



Evaline v Framingo Company Limited & 3 others (Environment & Land Case 20 of 2018) [2025] KEELC 2863 (KLR) (27 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2863 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 20 OF 2018
LA OMOLLO, J
MARCH 27, 2025**

BETWEEN

CHEPTOO EVALINE PLAINTIFF

AND

FRAMINGO COMPANY LIMITED 1ST DEFENDANT

COSMAS KEOCH 2ND DEFENDANT

COUNTY GOVERNMENT OF KERICHO 3RD DEFENDANT

PRAMIGO HOLDINGS LIMITED 4TH DEFENDANT

JUDGMENT

Introduction.

1. The Plaintiff commenced the present proceedings vide the Plaint dated 6th March, 2015 which Plaintiff was amended on 12th October, 2015 and further amended on 30th August, 2018.
2. The Plaintiff avers that she is the registered owner of land parcel No. Kericho/Kapsoit/2818.
3. The Plaintiff also avers that the suit parcel is bordered by an unmade minor road to the North West and South West which also serves as a boundary between land parcel No's Kericho/Kapsoit/310 and Kericho/Kapsoit/2819 as per Registry Index Map Sheet No. 8 and 9.
4. The Plaintiff avers that the 4th Defendant was contracted by the 3rd Defendant to maintain the roads in Kapsoit ward and it deployed its machinery near the Plaintiff's parcel of land.
5. The Plaintiff also avers that the 1st and 4th Defendants are either owners of the machinery and/or hirers who were carrying out the operations as contractors and/or employees of the 3rd Defendant who are therefore liable to the Plaintiff jointly and severally.



6. The Plaintiff further avers that the 3rd Defendant was constructing and maintaining the road between Kapsoit and Kaboswa when on 28th January, 2015 the construction made a detour into the suit parcel. It made a curve similar to a quarter moon crescent into and out of the suit parcel which was inconsistent with the map.
7. It is the Plaintiff's averment that the 3rd Defendant through its agents ignored the map and constructed a road through her land.
8. It is also the Plaintiff's averment that the 3rd Defendant trespassed onto her land despite being given clear protestations and warnings to desist from doing so.
9. The Plaintiff prays for judgement against the Defendants for;
 - a. An order restraining the Defendants from continuing the trespass on the Plaintiff's shamba.
 - b. A permanent injunction to restrain the Defendants their agents and/or servants from annexing, trespassing or in any way dealing with the Plaintiff's shamba.
 - c. General and exemplary damages for loss and degradation to the Plaintiff's property.
 - d. Costs of the suit.
10. The 3rd Defendant filed its Statement of Defence to the Amended Plaintiff on 6th August, 2016. It filed its statement of Defence to the Further Amended Plaintiff on 6th November, 2018 It denies the averments in the further amended Plaintiff and prays that the Plaintiff's suit be dismissed with costs.
11. The 4th Defendant filed its Statement of Defence on 12th February, 2019. It denies the averments in the further Amended Plaintiff and prays that the Plaintiff's suit be dismissed with costs.
12. It is important to note that the Plaintiff had initially instituted the suit against Framingo Co. Ltd as the 1st Defendant, Cosmas Koech as the 2nd Defendant, the County Government of Kericho as the 3rd Defendant and Pramigo Holdings Limited as the 4th Defendant.
13. Vide a ruling delivered by this Court on 27th September, 2019 the suit against Cosmas Koech, the 2nd Defendant was struck out.

Plaintiff's Evidence.

14. Cheptoo Evaline testified as PW1. She stated that she had filed a witness statement dated 5th March, 2015. She prayed that the Court adopts the said statement as part of her evidence in Chief, which prayer the Court acceded to.
15. It was her evidence that she is the owner of land parcel No. Kericho/Kapsoit/2818 upon purchase from her father. She produced a copy of the title deed as Exhibit P1.
16. It was also her evidence that the land was surveyed. A copy of the mutation form was marked as MFIP2.
17. It was her further evidence that she planted trees on the suit land.
18. She testified that in the year 2015 there was construction of a road from Kapsoit Trading Center to Kaboswa Village adding that the suit parcel is located at Kaboswa Village.
19. She also testified that when the road reached their area it passed through her land. She referred to the mutation form and testified that it has a sketch map which shows the correct position of the suit land.



20. She further testified that she informed the Chief who then instructed the Assistant Chief to visit the land. She added that she also informed their Member of County Assembly.
21. It was her evidence that they visited the site and marked the road and she thought the position of the road was corrected but the construction continued as before.
22. It was also her evidence that the contractor was the 4th Defendant and she therefore instructed her Advocates to file a suit against the 3rd and 4th Defendants.
23. It was further her evidence that she wrote a demand letter to the one Cosmas Koech who was the person on site whose name she got from her father.
24. She testified that she was informed by their member of County Assembly that it was the County Government that instructed the 4th Defendant to construct a road. She produced a copy of the demand letter as Exhibit P3.
25. She also testified that her trees were destroyed and the contractor went on and finished the road and added that the road passing through the suit parcel is nine meters wide and sixty meters long.
26. She further testified that she could not tell how many trees were destroyed and added that they also destroyed napier grass, her barbed wire and fence posts.
27. It was her evidence that the suit parcel was fenced and that construction materials including murrum were heaped on it and that this caused soil erosion as the soil was left exposed.
28. It was also her evidence that nothing has been rectified to date and that the road has become a public road. She urged the Court to grant her the orders sought.
29. It was also her evidence that the Court ordered that a surveyor visits the suit parcel and that he files a report. The surveyor's report was marked as MFIP4.
30. It was further her evidence that she has suffered loss as she cannot farm the land as before and its agricultural value has reduced.
31. She testified that the value of the trees that were destroyed is about Kshs. 2,000,000/=. She explained that there were 200 trees with each tree valued at Kshs. 10,000/=.
32. She also testified that the value of the napier grass was 10,000/= and explained that she would harvest it four times a year and earn a total of Kshs. 40,000/=.
33. She further testified that the fact of inability to grow and harvest napier grass went on for five years and it resulted in a loss of Kshs. 200,000/=.
34. PW1 testified that the value of the fence posts and barbed wire was Kshs. 18,000/=.
35. In her witness statement, PW1 states that the road that was under construction ran along her parcel of land and that it marked the boundary between land parcel No's Kericho/Kapsoit/2819 and 310.
36. She also states that the said road is clearly shown on the Registry map sheet No's 8 and 9. She further states that the said road was a foot path that was in use.
37. She states that on 28th January, 2015 she received information from her brother in law one Robert Bii that a road was being constructed on her land.



