



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 198 OF 2014

(FORMERLY KERUGOYA ELC NO. 1720 OF 2013)

LOYFORD GITARI LEONARD.....PLAINTIFF

VERSUS

WERU TEA FACTORY.....DEFENDANT

JUDGMENT

By an amended plaint dated 5th March 2014, the plaintiff filed this suit against the defendant and sought judgment in the following terms:

I. General and special damages.

II. A permanent injunction to restrain the defendant either by itself, agent, servant, assign or any person whatsoever from channeling storm water from land parcel No. MUTHAMBI/REGA/481 into the plaintiff's land parcel No. MUTHAMBI/REGA/940.

III. An order compelling the defendant to remove the Eucalyptus tree forest situated on the portion of MUTHAMBI/REGA/231 adjacent to MUTHAMBI REGA/940.

IV. An order compelling the defendant to renovate the plaintiff's house situated on MUTHAMBI/REGA/940 to as good condition as it was before the damage caused by the floods.

V. An order compelling the defendant to enact an impenetrable fence between the defendant's property and the plaintiff's property.

VI. An order compelling the defendant to install precipitators and absorbers.

VII. An order compelling the defendant to implement the recommendations contained in the Environment Assessment Report submitted to the plaintiff's lawyers by HELLEN NZAINGA and STEPHEN NGARI made in July 2013 signed 8.8.2013.

The plaintiff's claim was founded on pleadings that at all material times, he was and is still the registered proprietor of land parcel No. MUTHAMBI/REGA/940 while the defendant operates a tea factory on land parcels No. MUTHAMBI/REGA/231 and No. MUTHAMBI/REGA/481 which are adjacent to the plaintiff's land. That the plaintiff resided in a permanent house on which he reared poultry, cattle and planted napier grass, bananas and tea while the defendant erected buildings, dumped piles of wood and planted a forest of Eucalyptus trees as well as constructed deep soak pits. That during the rainy season in

December 2010 and January 2011, storm water and/or run off water from the roofs of the buildings erected on the defendant's land was channeled and/or escaped from the defendant's land into the plaintiff's land causing the plaintiff's house to crack while the soak pits flooded causing a semi-permanent toilet built thereon to crumble thus rendering the plaintiff's house inhabitable. That the pile of wood on the defendant's land harboured and still harbours mongoose, skunks and bush babies which are infested with ticks and fleas which spread into his compound making it impossible for the plaintiff to rear chicken. That the mongoose also sneaked into the plaintiff's land and fed on his chicken. That while the defendant erected an impregnable fence on its land which prevented escape of mongoose, skunks and bush babies from the pile of wood onto its land, it failed to do the same to prevent their escape into the plaintiff's land. That the defendant planted a forest of Eucalyptus trees on the land parcel No. MUTHAMBI/EREGA/231 which blocked sunlight from the plaintiff's land and made it impossible for the plaintiff to keep cattle due to extreme cold which also affected the plaintiff's yield of bananas and tea bushes making it impossible for the napier grass to grow. That the defendant also cut down its Eucalyptus trees which fell onto the plaintiff's land destroying his fence and denying the plaintiff the use of his land for over a year and also the defendant's agents entered the plaintiff's land without his authority converting it into a lumber yard. That the defendant operated the factory on its land in such a manner that smoke dust and ash escaped into the plaintiff's land settling on the plaintiff's compound, house, trees, tea bushes and other plants thereby reducing his yields and exposing his family to health hazards as a result of which the plaintiff's daughter developed complications and became Asthmatic. The plaintiff pleaded that the defendant's actions are negligent and amount to trespass and nuisance particulars whereof were itemized in paragraph 20 of the plaint to include:

