



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 258 OF 2013

DICKSON K. YATICH.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA1ST DEFENDANT

CHINA CHIANG CHIR.....2ND DEFENDANT

JUDGMENT

(Suit by plaintiff claiming that a company under instruction by a Government Officer entered his land and excavated murrum; plaintiff claiming the cost of restoring the land; claim against the Government brought after the limitation period; no sufficient evidence that it was the 2nd defendant company who actually excavated murrum from the plaintiff's land; suit dismissed with costs).

1. This is an old case commenced by way of plaint on 14 September 1998. In his plaint, the plaintiff pleaded that he is the absolute proprietor of the land parcel Sacho/Kabarak/390. He pleaded that in the month of May 1997, the 2nd defendant unlawfully entered his land, through the instructions of the Road Engineer of Public Works- Baringo District, and without the plaintiff's permission, removed murrum from his said land so as to gravel the Sigowo/Tabagon Road. The plaintiff has pleaded that this action has caused him loss. In his suit, the plaintiff has asked for orders for General Damages for trespass; costs of the suit and interest; and any further relief that this court may deem fit to grant. On 5 March 2012, the plaintiff applied to amend his plaint so as to seek specific damages of Kshs. 650,400/= said to be the cost that he will incur to back fill the land. The application was allowed and an amended plaint was filed on 3 December 2012.

2. In its statement of defence, the 1st defendant admitted that there was gravelling works being done by China Road and Bridge Engineering on the Saos-Emining Road, but denied approving the extraction of any murrum, or use of any murrum, from the plaintiff's land as alleged.

3. The 2nd defendant on the other hand denied existing as China Chiang Chir and stated that it is a total stranger to the claim of the plaintiff. It also put the plaintiff to strict proof that he is the registered owner of the suit land as claimed and also denied removing any murrum from the plaintiff's land so as to gravel the Sigowo/Tabagon Road. It put the plaintiff to strict proof of the claim for the sum of Kshs. 650,400/=.

4. The plaintiff testified that he is the owner of the suit land and he produced the title deed to the same. He also produced a map to indicate where the suit land is situated. He stated that in May 1997, the defendants excavated and took away murrum from his land without his authority. He stated that it is the

2nd defendant who did the excavation. He stated that he has sued the Attorney General on behalf of the Ministry of Works as they are the ones who gave the 2nd defendant the contract to make the road. He wrote a demand letter to the Attorney General seeking to be compensated but there was no reply. He then engaged the services of a valuer who quantified the cost of back filling the excavation at Kshs. 650,000/=. He stated that there is now a big hole where the murrum was excavated and he is unable to use his land.

5. Cross-examined by Mr. Kirui, learned counsel for the 1st defendant, he testified that he knew that the contract to construct the road had been given to the 2nd defendant as he used to work as a civil servant. He however did not see any contract to the 2nd defendant from the Government. He stated that he saw the 2nd defendant excavating his land and that a Land Rover of the Government was present. He stated that it is about an acre which was excavated out of his 14 acre land, and if he was to sell it, it would fetch about kshs. 400,000/=.

6. Cross-examined by Mr. Orege, learned counsel for the 2nd defendant, he testified that he previously used to work as a veterinary officer with the Government and he retired in the year 1984. He stated that the excavation took about two and a half weeks. He did not keep quiet as the excavation was ongoing as he stated that he informed the 2nd defendant, which he described as the Chinese company, from continuing with the excavation and also informed the District Officer (D.O). He added that the Assistant Chief supervised the excavation and that the D.O and Chief also came to the land while the excavation was ongoing. He instructed the valuer on 14 November 2006 and stated that if compensated, he would back fill the land. He also stated that he is claiming the loss he has suffered for not being able to use the land.

7. In re-examination, he asserted that he was sure that it is the 2nd defendant who excavated the murrum because it is the company which had the tender for constructing the road.

8. PW-2 was Daniel Kiprop Yatich. In his examination in chief, he testified that he is a businessman and that the plaintiff is his neighbor. He testified that he also has land near the plaintiff's land. He could recall that in the year 1997, the Chinese company "Chiang Chir" was given a subcontract to construct a road to Tabagon School and that it excavated murrum from the plaintiff's land. He testified that he was present when the murrum was being excavated and that they had a tractor and lorries.

9. Cross-examined by Mr. Kirui, for the 1st defendant, PW-2 conceded that the plaintiff is actually his father. He knew that it was the Chinese company because he asked the workers present. He however did not see any Government vehicle.

10. Cross-examined by Mr. Orege for the 2nd defendant, he stated that he was in Form 4 in the year 2000 at Baringo High School. He stated that he heard from neighbours that the Chinese company were the contractors. He also asked from one of the lorry drivers. He testified that it was he, who informed his father of the excavation. Cross-examined further, he stated that he sat his KCPE in the year 1997 which could not be reconciled by his statement that he finished Class 8 in the year 1996. I questioned him and he conceded that what he had told the court were lies. He conceded that he was not present when the excavation was done as he was in School. He confessed that he actually attended Kabartonjo High School and not Baringo High School.