38. She also states that she became concerned as the contractor was deviating from the road as clearly marked in the map. She informed the area member of County Assembly one Kipkirui Byegon who went to the suit parcel and set out beacons.
39. She further states that despite the area member of County Assembly setting out the beacons, one Cosmas Koech who was the contractor's foreman refused to abide by them and continued to construct the road on her land.
40. She states that she fenced off her parcel of land but the said Cosmas Koech destroyed her fence and continued with the construction of the road.
41. She also states that lines and gullies were formed in her shamba which caused destruction of young trees and fodder. She adds protests from her family members who were on site did not stop the construction works.
42. She further states that her parcel of land is very small and the said diversion reduced her land into an uneconomic agricultural unit.
43. Upon cross-examination by Counsel for the 3rd Defendant, she reiterated that she purchased the suit parcel from her father in the year 2010.
44. She admitted that there was a road passing through the initial parcel of land and also admitted that she was not present when the survey was done. She further admitted that she did not engage a private surveyor when the survey was being done.
45. She confirmed that the land was subdivided in the year 2010 and at the time of the subdivision, she did not know the width of the road.
46. She stated that what was in the mutation forms was accurate. The 'E-F' stretch shown on the surveyor's report exists on the ground as a foot path and not as a road.
47. She confirmed that 'A B C D' is now an abandoned road while 'B J K' is also a road. She reiterated that it was the County Government of Kericho that gave instructions for the construction of the road but admitted that she did not have anything that showed that it was indeed the County Government that had given the work to the 4th Defendant.
48. She admitted that she has not shown any of the things that were destroyed in Court. She also admitted that the values of the destroyed properties she gave in Court were estimates only.
49. She further admitted that she did not conduct a valuation of the destroyed items but she was pursuing valuation. She reiterated that before the actions of the Defendants, the suit land was fenced and that it was still fenced.
50. Upon cross-examination by counsel for the 4th Defendant, PW1 confirmed that road 'C D' on the mutation form was abandoned while road 'B C' does not exist.
51. She also confirmed that the road 'A B J K' exists and passes through her land. She also confirmed that the road 'E F' exists.
52. She further confirmed that 'C D' is a foot path and that that is where the road should have been.
53. PW1 explained that the area Member of County Assembly put a mark where the road should have passed and also explained that this is the same position as in the map. She went on to further explain that the contractor deviated from the marked area when constructing the road.



54. She confirmed that the road was to be marked as instructed on 'A B C D' on the mutation form but instead it was constructed as 'A B J K'.
55. She admitted that she was present when the area Member of County Assembly marked the road and added that the road was to be 9 meters wide. She reiterated that the 4th Defendant was a contractor and also reiterated that the beacons were still there.
56. She also confirmed that the destroyed trees were on the portion of the suit parcel where the road trespassed and passed.
57. Upon re-examination PW1 stated that land parcel No. 2819 belonged to her and added that there was another parcel which belonged to a person who bought from her farther.
58. She also stated that 'A B' and 'J K' existed on the ground while the latter also existed on the mutation forms.
59. She further stated that the public was using the road while the road marked as 'J K' led to someone else's home.
60. She stated that 'B C' does not exist on the ground and that at that time of construction she did not know who had instructed the 4th Defendant and added that it is the area member of County Assembly who gave her information.
61. She stated that she was doing a valuation of the destroyed items and clarified that she does not usually issue receipts for napier grass.
62. She explained that there was a beacon separating land parcel No. 2818 and parcel No. 310. She also explained that the area member of County Assembly gave notices for the people to move after marking where the road would pass.
63. Solomon Kiprono Ngeny testified as PW2. He testified in sign language with the help of PW1.
64. When he was asked if his name was Solomon Kiprono Ngeny, he nodded in the affirmative.
65. When also asked if he lives in Kapsoit and whether he was a farmer, he nodded his head in the affirmative.
66. When he was asked if he was aware of the case filed by the Plaintiff, he nodded his head and wrote down that he was only aware of the map.
67. He also nodded his head in the affirmative when asked whether he wrote and signed the statement dated 5th March, 2015.
68. He prayed that the Court adopts the said statement as part of his evidence in Chief which prayer the Court acceded to.
69. When asked if he had subdivided his land, he nodded his head in the affirmative and whispered that he subdivided it into two parcels.
70. He testified that the Plaintiff sold a portion of the land and 'pocketed' the money.
71. He nodded his head in the affirmative when asked whether he remembered the road that was on the suit parcel.
72. He testified that the road was not properly constructed on the suit parcel of land.



