant sent its agent with caterpillars and bulldozers to his parcel of land and forcefully created the access road measuring fifteen (15) metres wide and covering an area of approximately two (2) acres; that in the course of creating the access road destroyed over one hundred mature trees of varied species and some building bricks; that the defendant has now authorized members of the public to use the road and this has interfered with the plaintiff's privacy; that the defendant actions were done without the authority and/or consent of the plaintiff; that the actions are high handed and have infringed upon his constitutional rights to protection of his property; that the actions have caused the plaintiff extreme mental torture and substantial damage; that the destruction of the trees have denied the plaintiff the right to utilize his property in the manner he intended for financial gain in future and that the defendant's action are unlawful and that have no colour of right to trespass upon his parcel of land.

**The Defence**

3. The defendant filed its defence on **1/7/2016**. It denied all the allegations in the plaint. It denied creating an access road on the plaintiff's land; it denied having sent its agents with machinery to the plaintiff's land to forcefully create a road, or that the plaintiff has sustained any loss or damage as a result of its servants' activities; It avers that if ever there was an access road created, the same is a surveyed access road; It prays that the plaintiff's claim be dismissed with costs.

**The Reply to Defence**

4. The plaintiff filed his reply to defence on **6/7/2016** reiterating all the averments in the plaint.

### **The Plaintiff's Evidence**

5. The plaintiff testified on **24/2/2016**. The sum of his evidence is that he owns the suit land; that he resides and farms thereon; that he planted trees thereon in **2002**; that on **12/2/2015** his neighbour informed him over the phone that the caterpillars from the County Government had constructed a road in his land; that the map for the land shows that no road is supposed to traverse his land; that damage was occasioned to his trees, bricks and vegetables; that the total loss was assessed at **ksh 226,861**; that the road is **15 metres** wide; that when he enquired at the County Government office he was informed that members of the public had asked for the road to be made;

**6. PW2, Joel Kapsiliot and PW 3, David Kamama** respectively testified on **24/8/2017**. Both stated that they are neighbours to the plaintiff, that their plots are number **2799** and **2789** respectively; that they witnessed the caterpillars from the West Pokot County Government create the road on the plaintiff's land;

**7. PW 2** stated that in the process and upon being cut the plaintiff's trees fell on the plaintiff's bricks and destroyed them; that he called the plaintiff and informed him.

**8. PW3** testified that the caterpillar he saw had the name of the West Pokot County Government written on it and that the driver and the other people presiding over the process were in other West Pokot County Government vehicles.

**9. PW4, Henry Lumasayi**, West Pokot County Surveyor testified on **5/7/2018**. He produced a copy of a map for the area as **PEXh 6**; he stated that according to that map there was no road traversing the plaintiffs plot. However he testified that there is a **10 metre** wide road that exists between Plots Nos **2789** and **2800**. He averred that he had not visited the site.

### **The Defendant's Evidence**

**10. DW 1, Elijah Lopuke**, the defendant's sole witness testified on **10/7/2018**. He stated that he is the Chief Officer of Lands Department in the West Pokot County. He adopted the witness statement of **Matthew Rionokal Lomariono** filed on **20/3/2017** as his evidence. The said Matthew appears to have been **DW1's** predecessor in office. His said statement denies ever having released any machinery or authorized any of the county employees or contractors to go and construct a road on the plaintiff's land parcel.

**11.** In his oral evidence **DW1** stated that the county government lands office does not have such machinery as stated by the plaintiff's case but that the Ministry of public works has some. On cross examination he admitted that his department also deals with roads, and particularly in planning matters he never produced the work tickets for that day in respect of the caterpillars, though he stated that he had perused them. He admitted that the area in which the plaintiff's land is situated is within the county's jurisdiction.

**12.** The plaintiff filed written submissions on the **14/8/2018** and the defendant on **10/8/2018**. I have considered the pleadings, the evidence and the submissions.