- ***Channeling storm and/or run-off water into the plaintiff's land.***
- ***Dumping pile of wood knowing that mongoose, skunks and bush babies would inhabit the same and escape into plaintiff's land, feed on his chicken and infest his land with ticks and fleas.***
- ***Planting Eucalyptus forest next to the plaintiff's land knowing that the forest would block sunlight and make the temperatures extremely cold and thereby make it impossible for the plaintiff to keep cattle and also lower his yield of bananas and tea.***
- ***Failing and/or refusing to channel storm water away from plaintiff's land while knowing that it would cause damage to the plaintiff's property.***
- ***Failing and/or refusing to fence off its portion of land to prevent mongoose, skunks and bush babies harboured in the pile of wood from escaping into the plaintiff's land to feed on plaintiff's chicken.***
- ***Cutting down Eucalyptus trees and leaving them on plaintiff's property thus denying him his use of a large portion of his land.***
- ***Entering the plaintiff's property to remove logs without the plaintiff's authority and in the process causing further destruction to plaintiff's crops and property.***
- ***Allowing smoke, dust and ashes to escape onto the plaintiff's property and exposing his family to pollution knowing it would be detrimental to the health of the plaintiff and his family.***
- ***Leaving soak pits near the plaintiff's property open thus exposing the plaintiff and his family to harm and water borne diseases.***
- ***Failing to put an impenetrable fence between the defendant's and plaintiff's property thus allowing rodents and other animals to immigrate to the plaintiff's property destroying his crops and killing his chicken.***

As a result of the above negligence, nuisance and trespass, the plaintiff suffered loss and incurred expenses including:

- *Cracks to the plaintiff's permanent house rendering it inhabitable.*
- *Loss of plaintiff's source of income as he was compelled to stop rearing cattle and chicken from which he earned his daily bread. His tea production declined.*
- *Monetary loss in that the plaintiff's tea yield dropped from 1600 kilogrammes annually to approximately 600 kilogrammes as a result of the Eucalyptus trees.*
- *Dust, smoke and ash rendered the plaintiff's house inhabitable and lowered his crop production.*
- *Defendant's Eucalyptus trees destroyed the plaintiff's fence and rendered his land un-usable.*

The particulars of special damages suffered by the plaintiff were:

- 1. Environmental assessment report – Ksh. 60,000**
- 2. Hire of motor vehicle on 8th August 2013 by the plaintiff to visit the site and inspect the damages – Ksh. 3,500**
- 3. Fuel of motor vehicle – Ksh. 4,500**
- 4. Hire of motor vehicle on 17th May 2011 – Ksh. 3,200**
- 5. Taking photos of the damage caused Ksh. 3,500**

Despite demand and notice to sue, the defendant has refused, failed and/or otherwise neglected to make good the plaintiff's claim hence this suit.

By its amended defence dated 10th February 2015, the defendant denied each and every allegation made in the amended plaint save where expressly admitted. It denied that the plaintiff resided at land parcel No. MUTHAMBI/EREGA/940 adding that he only goes there occasionally. While admitting that it operates a tea factory and has erected buildings and planted Eucalyptus trees on its land adjacent to the plaintiff's land, the defendant denied that it has dumped piles of wood or that storm water has been channeled to the plaintiff's land adding that such water is collected and drained away from the plaintiff's land and there is no possibility of such storm water moving onto plaintiff's land as alleged or that such water emanates from its property and caused the plaintiff's house to crack or the soak pit to be flooded thus rendering the plaintiff's house inhabitable. The defendant further denied that it dumped wood on its portion of the land which harboured mongoose, skunks and bush babies which sneaked into plaintiff's land feeding on his chicken and infesting the plaintiff's premises with ticks and fleas. The defendant denied that its trees are next to the plaintiff's land where he allegedly keeps zero grazing cattle stating that its trees are within its land about 35-40 feet away from the fence and the plaintiff has planted trees along the common boundary. The defendant further denied that its Eucalyptus trees have blocked sunlight from plaintiff's land thus affecting his yield of bananas and tea and making it impossible to keep cattle. The defendant stated that the Eucalyptus trees were cut down by the plaintiff's brother whom it had engaged as an independent contractor and only a portion of a few trees fell on the plaintiff's land. The defendant denied having converted the plaintiff's land into a lumber yard adding that it was the plaintiff who denied the defendant's agents access to his land to remove the trees felled by plaintiff's brother. The defendant further stated that it operates an environmentally friendly system and its activities are not injurious to either plant, human life, buildings or the general habitat. It further denied that it was negligent or caused any trespass or nuisance as alleged or that the plaintiff has suffered any loss or damage for which the defendant is liable. It therefore sought the dismissal of the plaintiff's suit with costs for being misconceived and actuated by personal vendetta.