11. PW-3 was one Samwel Cheburet Cheboit. In his evidence in chief, he testified that he is a neighbor of the plaintiff. He stated that in the year 1997 a Chinese company that was making the road to Tabagong School entered the plaintiff's land and excavated murrum. He did not know which company did the excavation only that it was a Chinese company. He testified that the plaintiff was not present when the Chinese company excavated the murrum but they were on site for about one month. Cross-examined he testified that he also saw a "GK" car. He stated that the plaintiff came after about 2 weeks and tried to stop them, but he was not present when he came.

PW-4 was Engineer Michael Kabugu Ngunjiri. He is a specialist mining engineer and a lecturer at Taita Taveta University. He testified that he was instructed by the plaintiff to examine the suit land and make a report on the cost needed to restore the land. He put the cost of restoration at Kshs. 650,400/= and

prepared a report which he produced.

12. With the above evidence, the plaintiff closed his case. The defendants opted not to call any evidence.

13. In her submissions, counsel for the plaintiff submitted inter alia that the plaintiff has proved to be the registered owner of the suit land. It was submitted that there was trespass and that the valuation report is valid.

14. On the part of the 1st defendant, it was inter alia submitted that the claim is statute barred by dint of Section 3(1) of the Public Authorities Limitation Act which provides inter alia that proceedings founded on tort against the Government have a limitation period of 1 year. He relied inter alia on the case of **Kenya Bus Service Limited vs Minister for Transport & 2 Others (2012) eKLR**; and **Daniel Sebastian Angwenyi vs Everex Travellers Ltd & Another (2015) eKLR**. On the substance of the suit, he thought the same has not been proved as against the 1st defendant, and that the plaintiff's claim against the Road Engineer is based on concocted and unsubstantiated evidence. He saw no nexus between the plaintiff's claim and the Roads Engineer.

15. For the 2nd defendant, it was submitted inter alia that the plaintiff has not proved that he has spent the sum of Kshs. 650,499/= in his pleadings. Counsel also doubted the valuation report produced and was of the view that the plaintiff has not proved his claims of trespass.

16. I have considered the matter. The first issue that I need to address is whether the claim of the plaintiff is time barred in so far as it concerns the 1st defendant. The 1st defendant is the Attorney General and he has been sued on behalf of the Roads Engineer. The 1st defendant is therefore the Government and the provisions of the Public Authorities Limitation Act, Cap 39, apply. Section 3 provides as follows in so far as limitation of time is concerned.

3. Limitation of proceedings

(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.

(3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—

(a) twelve months, in the case of proceedings founded on tort; or

(b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.

17. It will be seen from Section 3(1) above, that the limitation period for torts in respect of suits against the Government is one year. The claim herein is for trespass which is squarely a tort and therefore Section 3(1) applies. The plaintiff thus needed to bring his claim, in so far as it relates to the 1st defendant, within one year of the trespass. The trespass is said to have occurred in May of 1997. This suit was filed on 14 September 1998 which is certainly a period that is beyond one year. The plaintiff has not claimed that he was under any disability as to entitle him to an extension of time. It is therefore apparent to me that the plaintiff's claim against the 1st defendant is time barred.

18. But even if the claim was not time barred, the plaintiff would still not have succeeded. It was said that the contractor who excavated the murram was instructed by the Roads Engineer. No letter giving such instructions was ever tabled before this court. The only evidence given is that the Roads Engineer was

present at site when the murrum was being excavated. Even assuming that this evidence is correct, that the Roads Engineer was actually present, the presence of the Roads Engineer does not by itself mean that he has issued instructions to excavate murrum.

19. The evidence that I have is very thin on who exactly entered the plaintiff's land and excavated murrum. PW-2's evidence was worthless as it was clear to me that he is a pathological liar. I am unable to take his evidence into account. That now leaves the evidence of the plaintiff and PW-3. PW-3's evidence was that all he knew was that the excavation was being done by a Chinese company but he did not know which company and his evidence is therefore also worthless. That only leaves the plaintiff's evidence. The plaintiff stated that he knew that it was the 2nd defendant company because it is them who had the contract to construct the road. No contract was produced before me and if the plaintiff needed some documentation to support his case, a simple Notice to Produce, would have sufficed. None was requested in this case. It was stated that some lorries were present, but I have not been given any evidence of which these lorries were; what their registration numbers were and who owned them. The plaintiff has not availed a driver of these lorries or the Chief or District Officer who was then in charge, to assist him in identifying who exactly entered his land and excavated murrum. In short, I am not persuaded that the plaintiff has tabled sufficient evidence to support the allegation that the entry to his land and excavation of murrum from it, was done by the 2nd defendant. It is trite law that he who alleges must prove.

20. From the above, I am not persuaded that the plaintiff has proved his case to the required standard. I have no option but to dismiss his case with costs to the defendants.

21. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 31st day of October 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Ms Cheruto holding brief for Mrs. Ndeda for the plaintiff

Ms. Ogange holding brief for Mr. Kirui and Mr. Orege for the defendants

Court Assistant : Carlton Toroitich

MUNYAO SILA

JUDGE

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