



Kenya Power & Lighting Co Ltd v Riguga & another (Environment and Land Appeal 3 of 2021) [2023] KEELC 18079 (KLR) (8 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18079 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND APPEAL 3 OF 2021**

YM ANGIMA, J

JUNE 8, 2023

(FORMERLY NAKURU HCCA 67 OF 2014)

BETWEEN

KENYA POWER & LIGHTING CO LTD APPELLANT

AND

MATHENGA MINJA RIGUGA 1ST RESPONDENT

KEIRU GATIKI 2ND RESPONDENT

(An appeal against the judgment and decree of Hon. D.K. Mikoyan (SPM) dated 11.12.2013 in Nyabururu CM ELC No. 361 of 2010)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. D.K. Mikoyan (SPM) dated 11.12.2013 in Nyahururu CM ELC No. 361 of 2010 – *Mathenge Minja Riguga and Another –vs- Kenya Power & Lighting Co. Ltd.* By the said judgment, the trial court allowed the 1st and 2nd Respondents' suit and awarded them special damages in the sum of Kshs. 400,000/= and Kshs. 1,716,000/= respectively together with costs and interest.

B. Background

2. The record shows that *vide* a plaint dated 23.12.2010 and amended on 17.07.2012 the Respondents sought the following reliefs against the Appellant:
 - a. An order of compensation for the damaged properties aforesaid at the obtaining market rate.
 - b. Cost of the suit plus interest thereon at court rates.



- c. Any other or better relief deemed fit by the Honourable Court.
3. The 1st Respondent pleaded that at all material times he was the registered proprietor of Title No. Nyandarua/Ndaragwa/62 and that in 2009 the Appellant through its agents undertook construction of an electric transmission power line through his land under the “Ndaragwa Rural Electrification Project” in the process of which various trees thereon were destroyed. It was also pleaded that the project affected the use of 0.3 ha of his land.
4. The 2nd Respondent pleaded that at all material times he was the registered proprietor of Title Nos. Nyandarua/Ndaragwa/725, 727, 890 & 891 which were subdivisions of original Plot No. 108 – Kanyagia – Ndaragwa Settlement Scheme and that the Appellant had through its agents similarly constructed a power transmission line through them in the process of which it destroyed various trees and affected the use of 0.4 ha. of land. It was also pleaded that his perimeter fence, abattoir and disposal pits were adversely affected.
5. The 1st and 2nd Respondents further pleaded that upon granting the Appellant a wayleave for passage of the power lines it was the understanding of all the parties that they (the respondents) shall be compensated for damage to their properties occasioned by the Appellant’s actions. It was contended that despite demand and service of a notice of intention to sue the Appellant had failed to make good their claim hence the action.

C. Appellant’s Response

6. By a defence dated 14.02.2011 the Appellant denied the contents of the plaint in their entirety and put the Respondents to strict proof thereof. The Appellant denied the Respondent’s ownership of the various properties mentioned in the plaint and denied having undertaken the alleged project and put the Respondents to strict proof thereof. The Appellant simply denied all the allegations contained in the plaint including the particulars of alleged damage and loss and contended that the suit was fatally defective and threatened to raise a preliminary objection to that effect at the hearing of the suit. The Appellant consequently prayed for dismissal of the suit with costs.

D. Trial Court’s Decision

7. The material on record shows that only the Respondents and their witness (a valuer) testified at the trial. The Appellant did not call any evidence at the trial. Upon hearing the Respondents’ suit the trial court was satisfied that it was the Appellant which undertook the construction of the power lines and that it was liable to the Respondents for any damage or loss occasioned by the works. The trial court was also satisfied that the Respondents had proved their respective losses on the basis of the valuation reports tendered at the trial. As a result, the 1st Respondent was awarded general damages of Kshs. 400,00/= whereas the 2nd Respondent was awarded special damages of Kshs. 1,716,000/=. The Respondents were also awarded costs of the suit and interest from the date of judgment.

E. Grounds of Appeal

8. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 03.06.2014 raising the following four (4) grounds of appeal:
 - a. That the learned magistrate erred in law and in fact by awarding the Respondents a sum of Kshs. 408,000/= and Kshs. 1,716,000/= respectively against the weight of the evidence.
 - b. That the learned trial magistrate erred in law and in fact by allowing a claim for which no court fees had been paid.