73. In his witness statement he states that prior to the year 2010, he subdivided land parcel No. Kericho/Kapsoit/2102 into land parcel No's Kericho/Kapsoit/2818 and 2819.
74. He also states that his parcel of land shares boundaries with land parcel No's Kericho/Kapsoit/2103 and 310 to the south, parcel No. 223 to the North East, 1882 to the North West and 224 to the North.
75. He further states that there was a road reserve between the said parcels which was sixty meters wide. This was reflected on the sketch by J.O.O K'obado a licensed surveyor on the mutation form dated 28th July, 2009.
76. He states that the provision of the access road is detailed on the Registry Map Sheet No's 8 and 9 and did not change after he subdivided his land.
77. He also states that the said road was a footpath and in 2015, the road authorities decided to construct a road from Kapsoit town to Kaboswa village.
78. He further states that a section of the road touches on land parcel No's 2103, 310, 2818, 2819, 223 and 224 as per the sketch map.
79. He states that the contractor deviated from the marked road on the map and constructed the road on portions of the suit parcel.
80. He also states that he spoke to one Cosmas Koech who was in charge of the construction but he did not listen. He further states that the matter was reported to the area Chief and Member of County Assembly who went to the suit parcel and fixed beacons of the road but the contractor ignored the said beacons.
81. Upon cross examination he was referred to the map attached to the Surveyor's report that had been marked as MFIP4.
82. In sign language, he stated that parcel No's 2818 and 2819 used to be one parcel of land.
83. He admitted that before subdivision, the parcel was No. 2102 and also admitted that before subdivision, there was only a foot path going through the land.
84. He also admitted that after subdivision there was no provision for a road between the two parcels of land.
85. PW2 stated that he would be relying on the map to show where the road was passing.
86. He admitted that both land parcel No's 2818 and 2819 did not belong to him.
87. He also admitted that he was not aware what was happening on the land.
88. Lawrence Sang Kipngetich testified as PW3. He testified that he is a valuer and works with Prime Land Limited.
89. He listed his professional qualifications as BSC Land Resource Management, AMISK affiliation and a member of the institution of Survey Kenya.
90. It was his evidence that on 24th April, 2019 he carried out a survey on land parcel No. Kericho/Kapsoit/2812 and filed a report.
91. It was also his evidence that his finding was based on the surveyor's report which they were given. It stated that there had been a road encroachment by the government and that the encroachment was 0.283 Ha.



92. It was further his evidence that they visited the suit parcel on 28th April, 2019 and did a valuation.
93. He testified that they established the value of the land together with the improvements on it at Kshs. 1,000,000/=. He also testified that at the time of the valuation there was a damaged fence and trees and that he signed the valuation report. He produced the report as Exhibit P6.
94. Upon cross examination he stated that he was a qualified surveyor and that he had graduated from Jomo Kenyatta University of Agriculture and Technology.
95. He also stated that he graduated in the year 2012. He admitted that he prepared the report in the year 2019 and during that period he needed a license.
96. He also admitted that he did not attach his license to the report but his colleague did.
97. He confirmed that he visited the suit property with one Philip Macharia but he was the one who signed the report as shown on the second last page.
98. He admitted that the report was in respect to a portion of land parcel No. Kericho/Kapsoit/2818 measuring 0.283 Ha. He referred to the heading of the survey report and confirmed that there were three parcels of land.
99. He also confirmed that his instructions were limited to one parcel of land. He further confirmed that the surveyor had stated that the encroachment was 0.78 Ha.
100. He admitted that the report did not indicate the acres. When he was referred to page 4 of his report titled "Definition of the market value" he admitted that he did not indicate any value.
101. He also admitted that he did not indicate the forced sale value and explained that this was so because he did not have instructions to conduct the said valuation.
102. He further admitted that they did a valuation of the fence and not the trees and even though it was not indicated, the value comprised of 0.07 acres plus the improvement on the fence.
103. He confirmed that the surveyor was to provide the demarcation and sketch map.
104. When he was referred to page 9 of his report he admitted that the fence and the land had improvements on it.
105. He read out the conclusion of the surveyor's report which stated that the road of access 'A B J K' existed on the ground but was not registered on the map. The report also stated that the road marked as 'A B C' was registered on the map but not existing on the ground.
106. He confirmed that their work was to value the encroached land as per the surveyor's map which showed the encroached portion.
107. On further cross-examination he confirmed that he was a valuation surveyor and not a land surveyor. He reiterated that their instructions were to value the encroached portion. He also reiterated that their valuation was guided by the Surveyor's Report.
108. Upon re-examination PW3 was referred to page 6 of the valuation report and he stated that at the bottom of the said page the area is given in hectares and acres.
109. He reiterated that they were instructed to conduct the said valuation of the area that was encroached. He stated that the map is supposed to provide guidance as to how things should be.



110. He also stated that since the findings on the ground did not tally with the map, it meant that when the new road was being constructed, there was an encroachment. He added that this was captured by the surveyor in his report.
111. Upon clarification by the Court he reiterated that he went to the ground and relied on the report provided by the surveyor and did not take any measurements.
112. One Kibet Isaac testified as PW4. It was his evidence that he was the Kericho County Surveyor working under the Ministry of Lands and Physical Planning.
113. He also testified that an order was issued to the District Surveyor to visit land parcel No's Kericho/Kapsoit/2812, 2819 and 310 and establish the portion of the road that was separating the said parcels.
114. He further testified that the survey work was done on 16th March, 2014 by Margaret Ruto representing the Surveyor Kericho District.
115. It was his evidence that the maps that were used were the Registry Index Map of Kericho/Kapsoit sheets 8 and 9. He went on to state that at the site the area Chief, a village elder and the owners of land parcel No's 2818 and 310 were present.
116. It was also his evidence that what they found on the ground as related to the sketch map attached and received in Court on 24th March, 2015, was that the section of the road 'A B' exists on the ground.
117. It was further his evidence that Section 'E F' that was on the Registry Index Map also exists on the ground and was also marked.
118. He testified that the road marked as 'B C D' is registered on the map but does not exist on the ground but it was graded. The access road which was existing on the ground and marked as 'P J K' was not registered on the Registry Index Map.
119. He also testified that the road marked as 'A B J K' exists on the ground but was not registered on the map. He reiterated that the road marked as 'A B C D' was registered on the map but did not exist on the ground.
120. He further testified that he made a report dated 18th March, 2015. It was marked and produced it as Exhibit P4.
121. Upon cross-examination he admitted that he did not prepare the report and added that it was prepared by Margaret Ruto. He explained that she was seconded to the County Government of Kericho as a surveyor.
122. He confirmed that the order was to the District Land Surveyor and the scope of the exercise was to mark the boundaries of land parcel No's Kericho/Kapsoit/2818, 2819 and 310 and to mark the official position of the road.
123. He admitted that the report did not show the boundaries but it showed the methodology used and that a sketch was drawn. He also admitted that the beacon certificate was not attached to the report and added that it was not part of the orders issued by the Court.
124. He acknowledged that the beacon certificate is used to confirm boundaries as shown on the ground. It shows the boundaries fixed upon a fixed boundary survey.
125. He disclosed that for parcels of land under freehold, they use fences. He admitted that they did not record any document but the owner of the land is free to put any mark as a boundary for a free hold title.