In support of his case, the plaintiff testified and produced his bundle of documents as exhibits. He also called the following witnesses:

1. MARTIN KIBAARA – PW2
2. PATRICK KINYUA NYAGA – PW3 and
3. HELLEN NZAINGA – PW4

He testified that he is the owner of land parcel No. MUTHAMBI/EREGA/940 and the defendant is his neighbour and operates a tea processing factory on its land and although there is a fence between the two properties, the defendant has piled firewood along the fence from where rodents including mongoose and skunks escape onto his land feeding on his chicken and infesting his cattle and goats with fleas. The defendant has also put up a septic pit near his property which emits raw sewage causing a stench and other bad odour to escape into his three bedroom house exposing him and his family to diseases. Rain water also escapes from the defendant's land causing his house to crack. When he complained to the defendant, it dug trenches to ameliorate the situation but the ash from the defendant's boilers continued to settle on the roof of his house changing its colour from blue to green. Due to the foliage from the Eucalyptus trees on the defendant's land, his animals were affected and also when the defendant cut down those trees, they fell on his land making it un-usable for over a year and caused his nappier grass, tea and bananas to shrink and his harvest of tea reduced from 1,600 kg to 600 kg per year in the period April 2011 to April 2012. He is no longer a farmer and he had to sell his cattle. He commissioned **HELLEN NZAINGA** (PW4) to prepare a report for which he paid Ksh. 60,000. He no longer lives on his house and stays in Nairobi and when he visits his rural home, he has to seek alternative accommodation. He therefore filed this suit.

MARTIN KIBAARA (PW2) is a trained Technologist and told the Court that when he was in college during the period 2004 to 2006, he occupied one room in the plaintiff's house and observed that when it rained, water from the nearby factory would flood the house which was even sinking on one side. He added that the water also caused cracks in the house.

PATRICK KINYUA NYAGA (PW3) is a younger brother to the plaintiff and also has a house in neighbourhood. He told the Court that the plaintiff's house is on land neighbouring the defendant whose Eucalyptus trees have damaged the plaintiff's tea and bananas. That the plaintiff no longer keeps cattle and a septic tank on the defendant's land causes sewage to overflow on to the plaintiff's land. He added that in 2009 when there was heavy rain, storm water escaped onto the plaintiff's land damaging his house which he now no longer uses. That the defendant also stocks firewood from which mongoose and other animals escape and feed on the plaintiff's chicken and crop. The witness stated that he knows the animals are mongoose because he previously worked for the defendant and he is also aware that the defendant's workers cut trees which fell unto the plaintiff's land and remained there for about six (6) months and although he complained to the defendant's factory manager Muthoni, nothing was done.

HELLEN NZAINGA (PW4) is an Environmental Impact Assessor and also a Registered Physical Planner with a Masters Degree in Planning and a Certificate in Environmental Impact and Planning with ten (10) years experience. She also lectures at Nairobi University having also worked with the Department of Lands and Urban Planning.

She told the Court that she and her partner **STEPHEN NGARI** visited the plaintiff's land after he complained about the negative impact caused by the defendant's tea factory on his land and prepared a report dated 8th August 2013. They found that because of the flooding on the defendant's land, water flows onto the plaintiff's land due to the slope and affects his land. There is also a sewage pit on the defendant's land which is just some six (6) metres from the plaintiff's land and so when there is flooding, the pit fills up and the smell causes a nuisance of smell. The defendant has also planted Eucalyptus trees which extract nutrients from the soil leaving it less fertile and the plaintiff's cassava turned yellow as a result. The trees were also just along the boundary yet the recommended distance is six (6) metres and it is also not recommended to grow such trees on size less than $\frac{1}{4}$ acre. There is also pollution from the factory on the defendant's land which emits smoke and fumes into the plaintiff's house affecting both his crops and the roof similar to what occurred in the Webuye Paper Mill Factory. While on the ground, they also observed rodents coming from the firewood stored on the defendant's land and although the

defendant had done well by putting up roads, there were still huge gully leading to soil erosion due to poor drainage thus impacting negatively on both the plaintiff's land and also the neighbouring land. That the defendant had not taken any measure to prevent the nuisance. In preparing the report which is part of the plaintiff's bundle of documents, she took into account the **Precautionary Principle** which is one of the **Principles in Environmental Management** that the defendant ought to have done before putting up the factory on its land. She stated further that the defendant's factory should have had chimneys to direct the fumes away from the plaintiff's land and also planted its trees further away. Similarly, under the subsidiarity principle, the defendant should have involved the locals before putting up the factory in the area.