- c. That the learned trial magistrate erred in law and in fact by failing to find that the Respondents had not proved their cases on a balance of probability.
 - d. That the learned trial magistrate erred in law and in fact by shifting the burden of proof to the Appellant.
9. As a result, the Appellant sought the following reliefs:
- a. That the appeal be allowed.
 - b. That the judgment and decree of the trial court be set aside.
 - c. That the Appellant be awarded costs of the appeal.

F. Directions on Submissions

10. The record shows that directions on the hearing of the appeal were given by the High Court at Nakuru on 23.07.2018. The parties were granted 42 days to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 18.10.2018 whereas the Respondents' submissions were filed on 10.12.2018.
11. The record further shows that the parties highlighted their respective submissions before the High Court at Nakuru on 14.10.2019 and the appeal was slated for judgment on 05.03.2020. On the said date, however, judgment was not delivered but the appeal was transferred to the Environment and Land Court at Nyahururu for disposal on the basis that it was an environment and land matter.

G. Issues for Determination

12. Although the Appellant raised 4 grounds of appeal in its memorandum of appeal, the court is of the opinion that resolution of the following three (3) issues shall effectively determine the appeal:
 - a. Whether the trial court erred in law and in fact in holding that the Respondents had proved liability against the Appellant.
 - b. Whether the trial court erred in law in awarding the 1st and 2nd Respondents special damages in the circumstances.
 - c. Who shall bear costs of the appeal and of the proceedings before the trial court.

H. Applicable Legal Principles

13. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”



14. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

15. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, L.C in *Watt –vs- Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

16. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

- a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.



I. Analysis and Determination

(a) Whether the trial court erred in law and fact in holding that the Respondents had proved liability against the Appellant

17. The court has considered the material and submissions on record on this issue. The Appellant submitted that there was no evidence on record to link it to the power line project the subject of the claim for compensation. It was submitted that the Respondents did not tender any documentary evidence to demonstrate that the Appellant or its agents were responsible for the damage and loss the Respondents had complained of. It was further contended that the trial court had erred in law by reversing the burden of proof in the circumstances by requiring the Appellant to disprove its liability.
18. The court has considered the evidence which was tendered by the Respondents before the trial court. The Respondent's evidence was to the effect that the power line was being constructed by a contractor known as ABB on behalf of the Appellant. It was the evidence of the senior chief of the area location that it was the Appellant which was compensating the land owners for damage to trees occasioned by the construction. The court is of the opinion that the trial court was entitled to find and hold that the Appellant was liable on a balance of probabilities. It must be remembered that the Respondents' evidence at the trial although challenged through cross-examination was not controverted by contrary evidence. In the circumstances, the trial court did not reverse the burden of proof by pointing out in its judgment that the Appellant did not tender any contrary evidence at the trial. The court does not accept the Appellant's contention that the only way of proving liability on its part was through documentary evidence. The court is thus of the opinion that the trial court did not err in law or fact in finding and holding that the Appellant was liable for the actions complained of.

(b) Whether the trial court erred in law in awarding the 1st and 2nd Respondents special damages in the circumstances

19. The Appellant submitted that the Respondents' claim for compensation for damage allegedly suffered by them was in the nature of special damages. It was submitted that the Respondents' claim for compensation was clearly quantifiable and the same ought to have been pleaded and particularized as such in the plaint. It was thus contended that since the claim was not pleaded with particularity and the amount of money claimed was not specified in the plaint then the same was not awardable.
20. The Appellant relied, among other cases, upon the cases of *Provincial Insurance Co. of East African Ltd -vs- Nandwa* [1995 – 1998] 2 EA. 288; *Siree -vs- Lake Turkana El-molo Lodges* [2002] 2 EA. 521; *Martim & Another -vs- Anjere* [1990 – 1994] EA 312; and *Summer Limited Meru -vs- Moses Kitbinji Nkanata* [2006] eKLR in support of its appeal on the issue of special damages. The court was consequently urged to set aside the trial court's award of special damages in favour of the Respondents.
21. The Respondents, on the other hand, contended that their claim for compensation was in the nature of general damages which was not required to be pleaded with specificity. They submitted in their written submissions that:

“The court relied upon the valuation report produced by PW4 as the basis for awarding compensation. I submit that although the trial court referred to the award as special damages, the award was in the form of general damages which need not be specifically pleaded and strictly proved.”
22. The Respondents further submitted that their claim before the trial court was for compensation for trespass and diminution in the value of their respective parcels of land hence they were entitled to



general damages. They, therefore, contended that the trial court was right in awarding them damages at it did. They relied upon some authorities on the award of damages for trespass to land and compensation for diminution in value. They cited the cases of *Reuben K. Arap Serem -vs- Zipporah Meli* [2017] eKLR; *Ochako Obinchu -vs- Zachary Oyoti Nyamongo* [2018] eKLR; and *Duncan Nderitu Ndegwa -vs- Kenya Pipeline Company Ltd & Another* [2013] eKLR in opposition to the appeal.