126. When referred to the survey report (Exhibit P4) he admitted that 'A B' existed on the ground while 'E F N' existed on the map and was marked.
127. He confirmed that there were four roads on the ground. Roads marked as 'E F' and 'B C D' were on the map and that road 'B J K' was on the ground but not the map.
128. He admitted that although road 'B C D' is registered, it is not on the ground.
129. He confirmed that at the time of the survey, the road that existed on the ground was 'B J K' which road was graded and passes through land parcel No. 2818.
130. He also confirmed that the report did not show any encroachment. He reiterated that road 'B J K' passes through land parcel No. 2818 by a section.
131. He admitted that the measurements of encroachment were not shown on the report and that the road has been existence but he could not tell for how long.
132. He was referred to map sheet No's 8 and 9 and confirmed that even though the report stated that the parcel was on map sheet No. 13, the parcel was on Map Sheet No's 8 and 9.
133. He also admitted that he had in his possession map sheet No's 8 and 9.
134. Upon further cross-examination, he reiterated that Ms. Margaret Ruto was seconded to the County Government of Kericho.
135. He confirmed that he could not remember the exact year she was seconded but when he reported in Kericho in the year 2018, she had already left.
136. He also confirmed that he did not visited the ground but his evidence was based on the documents and map sheets 8 & 9.
137. He admitted that since Margaret Ruto worked for the government, he hardly worked with her and added that she worked with his other colleague.
138. Upon re-examination he stated that the purpose of the survey was to demarcate land parcel No's 2818, 2819 and 310 and to confirm the official position of the road.
139. He also stated that the survey was to show the disputing parties the boundaries of their land and the road that passes through the land.
140. He further stated land parcel No. 2818 and 2819 are separated by a road while land parcel No. 2818 and 310 are also separated by a road. He added that the official road was supposed to be 'B C D'.

4th Defendant's Evidence.

141. Benard Kiprotich testified as DW1. He stated that he filed a witness statement dated 10th December, 2018. He prayed that the Court adopts the said statement as part of his evidence in chief, which prayer the Court acceded to.
142. He testified that he is a director of Pramigo Holdings Limited which is registered and its main object is to do general construction work.
143. He also testified that he came to know of the Plaintiff after the case was filed.
144. He further testified that he is a contractor and that he later came to learn that the road was constructed where it should not have been constructed.



145. It was his evidence that the road was constructed where the County Government wanted it to be constructed. It was also his evidence that he attended the site visit with other contractors before bidding for the work. He added that they were told what was to be done on the suit parcel.
146. It was also his evidence that during construction, the County government engineers were present to ensure the width was achieved.
147. It was further his evidence that he was an agent of the County Government of Kericho and that they undertook the work as authorized by the County Government.
148. He testified that after being awarded the work, they were taken to take possession of the site and were shown the starting point and the end and the road was 3.8 km.
149. He also testified that the residents were asked to relocate any encroaching structures as the width of the road was 4.5 meters from the middle of the road.
150. He further testified that there were no complaints and that the Plaintiff's parcel is at about the 2.8 km mark.
151. In his witness statement he states that the 4th Defendant is incorporated in Kenya under Certificate No. C149304.
152. He also states that sometime in the year 2016, the County Government of Kericho called for tenders for the construction of various roads within the County.
153. He also states that among the said roads was the Kaboswa – Kipkero Kiptenden road under tender No. CGK/Q008/QRTI/RD/2014-15 Kapsoit Ward -3.8 km.
154. He further states that they participated in the mandatory site visit where the participants were taken through the entire length of the road and given brief instructions of the activities required to be executed.
155. He states that on 6th January, 2015 he received a letter of notification award for the construction of the Kaboswa-Kipkero Kiptenden road. Within fourteen days they signed a formal contract agreement with the County Government of Kericho and were issued with instructions to commence the work.
156. He also states that they undertook a site possession exercise where they were taken through the road, shown the width and the other activities that they were to be undertaken on the road.
157. He further states that they, thereafter, commenced the exercise of pegging the road width which was 9 meters as per the requirements of the County Government.
158. He states that any locals who had encroached on the road reserve were given two weeks' notice to relocate any structures from the pegged area.
159. He also states that after the lapse of the notice, they carried out the road activities as stated in the bill of quantities and during this period the county engineers and road inspectors oversaw each step of the construction.
160. DW1, goes on to state that upon completion, an ad hoc committee on inspection and acceptance inspected the road and did a report that stated that the works were done satisfactorily and in accordance with the instructions given.
161. Upon cross-examination he confirmed that during construction there were inspectors in addition to road engineers who were present on the ground.