The defendant called as its witness **JEMICILIA MUTHONI NJERU (DW1)**, its Field Service Coordinator who recalled that in April 2011, they wanted to cut their Eucalyptus trees at their common boundary with the plaintiff and so they contracted some people to do so one of whom was the plaintiff's brother **KINYUA (PW3)** himself an experienced wood cutter. He did the work well but in the process, he noticed that there was a tree which was likely to fall onto the plaintiff's land and so after consultation, it was agreed that **KINYUA** would consult the plaintiff before the tree is cut. The plaintiff agreed that the tree be cut so long as nothing was damaged. It was cut and some branches fell on the plaintiff's land where there was no crop and **KINYUA** was paid for his work. She however denied that there have been complaints about the processes on the defendant's factory adding that an **Environmental Impact Assessment Report** was done and the factory has a proper drainage system. She also denied that the storm water drains onto the plaintiff's land adding that it drains onto the defendant's land.

At the end of the trial, submissions were filed both by **MR. GIKUNDA** advocate for the plaintiff and **MR. AMALEMBA** advocate for the defendant.

I have considered the oral and documentary evidence by both parties as well as the submissions by counsel.

It is not in dispute that the plaintiff's land neighbours that of the defendant. It is also common ground that while the plaintiff has put up a residential house on his land, the defendant operates a tea factory on the adjacent land. The issue to be determined by this Court is whether the defendant, either by its acts of commission or omission on its land, has been negligent or caused a trespass or nuisance through which the plaintiff has thereby suffered damages and if so, the remedies that this Court can award. I shall therefore examine each of the alleged acts of negligence, trespass and nuisance levelled against the defendant as per the plaint.

1. CHANNELLING STORM WATER AND FUMES ONTO PLAINTIFF'S LAND AND LEAVING SOAK PITS NEAR PLAINTIFF'S LAND THUS EXPOSING HIM AND HIS FAMILY TO HARM AND DISEASES:

The Plaintiff's evidence is that rain water escapes from the defendant's land thus causing damages to his house which has developed cracks and further, the sewage from the defendant's septic pit causes a stench and other bad odour to enter his house exposing him and his family to diseases and that when the plaintiff complained, the defendant dug trenches to ameliorate the situation but the ash from the boilers on defendant's land continued to settle on the roof of his house changing the colour from blue to green. This was corroborated by his witness **MARTIN KIBAARA (PW2)** who testified that when he lived in the plaintiff's house between 2004 and 2006, he observed that rain water from the defendant's factory flooded the house causing cracks. **PATRICK KINYUA NYAGA (PW3)** who is the plaintiff's brother testified that sewage overflowed from the defendant's septic tank and also rain water escaped onto the plaintiff's land causing his house to crack. Similar evidence was adduced by **HELLEN NZAINGA (PW4)** an Environmental Impact Assessor and also a Registered Planner who prepared a report after visiting the scene and found that rain water floods onto the defendant's land and flows on to the plaintiff's land thus impacting on it negatively. She also testified that there is pollution from the defendant's factory which emits smoke and fumes into the plaintiff's land affecting his crops. All this was denied by the defendant's witness **JEMICILIA MUTHONI NJERU (DW2)** who testified that the factory on its land has a proper drainage system which drains the rain water onto the defendant's land. She added that

an Environmental Impact Assessment Report was done on the factory. The record shows that on 23rd March 2015 and with the consent of both parties, **BWONWONGA J.** directed the Deputy Registrar to visit the site and prepare a report whose terms of reference were set out. The Deputy Registrar complied and in an un-dated report filed in Court, he made the following findings with regard to the rain water:

“The topography of the area is almost flat save that there is a slight decline towards the plaintiff’s house. It is not possible to tell that that water collecting from the rain onto the defendant’s land flows to the plaintiff’s land. The drainage system available on the defendant’s land drains water elsewhere and not to the plaintiff’s land”