23. The court is unable to agree with the Respondents' submission that their claim for damages based on trespass to land. The Respondents' evidence before the trial court was that they had granted the Appellant consent by signing wayleave forms hence they expected compensation for any damage occasioned to their parcels of land and other properties thereon. They also pleaded in paragraph 5 of their amended plaint that they had authorized the Appellant's agents to undertake the construction works on the understanding that they would be compensated for any loss or damage occasioned by the project.
24. The court is not persuaded by the Respondents' submission that their claim for compensation for loss of trees, other properties and diminution in value was in the nature of general damages. It is evident from the plaint that the Respondents' claim was clearly quantifiable with reasonable precision. They enumerated all the things which were allegedly destroyed or affected by the Appellant's project in paragraph 6 of their amended plaint and sought compensation at the "obtaining market rate". What the Respondents omitted to do was to plead with particularity the market values or rates of the trees, abattoirs, disposal pits and diminution in value of the affected parcels of land. As it turned out at the trial, the Respondents actually presented a valuation report which had computed to the cent the "market value" of their alleged losses. The valuation report by Mbugua & Associates was dated 16.08.2010 well before the date of the plaint.
25. It is thus evident that the Respondents knew the full extent of the financial losses they had allegedly suffered before the filing of the suit. Their claim for compensation was clearly quantifiable and the same ought to have been pleaded with particularity and proved to the required standard. In the case of *Siree -vs- Lake Turkana El Molo Lodges (supra)* it was held, inter alia:

"It is now well settled that special damages, need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead."
26. Similarly, in the case of *Summer Limited Meru -vs- Moses Kithinji Nkanata (supra)* the court referred to the case of *Martim & Another -vs- Anjere (supra)* and stated that:

"In this regard, we can only refer to this court's decision in *Sande -vs- Kenya Cooperative Creameries Limited Civil Appeal No. 154* where as we pointed out at the beginning of this judgment, Mr. Lakha readily agreed that these sums constituting the total amounts were in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."
27. The court is thus of the opinion that the Respondents' claim for compensation at market rates was in the nature of special damages and the failure to plead the same with sufficient particularity was fatal to their claim. In the premises, the court takes the view that the trial court erred in law in awarding the 1st and 2nd Respondents Kshs. 400,000/= and Kshs. 1,716,000/= respectively when the same had not been pleaded with particularity as required by law.



28. The nature of particularity required in pleading a claim for special damages was considered by Chesoni J (as he then was) in the case of *Ouma -vs- Nairobi City County* [1976] eKLR as follows:

“Thus for a Plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court’s view is as laid down in the English leading case on pleading and proof of damage, *Ratcliffe v Evans* (1892) 2 QB 524 where Bowen LJ said at pages 532, 533:

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

(c) Who shall bear costs of the appeal

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to 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. See *Hussein Jannohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court has considered the fact that the Appellant did not tender any evidence before the trial court and it seems it did not want to assist the trial court in arriving at a just decision but was quick to appeal the decision once made. The court has also considered the fact that although the Appellant has succeeded on the award of special damages, it has not succeeded on the issue of liability. In the premises, the court is of the opinion that the appropriate order to make is that each party shall bear his own costs both in this appeal and before the trial court.

J. Conclusion and Disposal Orders

30. The upshot of the foregoing is that although the Appellant has lost on the issue of liability it has succeeded on the award of special damages to the 1st and 2nd Respondents. In the premises, the court finds merit in the Appellant’s appeal and makes the following orders for disposal thereof:

- a. That the appeal be and is hereby allowed.
- b. The trial court’s award of special damages to the 1st Respondent and the 2nd Respondent in the sum of Kshs. 400,000/= and Kshs. 1,716,000/= respectively is hereby set aside.
- c. The 1st and 2nd Respondents’ suit before the trial court in Nyahururu CM ELC No. 361 of 2010 is hereby dismissed.
- d. Each party shall bear its own costs of the appeal and the proceedings before the trial court.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 8TH DAY OF JUNE, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:



Ms. Cheloti for the Appellant
Ms. Ndegwa for the Respondent
C/A - Carol

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Y. M. ANGIMA

JUDGE