162. He also confirmed that they were expanding an existing road. He acknowledged that if there was an order for survey, it must have been given after they finished their work.
163. He denied being aware of any survey that was done before construction. He stated that he would have no comment if the surveyor said that there was trespass.
164. He also stated that his job was to construct the road, complete the work and get money and added that he was paid after the final inspection.
165. Upon re-examination, DW1 stated that when they were constructing the road, no order was served upon them to stop the work.
166. This marked the close of the 4th Defendant's case.
167. The 3rd Defendant's case was also closed.

Issues For Determination.

168. The Plaintiff filed her submissions on 24th October, 2024, the 4th Defendant filed its submissions on 28th October, 2024 while the 3rd Defendant filed its submissions on 30th October, 2024.
169. The Plaintiff in her submissions gave a summary of the evidence and submits on the following issues;
 - a. Whether the Plaintiff is the owner of land parcel No. Kericho/Kapsoit/2818.
 - b. Whether there was a road clearly marked both on the available maps for the area and on the ground which was in use.
 - c. Whether or not the 4th Defendant followed the construction and/or maintenance of the road in accordance with what was clearly marked on the official maps and in use at the material time.
 - d. Was there a diversion into the Plaintiff's premises contrary to the official map?
 - e. Whether the diversion into the Plaintiff's premises occasioned her damage and loss.
 - f. Is the third Defendant liable for the wrongs attributable to the 4th Defendant?
 - g. What is the quantifiable loss and damage has (sic) the Plaintiff suffered for which she should be compensated?
 - h. Who bears the costs of the suit?
170. With regard to the first issue, the Plaintiff submits that she is the owner of the suit parcel. She also submits that she produced a copy of her title deed when she gave evidence and no tangible evidence was adduced to challenge her ownership of the suit parcel.
171. The Plaintiff submits that as per the evidence of the 4th Defendant the engineers, surveyors and officials of the 3rd Defendant visited the site and confirmed the length and width of the road.
172. The Plaintiff also submits that as per the evidence of PW2, the road which was to be constructed was clearly marked on registry Index Map No's 8 and 9. The said road was a foot path.
173. The Plaintiff further submits that it was Pw2's evidence that the 3rd Defendant made a detour into her parcel of land to avoid a longer rectangular corner ahead.
174. It is the Plaintiff's submissions that PW2 made requests to the 4th Defendant to follow the official mapped route but the 4th Defendant refused to comply.



175. The Plaintiff then reiterates the evidence of the District Surveyor.
176. With regard to the third issue, the Plaintiff submits that the 3rd Defendant was warned severally that it was constructing a road on the ground which did not tally with the map but it refused to stop construction.
177. The Plaintiff also submits that the 3rd Defendant committed a tort of trespass onto her property and that both the 3rd and 4th Defendants are liable.
178. With regard to the fourth issue, the Plaintiff submits that the diversion took 0.7 acres of her property which she will never use again unless orders were issued for the closure of the road.
179. The Plaintiff relies on Article 40 (3) (a) of *the Constitution* of Kenya, Sections 110(1) & 111(1) of the *Land Act*, the judicial decision of M'mkunyuu vs M'bijiwe [1984] 761 and submits that the portion of her land that was used to construct a road was not acquired procedurally and no compensation has been made to date.
180. The Plaintiff submits that the said encroachment took place in the year 2015 and a period of ten years has lapsed since then.
181. With regard to the 5th issue, the Plaintiff reiterates that she lost the use of 0.7 acres since February, 2015 and that crops, trees and fodder together with the hedge and fence were destroyed.
182. The Plaintiff relies on the judicial decision of Kanini Farm Limited vs Commissioner of Lands [1986] KLR 310 and submits that as per the valuer's report, the damage she suffered was to the tune of Kshs. 1,000,000/=.
183. The Plaintiff also submits that the present case is a proper case where exemplary damages can be awarded. The Plaintiff relies on the definition of exemplary damages as per the Blacks Law Dictionary 3rd Edition and submits that PW2 was at the suit property and urged the agents of the 4th Defendant to follow the map but they refused. She therefore seeks that the Court awards her Kshs. 1,000,000/= as exemplary damages.
184. On general damages, the Plaintiff submits that the Court should award her kshs. 1,000,000/= as the value of the property encroached upon, Kshs. 3,454,000/= as the value of loss of trees, fodder and other developments, Kshs. 8,000,000/= for loss of income from use of the land & property appreciation and Kshs. 1,000,000/= currency depreciation placed at 14% per annum for ten years and Kshs. 1,000,000/= as exemplary damages.
185. The Plaintiff urges the Court to award her kshs. 14, 854,000/= as compensation.
186. The Plaintiff also submits that portions of her parcel of land were illegally used to construct a road and therefore the Court should issue an injunction stopping the use of the road and for members of the public to use the route provided for in the map.
187. The Plaintiff urges the Court to allow her prayers as set out in the Further Amended Plaintiff.
188. The 3rd Defendant submits on the following issues;
 - a. Whether the Plaintiff proved her case on a balance of probabilities (liability). (sic)
 - b. Whether the Plaintiff tendered a valuation assessment report for damages.
 - c. Whether there is a valuation report filed by a Forest Officer or Agricultural Officer for the damaged trees and or crops.