In his submissions, counsel for the defendant urged this Court to disregard the evidence of **HELLEN NZAINGA** (PW4), the Environmental Impact Assessor terming her evidence as “**biased**” in favour of the plaintiff and therefore of no evidentiary value. Counsel urged the Court to rely instead on the evidence of the defendant’s witness and the report of the Deputy Registrar part of which I have reproduced above. With respect, the report by the Deputy Registrar on whether or not rain water flows from the defendant’s land onto the plaintiff’s land is not of much help and is infact contradictory because while it indicates that “**it is not possible to tell that that water collecting from rain on the defendant’s land flows to the plaintiff’s land**”, the same report goes on to state that the “**drainage system available on the defendant’s land drains water elsewhere and not to the plaintiff’s land**”. Either the rain water from the defendant’s land flows to the plaintiff’s land or the drainage system has arrested that situation. This Court does not derive much help from that report. The plaintiff’s evidence on this issue was that when he complained to the defendant about the rain water flowing onto his land and causing damage, the defendant, in an attempt to ameliorate the situation dug trenches which are visible from the photographs which were produced as evidence. The defendant’s witness **JEMICILIA MUTHONI NJERU** (DW4) conceded in cross-examination by the plaintiff’s counsel that indeed such trenches were dug. She said:

“It is true that in 2010, the defendant dug some terraces but that was not to prevent the storm water from entering the plaintiff’s land”

This Court is satisfied that the only reason why those terraces were dug was to try and ameliorate the damage caused by the flooding of rain water which flowed to the plaintiff’s land otherwise there would have been no need for such terraces. In her report **HELLEN NZAINGA** (PW4) makes the following recommendations at page 26 paragraph 5: 3

“The Weru Tea Factory should be compelled to dig terraces as a way of controlling the surface run-off and thereby curb flooding within the plaintiff’s premises and other neighbouring areas”.

HELLEN NZAINGA (PW4) falls within a class of witnesses who, as experts in their field, their evidence is entitled to the highest possible regard and though the Court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such expert evidence must not be rejected except on firm grounds – **JULIET KARISA VS JOSEPH BARAWA & ANOTHER CIVIL APPEAL No. 108 of 1988**. In an attempt to discredit the report and evidence of **HELLEN NZAINGA** (PW4), counsel for the defendant has submitted that she was not knowledgeable and could not state when she achieved her qualifications etc. However, from my own assessment of this witness whom I observed during the trial and who outlined her qualifications and work experience including being a lecturer at the University of Nairobi, I have no reason to doubt the veracity of her evidence. It is my finding therefore that rain water does infact flood onto the defendant’s land and flow onto the plaintiff’s land where it causes damage. Under the rule in **RYLANDS VS FLETCHER (1868) LR 3HL 330** however, where water and sewerage escapes from one’s land onto the adjoining land, the person from whose land the matter escapes is only liable if he has been negligent. With regard to the water flowing from the defendant’s land onto the plaintiff’s land, I am not satisfied that the defendant was negligent. Indeed by the plaintiff’s own admission, the defendant dug trenches to ameliorate the nuisance. However, there is also the evidence that sewage and dust flowed from the defendant’s land onto the plaintiff’s land. The Deputy Registrar in his un-dated report found that the soak pits were only 11.2 metres from the common boundary. The plaintiff testified that the defendant has constructed septic pits near his land which emits raw sewage causing a stench of bad odour into his residence. Further, that ash

from the defendant's boilers has settled on the roof of his house causing it to change colour from blue to green. He no longer lives in the house and when he visits his rural home, he has to seek alternative accommodation. The flow of sewage onto the plaintiff's land was also confirmed by his brother **PATRICK KINYUA NYAGA (PW3)**. On her part, **HELLEN NZAINGA (PW4)** said:

“There is a sewage pit in the factory which is just some six (6) metres from the plaintiff's land so when there is flooding, the pit which is open fills up then the smell and the waste is a nuisance to the plaintiff”.

In her written report, this witness makes the finding at page 6 paragraph 2 that some of the defendant's activities that are impacting negatively on the surrounding properties including the plaintiff's land include:

1. “The location of the sewage pits next to the plaintiff's main house”

2. “The current management of fumes and wastes especially the ash that is frequently blown by the wind into the plaintiff's compound are a danger to the other residents health and comfort”

The defendant's witness **JEMICILIA MUTHONI NJERU (DW1)** similarly confirmed the presence of septic pits some 11 metres from the parties' common boundary which is the same distance as per the report by the Deputy Registrar. In cross-examination by the plaintiff's counsel, she said:

“It is true that the defendant has some septic pits/tanks which could be some 11 metres or so from the common boundary. I confirm that when we visited the land to prepare the report, the septic pits were un-covered. It is true that the septic tanks are on the lower gradient of the land”.