**13.** The issues for determination are as follows:

**a. Whether there is a road that goes through the plaintiff's land;**

**b. Whether the plaintiff has established that the defendant created a road upon his land without his consent;**

**c. Whether the plaintiff has proved loss and damage.**

**d. What orders should issue.**

**a. Whether there is a road that goes through the plaintiff's land;**

**14.** The surveyor, **PW4** produced a map of the area referenced as "**Mnangei Location Keringet "A" Registration Section Sheet Number 21(75/3/2/8)**". He stated that he obtained it from the Eldoret Survey Office. The same shows that the only road that is in the area passes between plots **2789** and **2800**. I have examined the said map and I find that there is no road shown thereon as passing through the plaintiff's land. On that map, the latest date shown for the effecting of amendment to reflect the subdivision of certain parcels in the area is **3/4/2017**. In my view, there is sufficient evidence to prove that there is no road passing through the plaintiff's land.

**b. Whether the plaintiff has established that the defendant created a road upon his land without his consent;**

**15.** There is evidence that a road was created on the plaintiff's land and that in the process some trees were cut. **PW2** and **PW3** stated that they saw the county machinery creating the road. **PW2** called the plaintiff on phone when the event was occurring. **PW3** testified that the caterpillar that he saw had the name of the West Pokot County Government written on it. This evidence was not controverted. Even though they never gave the registration numbers of the caterpillars that created the road, their evidence relates to events that they witnessed and it is believable.

**16.** When **DW1** came to testify, he never brought any work tickets for his county's caterpillars which could have proved where the machinery had been deployed on that date. It must be assumed that the work tickets has not presented, it being so obviously needed for the defendant's case, would be adverse evidence to the defendant's case if it had been produced. His evidence amounted to implied concealment

of material facts.

17. I also find that **DW1** being in charge of the lands and planning of roads, he could have raised doubts by showing that the road never fell under the classification of roads that were within the jurisdiction of the county government as intimated in his counsel's cross examination. It was easy to establish from their records if such a road had ever been planned or surveyed. However no evidence was forthcoming from him, yet paragraph 5 of the defendant's defence intimated that such evidence could be availed.

18. The defendant had all the time to establish if its officers were involved in the creation of the road and it is regrettable that they brought in a witness who appears not to even know or recognize the proper extent of his office duties sufficiently to reasonably defend his employer's interests. He was a total liability to the defendant. Besides **DW1** also seemed a very evasive witness who did not help his employer's case at all.

19. I find that on the evidence of the witnesses, it has been established that the County Government of West Pokot created the road in question.

**c. Whether the plaintiff has proved loss and damage**

20. Special damages can only be awarded upon proof and not otherwise. Photographs of felled trees were produced in evidence. The plaintiff also produced a report prepared by **JK Songol**, District Forest Officer, West Pokot Sub County. However that letter is to the OCS Kapenguria. It is dated **21/2/2015**. It is referenced: "*RE: FARM FOREST PRODUCE TREE ASSESSMENT: MR BENSON MAIYWA.*" It does not refer to the plaintiff's land. The tabulation on the separate leaf attached to the said letter does not refer to the plaintiff or his land; it also does not have a date.

21. This suit has been ongoing for such a long time that it is quite surprising that this is the only document that the plaintiff can purport to be his proof of loss and damage, yet it does not help him. It is doubtful that even if the maker thereof had been called it would have aided the plaintiff at all. I find that the plaintiff has not proved special damages.

22. However, in regard to general damages for trespass, I find that the plaintiff has proved that the defendant trespassed onto his land and he is therefore entitled to general damages.

**d. What orders should issue.**

23. I find that the plaintiff has partially established his claim against the defendant on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendant and issue the following orders:

**a. A declaration that the Land Parcel No. West Pokot/Keringet 'A'/2800 belongs to the plaintiff.**

**b. The defendant shall pay to the plaintiff Kshs. 115,000/= being general damages for trespass.**

**c. A permanent injunction is hereby issued restraining the defendant, its servants and/or agents from trespassing upon and/or in any other way interfering with the plaintiff's peaceful use and possession of Land Parcel No. West Pokot/Keringet 'A'/2800.**

**d. The defendant shall bear the costs of this suit**

It is so ordered.

Dated, signed and delivered at Kitale on this 24<sup>th</sup> day of **October, 2018**.

**MWANGI NJOROGE**

**JUDGE**

**24/10/2018**

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for plaintiff

Mrs. Asseso for Barongo for defendant

**COURT**

Judgment read in open court

**MWANGI NJOROGI**

**JUDGE**

**24/10/2018**