- d. Whether there was a beacon certificate from a licensed surveyor produced to ascertain the boundary of the Plaintiff's land.
189. With regard to the first issue, the 3rd Defendant relies on Section 80 of the *Evidence Act* and submits that the burden of proof is on the Plaintiff to demonstrate that there was trespass on her land which resulted in loss and damage.
190. On the second issue, the 3rd Defendant submits that the Plaintiff did not produce any valuation assessment report on the damages she alleged the 3rd and 4th Defendants caused.
191. With regard to the third issue, the 3rd Defendant submits that no forest officer or agricultural officer conducted any field visits to assess the suit parcel. Since no such valuation was produced, the Plaintiff is not entitled to any form of compensation.
192. With regard to the fourth issue, the 3rd Defendant relies on Section 19 of the *Land Registration Act* and submits that a beacon certificate is used to accurately point out the geographical positions of the beacons on the land.
193. The 2nd Defendant also submits that the Plaintiff did not produce any beacon certificate that shows the boundaries of the suit parcel and if indeed her rights had been infringed.
194. The 3rd Defendant relies on the judicial decisions of *Miller v Minister of Pensions* [1942] 2 ALL ER 372, *Rheir Shipping Co. SA vs Edmunds* [1955]1WLR 948 and 955 and submits that since the Plaintiff did not produce any valuation report, the general damages of kshs. 14,854,000/= should not be awarded.
195. The 3rd Defendant relies on Section 27 (1) of the *Civil Procedure Act*, the judicial decision of *Levben Products vs Alexandra Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 and urges the Court to dismiss the Plaintiff's suit with costs.
196. The 4th Defendant submits on the following issues;
- a. Whether the 4th Defendant is liable for encroachment into the Plaintiff's land while constructing and maintaining the suit road.
 - b. Whether the Plaintiff has established necessary grounds for general and exemplary damages.
 - c. Who should pay costs of the suit.
197. With regard to the first issue, the 4th Defendant relies on the judicial decision of *Unilever Tea Kenya Limited v National Land Commission & 2 Others* [2018] eKLR and submits that it was contracted by the 3rd Defendant to construct a road according to the dimensions it was given.
198. The 4th Defendant submits that it constructed the road within the scope it was given and was paid. It is therefore not liable for any alleged encroachment onto the Plaintiff's property.
199. With regard to the second issue, the 4th Defendant relies on the judicial decision of *John v MGN Limited* (citation not given) as was cited in *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, *The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo* [2018]eKLR, *Obongo & another v Municipal Council of Kisumu* [1971] E.A 91 as was cited in *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR the fourth Schedule of *the Constitution* of Kenya, 2010 and reiterates that it acted within the scope of the contract it entered into with the 3rd Defendant.
200. The 4th Defendant also submits that as per the valuation report dated 24th April, 2018 that was produced, there are no factors that would adversely affect the sale of the Plaintiff's property.



201. The 4th Defendant relies on Section 27 of the *Civil Procedure Act* and urges the Court dismiss the Plaintiff's suit with costs.

Analysis And Determination.

202. After considering the pleadings, evidence adduced by the Plaintiff and the 4th Defendant, and the submissions filed, my view is that the following issues arise for determination:

- a. Whether the 3rd and 4th Defendants encroached onto a portion of land parcel No. Kericho/Kapsoit/2818 while constructing the Kapsoit -Kaboswa road.
- b. Whether the prayers sought in the further amended Plaint should be granted.
- c. Who should bear costs of the suit?

A. Whether the 3rd and 4th Defendants encroached onto a portion of land parcel No. Kericho/Kapsoit/2818 while constructing the Kapsoit-Kaboswa road.

203. It is the Plaintiff's case that she is the registered owner of land parcel No. Kericho/Kapsoit/2818. It is also her case that sometime in the year 2015, the 4th Defendant began construction of the Kapsoit – Kaboswa road under the supervision of the 3rd Defendant.

204. It is further the Plaintiff's case the 4th Defendant did not construct the road as indicated in the Registry Index Map sheets 8 and 9 but it instead constructed a portion of the road on her parcel of land thereby encroaching on it.

205. It is the Plaintiff's case that in the course of the said construction, her trees were cut down and her fence destroyed and she seeks compensation for the destruction.

206. In support of her case, the Plaintiff produced a copy of her title deed. (Exhibit P1). The title deed is for land parcel No. Kericho/Kapsoit/2818 issued to Cheptoo Evaline on 9th September, 2010. The said parcel measures 0.59 Ha and it is found on Registry Map Sheet No. 8 and 9.

207. The Plaintiff also produced a copy of the letter dated 10th February, 2015 (Exhibit P3). The letter was drafted by Masese & Company Advocates and addressed to Cosmas Koech. The subject of the letter is trespass on land parcel No. Kericho/Kapsoit/2818.

208. The said letter informs him that in the course of constructing the Kapsoit/Kiptendan access road and while under the instructions of the County Government of Kericho, he trespassed onto the Plaintiff's parcel of land and dug through it thereby opening it to the public without her consent.

209. The letter cautions him to stop the said trespass and the willful destruction of property and instead construct the road as per the official map.

210. The letter is copied to among other people the secretary of the County Government of Kericho.

211. A copy of the surveyor's report dated 18th March, 2015 was produced as Exhibit P4. The report is titled "Report for demarcation of boundaries and road of access between parcels Nos (sic) Kericho/Kapsoit/2818 vs 2819 and 310."

212. The date of the exercise is said to be 16th March, 2014 and the map used was Registry Index Map (R.I.M) Kericho/Kapsoit Sheet 13.