In her report at page 30, **HELLEN NZAINGA (PW4)** makes the following recommendation on this issue:

“Taking cognizance of the polluter pays principle, precautionary principle and intragenerational and intergenerational equity principles, the respondent should be compelled to conserve the environment by using cleaner production technologies and should also be ready to pay the costs of the damages caused, including the compensation of the plaintiff's abandoned house, loss of livelihood sources and other structures”

At page 22 paragraph 5:23 of the same report, this witness makes the following findings:

“The plaintiff and some neighbours across the ridge but directly near the factory complained of the increase in air pollution and noise from the factory machine. The emission of GHG from the fuel used in the heating process to dry tea together with the ash have made life uncomfortable for the plaintiff's greater family members”

Among the measures that the witness recommends at page 26 of her report is the ***“installation of appropriate dust precipitators and absorbers and use of cleaner production technologies”*** It is also recommended that the defendant ***“be compelled to carry out air pollution tests to ascertain the liveability of the area for the plaintiff's family and livestock”***. I am satisfied from the evidence on record that the presence of septic pits on the defendant's land so close to the plaintiff's house which, as per the evidence of the defendant's own witness, were even open at the time the site was visited are a source of nuisance to the plaintiff and detrimental to his health and comfort as well as that of his family. Further, the dust from the defendant's factory exposes the plaintiff and his family to pollution which is also a health hazard. This trespass and nuisance is clearly due to negligence on the part of the defendant which could have been arrested by for instance, locating the septic pits far away from the parties' common boundary and by adopting user friendly technologies in its factory as recommended by the expert witness. The rule in ***RYLANDS VS FLETCHER*** (supra) applies therefore with respect to the nuisance caused by the sewerage system and the emission of dust from the defendant's factory for which

damages are available to the plaintiff in nuisance. Nuisance is defined in **CLERK & LINDSELL ON TORTS 18th EDITION Page 973** as:

“..... any act of omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land, when it is a private nuisance”

Causing smoke or noxious fumes to pass onto another’s land constitutes a nuisance – **CRUMP VS LAMBERT 1867 L.R 3**. It is clear from the circumstances of this case that consequent upon the activities on the defendant’s land, fumes and dust have escaped onto the plaintiff’s land unduly interfering with his enjoyment of the same as is now clear that he has had to abandon the house on the land. I am therefore satisfied that the plaintiff is entitled to damages for this nuisance which I shall assess shortly.

2. DUMPING WOOD FROM WHICH MONGOOSES, SKUNKS AND BUSH BABIES INHABIT AND ESCAPE AND FEED ON THE PLAINTIFF’S CHICKEN AND INFEST HIS LAND WITH TICKS AND FLEAS:

From the evidence on record, I am not satisfied that there were mongoose, skinks and bush babies inhabiting the wood on the defendant’s land from which they escaped and feed on the plaintiff’s chicken and infested his land with ticks and fleas. While it is common knowledge that all manner of animals can live in wood stored in one’s land and escape onto a neighbour’s land and cause damage, the animals that are pleaded in paragraph (9) (vi) of the plaintiff’s amended plaint were:

“Failing and/or refusing to fence of its portion of land to prevent the mongooses and skunks and bush babies harboured in the pile of wood from escaping into the plaintiff’s land while the defendant knew and/or had reason to know that they would escape and feed on the plaintiff’s chicken”. Emphasis added

It was therefore the duty of the plaintiff to lead evidence and prove that indeed mongoose, skunks and bush babies live in the wood on the defendant’s land from which they escape onto the plaintiff’s land where they not only feed on his chicken but also infest it with ticks and fleas. However, nobody appears to have seen these mongoose, skunks and bush babies either on the defendant or plaintiff’s land and the photographs of those animals which appears in the report of **HELLEN NZAINGA** are clearly lifted from the internet perhaps only as a way of describing what they look like. But that is not enough because, under **Section 107 of the Evidence Act**, proof of any particular fact lies on the person who alleges the existence of that fact. A photograph of the mongoose, skunks and bush babies taken on the plaintiff’s land would have been the best evidence in the circumstances. Pictures picked from the internet only demonstrates what those animals look like. They do not prove, neither can they substitute direct evidence, that those animals actually entered the plaintiff’s land as claimed. That claim must therefore be dismissed for want of proof.

