



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

HCCA NO. 19 OF 2017

JUSTIN GATUMUTA.....APPELLANT

VERSUS

KENYA POWER & CO. LTD.....RESPONDENT

J U D G M E N T

This appeal arises from the judgment and decree of Embu Chief Magistrate in CMCC NO.265 of 2012. The appellant's claim against the respondent was dismissed for lack of merit. He was dissatisfied with the said judgment and lodged this appeal, relying on six grounds summarized as follows:-

- 1. THAT the Magistrate erred in law and fact in failing to find the respondent liable for the tort of trespass contrary to the evidence on record.**
- 2. THAT the Magistrate erred in failing to make a finding for general damages for trespass.**
- 3. THAT the Magistrate wrongly relied on the respondents's documents which were not produced in evidence and disregarded the uncontroverted evidence of the appellant.**

This appeal was argued by way of written submissions filed by the respective Counsels on record for the parties. Messrs.Mugendi Karigi & Co. represented the appellant while Messrs. Gachiri Kariuki was for the respondent.

The duty of the first appellate court is set out under Section 78 of the Civil Procedure Act and was discussed in the case of **ABOK JAMES ODERA – VS – JOHN PATRICK MACHIRA CA 161 OF 1199** as follows:-

“On a first appeal from the High Court, the Court of Appeal should 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. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

The gist of the judgment of the Honourable Chief Magistrate was that the appellant had failed to prove his case which led to dismissal of the suit with costs. The background of the facts of the appellant's case is that he sued the respondent seeking for a prohibitive injunction and damages for the tort of trespass. The appellant alleged that he was the owner land reference **No.NGANDORI/KIRIARI/2095** on which the respondent had trespassed through his agents and workmen and interfered with the appellants rights of land use. The respondent was said to have carried out installation on the land without the consent of the appellant and as a result damaged trees and crops. It was further contended that the respondent had interfered with the appellant's plans of constructing a high rise building on the land.

The appellant testified solely and produced documents of ownership of **LR. NGANDORI/KIRIGI/2095** registered in his name. He claimed that the respondent as liable to pay damages for trespass and for the damage caused on his land.

The respondent did not call any witness but filed statements of evidence as well as other documents which it sought to rely on.

The evidence gathered from the witness statements and the documents was that one **FRANCIS STANLEY NJAGI MOKO** applied for installation of electricity on his land **LR.NGANDORI/KIRIGI/2094**. A way-leave acquisition was carried out by the respondents' agent in respect of neighbouring parcels of land **LR. NGANDORI/KIRIGI/402,2740,2741,2777** and **2094**. The process was completed and **ATECHS** was contracted to carry out the installation job.

The respondent stated that the land of the appellant **LR.NGANDORI/KIRIARI/2095** was not interfered with and no electric cables passed over the land. The documents produced included the way leave consents duly signed by the owners of the affected parcels of land, the relevant way-leave certificates and a map showing the power lines route.

It is imperative to mention that the learned Magistrate when preparing the judgment did not have the benefit of the respondent's document because they had gone missing from the court file. On 26/09/2016 the court gave judgment in favour of the appellant and awarded damages.

After the delivery of the judgment, the respondent brought to the attention of the court that its documents had gone missing and were not given due consideration of the judgment. The court allowed the application for review and gave the respondent time to file certified copies of the missing documents.

The earlier judgment was set aside/reviewed on 17/05/2017. The court upon considering the evidence and the documents relied on by both parties found that the appellant had failed to discharge the burden of proof and dismissed the claim. This appeal therefore arises from the judgment of the court delivered on 17/05/2017.

The issues for determination arising from this appeal are as follows:-

a. Whether the appellant discharged the burden of proof.

b. If so, whether he was entitled to damages.

c. Who will meet the costs of this appeal.

The record shows that on 01/08/2016, the parties adopted the evidence statements of their witnesses and renounced their right to cross-examine the witnesses. Written submissions were later filed by the advocates for each part.

The burden of proof was on the appellant to prove the tort of trespass against the respondent. **Section 107 of the Evidence Act** provides that:-

“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”.

The evidence of the appellant in his statement is that he was the proprietor of **LR.NGANDORI/KIRIARI/2095**. He produced copies of search showing that the land was registered in his name. He went on to state that the respondent trespassed on his land and damaged tea bushes and other crops as he carried out the installation. According to appellant he argues that he proved trespass which is *actionable per se* and is as such entitled to damages.

He relied on the case of **DUNCAN NDERITU NDEGWA – VS – KENYA PIPELINE COMPANY LTD & ANOTHER (2013) eKLR** where Nyamweya, J. held that once trespass has been established, it is actionable *per se* and no proof of damage is required and that the court ought to proceed to award damages.

The appellant argues that his evidence remained uncontroverted because the respondent did not call any witness. This argument is not supported by the record because the parties opted to rely on the evidence of the witnesses in the statements and to forego their rights of cross-examination. The statements of both parties were their evidence in this case. As such the evidence of the appellant was not uncontroverted as he puts it in his submissions.

The respondent filed statements of three witnesses. The way-leave Officer explained that the way-leave of several parcels of land were processed to give way for electricity installation for one **EPHANTUS S. N. MOKO** the proprietor of **LR. NGANDORI/KIRIARI/2094**. The appellant's land No.2095 was not among the parcels affected by the way-leave acquisition. The way-leave consents duly signed and the relevant certificates in respect of all the parcels were annexed to the statement of the way-leave officer. A map showing all the parcels of land and the power line passing over them was produced. From the said map, the appellant's land was not affected. The appellant did not produce a survey map to controvert the respondent's evidence.

The other two witnesses of the respondent namely the supervisor and the contractor supported the evidence of the way-leave officer that no power line passed over the appellant's land. The trial Magistrate believed the evidence of the respondent which was in my considered view clear and detailed on what transpired on the ground.

In view of the respondent's evidence, the appellant failed to discharge the burden of proof on the tort of trespass against the respondent. This being the position, the Magistrate could not award damages because the tort of trespass was not proved. It follows that the court would also not grant the prayer of the prohibitive injunction against the respondent because the case was not proved.

As brief as the judgment was, I am convinced by its content that the Magistrate considered all the evidence on record and the submissions in his judgment. The appellant did not point out at any part of his evidence or submission that was not given due consideration.

I find that the learned Magistrate was right to hold that the appellant had failed to prove his case on the balance of probabilities. The finding and the subsequent orders were supported by cogent evidence.

For the foregoing reasons, I find that this appeal has no merit. The judgment and any consequent orders of the lower court are hereby

upheld.

The appeal stands dismissed with costs.

It is hereby ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 24TH DAY OF SEPTEMBER, 2018.

F. MUCHEMI

JUDGE.

In the presence of:

Mr. Macharia for Mugendi for Appellant

Mr. Muriithi for Mwongera for Respondent