213. The Report is done by Margaret Ruto and its findings are as follows;



- a. The road of access Line AB is existing on the ground and point B was marked.
 - b. The road of access line E F marked on the map is also existing on the ground and was marked.
 - c. The road marked B – C – D is registered on the map but is not existing on the ground and it was graded.
 - d. The Road of access which was existing on the ground is as marked B – J – K but it is not registered on the Registry Index Map (R.I.M).
214. The report's conclusion is as follows;
- “The road of access which is marked A-B-J-K is existing on the ground but not registered on the map.
- The road marked A-B-C-D is registered on the map but not existing on the ground.”
215. The valuation report dated 24th April, 2019 was produced as Exhibit P6. The report is done by Prime Land Limited and it is for land parcel No. Kericho/Kapsoit/2818 on the portion of land measuring 0.7 acres.
 216. The report states that the inspection was done on 18th April, 2019 and the suit parcel does not encroach on any road reserve and neither was it set aside for public use and/or utility.
 217. The report further states that the suit parcel measures 0.59 Ha but the valuation was done on 0.283 Ha which is 0.7 acres. The report notes that there are no developments on the land as it is under natural vegetation cover, tree plantations and the other section is used for grazing.
 218. The Report states that the road encroached onto the Plaintiff's parcel of land by 0.283 Ha which is equivalent to 0.7 acres. The value of the said portion is Kshs. 1,000,000/=.
 219. The Report is prepared by Lawrence Sang Kipng'etich and Philip Macharia Wanjiru.
 220. Annexed to the report is a copy of the Registry Index Map. It is stamped and signed by the District Surveyor Kericho. It states that the area encroached measures 0.7 acres which is equivalent to 0.283 Ha.
 221. The 4th Defendant's case on the other hand is that it was contracted by the 2nd Defendant to construct the Kapsoit- Kaboswa road.
 222. It is also the 4th Defendant's case that it constructed the said road where the County Government of Kericho (the 3rd Defendant) wanted it to be constructed.
 223. It is further the 4th Defendant's case that it later came to learn that the road had been constructed where it was not to be constructed.
 224. It is the 4th Defendant's case that it worked as the agent of the 3rd Defendant and that the 3rd Defendant's engineers were present to ensure that the width of the road was achieved.
 225. The 4th Defendant did not produce any documents in support of its case.
 226. It is not disputed that the Kericho-Kaboswa road was constructed by the 4th Defendant upon being awarded a tender by the 3rd Defendant. It is also not disputed that the road encroached onto a portion of the suit parcel. What is disputed is the extent of encroachment.
 227. The Plaintiff called the evidence of Lawrence Sang Kipng'etich a valuer with Prime Land Limited (PW3) and Kibet Isaack the Kericho County Surveyor. (PW4).



228. PW4's evidence was that his colleague went to the suit parcel to confirm the position of the road and the boundaries of land parcel No's Kericho/Kapsoit/2812, 2819 and 310.
229. It was also his evidence that his colleague found that the road that was constructed on the ground did not exist on the map. The said road was marked as 'A B J K' in his report. It was his further evidence that the said road passes through the Plaintiff's parcel of land.
230. During cross examination PW4 admitted that his report did not show any encroachment but it was clear that the road 'B J K' passed through a portion of the suit property.
231. PW3 in his evidence stated that he conducted a survey of the suit parcel and while relying on the surveyor's report found that the road encroached onto the Plaintiff's parcel of land by 0.283 Ha.
232. As afore stated, annexed to the valuation report (Exhibit P6) is a copy of the Registry Index Map which bears the signature and stamp of the District Surveyor Kericho that shows that the area of encroachment is 0.283 Ha which is the equivalent of 0.7 acres.
233. The evidence of PW3 and PW4 was not controverted.
234. Section 107 of the *Evidence Act* provides as follows;
- “(1) Whoever desires any Court to give judgment as to any legal right 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.”
235. Section 108 of the *Evidence Act* provides as follows;
- “The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
236. Section 109 of the *Evidence Act* provides as follows;
- “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.”
237. The Court of Appeal in Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR held as follows;
- “We have carefully considered the judgement of the superior Court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the Court on the basis of those pleadings pursuant to the provisions of order XIV of the Civil Procedure Rules. And the burden of proof is on the plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof



should fail. It also follows that a Court should not make any findings on unpleaded matters or grant any relief which is not sought by a party in the pleadings.” (Emphasis mine)

238. After considering the totality of the evidence adduced in this matter, it is evident that the Plaintiff has demonstrated that the Kapsoit- Kaboswa road as was constructed by the 4th Defendant under the instructions of the 3rd Defendant encroached onto the suit parcel. The area of encroachment measures 0.283 Ha.

B. Whether the prayers sought in the Further Amended Plaintiff should be granted.

239. The prayers sought in the Further Amended Plaintiff have been set out in the preceding paragraphs but I will nonetheless replicate them as hereunder;

- a. An order restraining the Defendants from continuing the trespass on the Plaintiff’s shamba.
- b. A permanent injunction to restrain the Defendants their agents and/or servants from annexing, trespassing or in any way dealing with the Plaintiff’s shamba.
- c. General and exemplary damages for loss and degradation to the Plaintiff’s property.
- d. Costs of the suit.”

240. The Plaintiff seeks for orders of general and exemplary damages for loss and degradation of her property.

241. Section 3 (1) of the Trespass Act, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

242. In *Park Towers Ltd Vs John Mithamo Njika et al* (2014) eKLR, the Court held as follows;

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.” (Emphasis mine)

243. On the award of general damages for trespass, the Court in the judicial decision of *Philip Ayaya Aluchio Vs Crispinus Ngayo* [2014] eKLR held as follows;

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less. See *Hostler – Vs – Green Park Development Co.* 986 S. W 2d 500 (No. App. 1999).” (Emphasis mine)

244. The valuation report dated 24th April, 2019 produced as Exhibit P6. states that the portion of land measuring 0.7 acres is valued at Kshs. 1,000,000/=.



245. The Plaintiff has urged the court to award Kshs. 100,000,000 as general damages.
246. The report only gives us the value of the property as at the date of valuation. The report does not say whether there is a different value attached before trespass. My view, therefore, is that an award of Kshs. 650,000 for general damages for trespass is sufficient.
247. The Plaintiff also seeks exemplary damages. In her submissions, she has urged this court to award Kshs. 1,000,000.
248. In *Mikidadi –vs- Khaigan and Another* [2004] eKLR 496 the Court held as follows;

“Exemplary damages are only to be awarded in limited instances namely,

- (a) oppressive arbitrary or unconstitutional action by servants of government,
- (b) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the Plaintiff, or
- (c) Cases in which the payment of exemplary damages is authorized by statute.”