3. PLANTING EUCALYPTUS TREES NEXT TO PLAINTIFF’S LAND WHICH BLOCKED SUNLIGHT MAKING IT IMPOSSIBLE TO KEEP CATTLE AND AFFECTING PLAINTIFF’S YIELD FROM HIS BANANA AND TEA CROPS:

Plaintiff’s case is that the foliage from the Eucalyptus trees planted on their common boundary affected his crops and his tea harvest declined from 1,600 kg per year to about 600 kg. He also had to sell his cattle. **HELLEN NZAINGA** (PW4) testified that Eucalyptus trees extract nutrients from the soil leaving it less fertile and in this case, the plaintiff’s cassava turned yellow. That the recommended distance should be six (6) metres from other crops yet the Eucalyptus trees were just on the boundary. While the defendant’s witness confirmed the existence of the Eucalyptus trees on the parties’ common boundary, she however said that they are some 4.5 metres from the common boundary. That would mean that they are well within the recommended distance of six (6) metres as stated by the Expert witness. However, other than stating that his yield from the crop of tea dropped from 1,600 kg to 600 kg and then documentary evidence showing that he delivered tea to some factory, the claim of Ksh. 1,288,000/= as

loss of income from the tea has only been raised in the submission by plaintiff's counsel. Loss of income or revenue is in the nature of a special damage claim which must be specifically pleaded and proved. The amended plaintiff in paragraph 20 itemizes the particulars of special damages and only confines itself to Ksh. 60,000 from the Environmental Assessment report, Ksh. 3,500 and Ksh. 3,200 for hire of vehicles, Ksh. 4,500 for fuel and Ksh. 3,500 for taking photographs. There is no mention in that pleading that the plaintiff is seeking the sum of Ksh. 1,288,000 for his loss of tea harvest. This figure has only been thrown at the Court in submission where it is also submitted that I award a global sum of Ksh. 1,000,000 for the loss of income from other crops. As the claim for the above sums as special damages was only raised in the submissions but was not specifically pleaded as required by law, it is not available to the plaintiff. A party cannot seek through submissions what has not been pleaded in the plaintiff and proved by evidence. Paragraph 20 (v) of the amended plaintiff only pleads that plaintiff's tea yield dropped from 1,600 Kg to 600 Kg. That is special loss that had to be particularized. In the case of **COAST BUS SERVICES LTD VS MURUNGA DANYI & OTHERS C.A CIVIL APPEAL No. 192 of 1992** stated that:

“Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaintiff as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaintiff to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaintiff that a claimant will be allowed to proceed to strict proof of those particulars”.

The plaintiff in this case finds himself in the same situation described in the case of **COAST BUS SERVICES VS MURUNGA** (supra). It is clear that the exact loss that the plaintiff suffered following the reduction of his tea yield and other crops could easily be confirmed from the documents that he has tendered. They were all within his knowledge even at the time this suit was being filed. However those claims were not specifically pleaded and therefore, notwithstanding that some documents were produced during trial to prove that plaintiff used to deliver some tea and milk at some buying center, there was really nothing to prove because it is otiose to prove what has not been pleaded. In the circumstances therefore, this Court must reject the submission that I award the plaintiff damages of Ksh. 1,288,000 for loss of income from tea and Ksh. 1,000,000 being loss of income from other crops. Only the claims pleaded in paragraph 20 (v) of the amended plaintiff are available as special damages claim.

4. CUTTING DOWN EUCALYPTUS TREES, LEAVING THEM ON PLAINTIFF'S LAND THUS DENYING HIM USE OF THE LAND AND ENTERING PLAINTIFF'S LAND TO REMOVE LOGS WITHOUT HIS CONSENT:

The plaintiff testified that in April 2011, the defendant cut about 100 of its Eucalyptus trees which fell on his land and he could not use until April 2012 when they were removed. The trees damaged his macadamia crop while his nappier grass, tea and bananas started shrinking. In its defence, the defendant's witness **JAMICILIA MUTHONI** confirmed that indeed in 2011, the defendant contracted some people to cut down some 80 Eucalyptus trees. One of those contracted was the plaintiff's brother an experienced wood-cutter. One of the trees to be cut was near the plaintiff's land and was likely to fall on plaintiff's land so he was consulted and he agreed that it be cut unless nothing is damaged. The tree was cut but the branches fell on the plaintiff's land where there was no crop. On his part, the plaintiff's brother **PATRICK KINYUA NYAGA** (PW3) said as follows on the issue:

“I also know that the defendant's workers cut their trees which fell and remained on the plaintiff's land for about six (6) months”.