249. In the judicial decision of *Ajit Bhogal Vs Kenya Power and Lighting Co. Ltd* [2020] eKLR the Court held as follows;

“ 38. The Plaintiff has also asked for award of exemplary and aggravated damages. In the case of *Rookes –v- Barnard* (1964) 1 ALL ER 367 cited by Munyao J in the case of *Titus Gatitu Njau –v- Municipal Council of Eldoret* (2015)eKLR, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the Defendant’s conduct was calculated to procure him some benefit, not necessarily financial at the expense of the Plaintiff. That English case received approval of the East African Court of Appeal in the case *Obongo & Another –v- Municipal Council of Kisumu* (1971) EA 91 and has been applied in various decisions. The basis of awarding exemplary damages is to punish the Defendant for his conduct. At the same time, punitive damages should not be awarded to enrich the Plaintiff. The Court in awarding such damages or not should look at the circumstances of each case.

39. In the case of *Obongo and Another –v- Municipal Council of Kisumu* (supra), the Court of Appeal stated:

“Exemplary and punitive damages are appropriate in two classes of cases; oppressive, arbitrary, or unconstitutional action by the servants of the government and conduct by a Defendant calculated to make a profit for himself which may well exceed the compensation payable to the Plaintiff... It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a Court is making a general award, it may take into account factors such as malice or arrogance on the part of the Defendant and this is regarded as increasing the injury suffered by the Plaintiff, as, for example, by causing him



humiliation or distress. Damages enhanced on account of are regarded as still being essentially compensatory in nature.” [Emphasis mine]

250. In the present case, the 3rd Defendant supervised the construction of a portion of the Kapsoit-Kaboswa road on the suit parcel without regard to the Registry Index Map which showed that the road did not pass through the Plaintiff’s land.
251. The plaintiff brought the fact of imminent trespass to the 3rd Defendant’s attention but it fell on deaf years.
252. The Plaintiff got in touch with her area Member of County Assembly who visited the site and offered insights as to where the road should pass through and these was also ignored.
253. I have no doubt that the 3rd Defendant’s conduct has caused anguish and distress to the Plaintiff. I am of the view that Kshs. 500,000 as exemplary damages would be sufficient.
254. I have noted that the Plaintiff in her submissions seeks to be awarded a general figure of Kshs. 14,854,000/=. Kshs. 2, 000,000 is for general and exemplary damages. The rest of the amount, as read from the submissions is for the following:
- a. Kshs. 3,454,000/= as the value of loss of trees, fodder and other developments,
 - b. Kshs. 8,000,000/= for loss of income from use of the land & property appreciation
 - c. Kshs. 1,000,000/= currency depreciation placed at 14% per annum for ten years.
255. These amounts, in my view, are in the realm of special damages. The law in respect of special damages is settled; special damages must be specifically pleaded and proved. The said amounts have not been pleaded.
256. Submissions are not pleadings. This position was espoused in the judicial decision of *Mwavula v Waweru t/a Antique Auctioneers Agencies & another (Civil Appeal E374 of 2023)* [2024] KEHC 5988 (KLR) (24 May 2024) (Ruling). The Court observed as follows;
- “9. Submissions are neither pleading nor evidence. Beautiful pleadings are akin to watching warm fire in television. It will not remove any morning chilly weather. The Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:
“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
 10. A party is bound by their pleadings and the Applicant cannot expected this Court to grant what they did not plead or pray for in this case.” (Emphasis mine)



257. As was held in the above cited judicial decision, parties are bound by their pleadings. Considering that submissions are not pleadings, I am unable to award any of the amounts that I have described as falling in the realm of social damages. They were not specifically pleaded and proved.
258. The question that follows is who is to pay the exemplary and general damages. It is not disputed that the 4th Defendant carried out construction work on the Kapsoit-Kaboswa road on a portion of the suit property measuring 0.283 Ha.
259. The 4th Defendant's evidence is to the effect that it did the said construction under the direction and supervision of the 3rd Defendant. This evidence was not controverted by the 3rd Defendant. I find that no liability attaches to them.
260. In the circumstances, the general and exemplary damages shall be borne by the 3rd Defendant; the County Government of Kericho.
261. The Plaintiff has also sought orders of permanent injunction restraining the Defendants their agents and/or servants from annexing, trespassing or in any way dealing with the Plaintiff's parcel of land. Taking into consideration the evidence adduced, nothing is easier than granting the said order.

C. Who shall bear costs of this suit?

262. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.
263. The Plaintiff shall have costs of the suit which shall be borne by the 3rd Defendant.

Disposition.

264. In the result, I find in favour of the Plaintiff and make orders as follows;
- a. An order of permanent injunction is hereby issued restraining the Defendants their agents and/or servants from annexing, trespassing or in any way dealing with the Plaintiff's parcel of land known as Kericho/Kapsoit/2818.
 - b. The 3rd Defendant shall pay to the Plaintiff an amount of Kshs. 650,000 (Six hundred and fifty Thousand only) as General damages.
 - c. The 3rd Defendant shall pay to the Plaintiff an amount of Kshs. 500,000 (Five Hundred Thousand only) as exemplary damages.
 - d. The suit against the 4th Defendant is hereby dismissed.
 - e. The costs of this suit shall be borne by the 3rd Defendant.
265. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY OF MARCH, 2025.

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Masese for the Plaintiff.



Mr. Mutai for the 4th Defendant.

Mr. Tele for the 3rd Defendant.

Court Assistant; Mr. Joseph Makori