In his evidence in cross-examination, this witness confirmed that indeed it was him who cut the tree. He said:

“It is me who cut the trees while working for the defendant. They were about forty (40) trees. I was told by Muthoni who was working for the defendant. Muthoni was my boss then”.

The Muthoni being referred to is the defendant's witness. It is clear that there is a serious contradiction between the evidence of the plaintiff and his own witness (PW3) as to the number of trees cut and for how long they were on plaintiff's land. There is also evidence from the defendant's witness that in fact the plaintiff was consulted and consented to the cutting of one tree and only the leaves fell on his land. The contradiction between the evidence of the plaintiff and his own witness who cut the trees must be resolved in favour of the defendant. That claim must also be rejected.

In the end, the only particulars of negligence, trespass and nuisance that the plaintiff has been able to establish against the defendant are with regard to the leaving of soak pits near the plaintiff's land thus exposing him and his family to diseases. Similarly, the plaintiff has proved that the fumes and dust from the defendant's factory have not only exposed him and his family to pollution which is a health hazard but also made his house un-inhabitable. The plaintiff testified that he has to look for alternative accommodation when he visits his rural home. The plaintiff's counsel submitted that the sum of Ksh. 6,000,000 (six million) would be reasonable compensation for this trespass and nuisance. Considering all the above and particularly bearing in mind that the plaintiff has had to abandon his house due to this nuisance which also poses a health hazard, I would assess the general damages at Ksh. 2,000,000 (two million).

As there is expert evidence that the Eucalyptus trees are also too close to the plaintiff's land, an order that they be removed is in order and so too is an order that the defendant erects an impenetrable fence between the two properties. While this Court has not found the defendant negligent with respect to the storm water, it must put in place mechanisms to ensure it does not drain into the plaintiff's land and so an order of permanent injunction is merited. With regard to the renovation of the plaintiff's house, this Court is not certain as to which damage was caused by the storm water from the defendant's land and which damage may be due to the normal wear and tear of any building. That remedy is therefore not available.

The plaintiff seeks also that the defendant implements the recommendations contained in the Environmental Assessment report prepared by **HELLEN NZAINGA** and **STEPHEN NGARI** dated 8th August 2013. I think some of those recommendations such as rehabilitating access roads would amount to over-stretching the mandate of this Court in view of the claim herein. Some of those recommendations are however well captured in the pleadings herein.

Ultimately therefore, there shall be judgment for the plaintiff against the defendant in the following terms:

- 1. A permanent injunction to restrain the defendant by itself, its agents, servants, assigns or any other person whosoever from channeling storm water from MUTHAMBI/EREGA/481 into the plaintiff's land MUTHAMBI/EREGA/940.***
- 2. An order compelling the defendant to remove the Eucalyptus trees situated on the portion of MUTHAMBI/EREGA/231 adjacent to MUTHAMBI/EREGA/940 as per the expert evidence of HELLEN NZAINGA, the Eucalyptus trees that the defendant is allowed to retain must be at least six (6) metres from the common boundary between the two parties parcels of land.***
- 3. An order compelling the defendant to erect an impenetrable fence between the two parties parcels of land.***
- 4. An order compelling the defendant to install dust precipitators and absorbers and to re-design and relocate the sewage pits away from the common boundary so that they are not a health hazard to the plaintiff and his family.***
- 5. General damages of Ksh. 2,000,000 (two million).***
- 6. Special damages of:***
 - (a) Ksh. 60,000 - Environmental report***

(b) Ksh. 3,500 - Hire of vehicle on 8th August 2013

(c) Ksh. 4,500 - Fuel for vehicle

(d) Ksh. 3,200 - Hire of vehicle on 17th May 2011

(e) Ksh. 3,500 - For taking photographs.

Total Ksh. 74,700

7.Costs and interest.

B.N. OLAO

JUDGE

21ST JULY, 2017

Judgment delivered, dated and signed in open Court this 21st day of July 2017

Mr. Gikunda for Plaintiff present

Mr. Mwangi for Mr. Gitonga for Defendant present

Plaintiff present

Right of appeal explained.

B.N. OLAO

JUDGE

21ST JULY, 2017

MR. MWANGI: I apply for stay of execution for 30 days.

MR. GIKUNDA: We have not moved to execute yet.

COURT: Stay for 30 days is granted.

B.N. OLAO

JUDGE

21ST JULY, 2017