



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CIVIL SUIT NO. 85 OF 2005.

NAZMUDIN SHARRIF)

ALTAF SHARRIF)

FEROZ SHARRIF).....PLAINTIFFS

ARIF SHARRIF)

VERSUS.

KENYA POWER & LIGHTING CO. LTD.DEFENDANT

JUDGMENT.

[1]. The plaintiffs in their amended plaint allege that the defendant unlawfully, without any colour of right and in total disregard to the plaintiffs possession of Land Parcel Bungoma/Township/608 and their right to quiet possession and enjoyment of the same trespassed on the aforesaid land erecting Service line, Cables and Stay wire Criss-trespassed on their aforesaid land without their consent first obtained in writing and despite their protestations, the defendant neglected to remove their lines cables and stay wire or seek their approval for their continued erection therein thereby trespassing and grossly violated the plaintiffs property rights in the said land.

[2]. It was alleged that the acts of the defendant continued unabated until the 17th October 2002 when the offending lines were removed without the defendant making any amends and/or apologizing to the plaintiff for the trespass and the occupation of his land thereof. The plaintiff set out the particulars of damage at Kshs.32,743,721/=. The plaintiffs further claim exemplary and aggravated damages for inconveniences, material distress and nuisance for the alleged illegal occupation thereof for a period of 15 months.

[3]. The defendant in its statement of defence dated 23rd November 2005 generally denied the plaintiffs claim. They alleged that the suit is an abuse of the process of the court and that the suit is time barred.

[4]. During the hearing of the case PW1 Nazimudin Sharrif stated that he acquired Plot No. 608 in the year 2000. That the Plot was jointly owned between himself and others Altaf Sharrif, Feroze Sharrif and Arif Sharrif. Two of them being his brothers and the other being his nephew. He produced a certificate of lease in their names. However, Arif relinquished his interest on the property. The witness said that they are in the Supermarket Business for 22 years and they wanted to construct a Supermarket, Stalls, Restaurant and a Bar.

[5]. The witness said that in February 2001, they were approached by someone from KPLC asking them

to sign some way leaves but they declined and said that he had plans for the property. A little while later, he however saw power lines mounted over his property. He said that he visited the KPLC Offices in Bungoma and Kakamega who did not help and he was told to do whatever he wanted to do. He visited an advocate and instructed him to send a demand notice. KPLC responded on 3/4/2011 and said that they would investigate and revert to them but they never did so. The plaintiffs then filed Bungoma SPMCC No. 333 of 2002 whereby they were granted Mandatory injunction on 16/7/2002. The order required the defendants to remove the offending cables from the property. The order was produced in Court as Ex. D4. The cables were finally removed on 17/10/2002 after having been there for 15 months. They were removed without any information whatsoever to the plaintiffs. By this time, the constructions of the plot had not commenced but the plans were ready. The plaintiff states that those cables delayed the construction. The construction started between August and September 2004. He stated that the premises is now complete and occupied. He claimed that their losses were Kshs.50,000,000 but at the filing of the case the estimated Loss was 32.3 million. The witness said that they have 60 shops within the centre two shops and a bar and a supermarket. The witness said that the process to remove the KPLC lines was very frustrating and that he was therefore seeking damages on trespass, loss of income and costs of the suit.

[6]. The plaintiffs called Enock Barongo CPA(K) from PKFEA Audit Firm who said he had a Masters degree in Finance and a Bachelors degree in Commerce. The witness said that he prepared a report in October 2005 and also prepared a report in 2009 detailing the loss incurred by the plaintiffs as a result of the delay in construction. The report was filed in court. The report was based on discussions with the management, Lawyers and the documents availed. He said that the loss incurred is based on the delay by KPLC removing their Service lines from the property for a period of 15 months. They included rising construction costs, Ripple effect on delay in operating a Supermarket, profits on food in the restaurant, loss of rental income and loss of interest from the revenue collected.

[7]. The witness argued that on loss of income, the delay pushed forwards the dates when income was expected. Each shop could fetch 6000/= therefrom a total of 300,000/= plus interests making a total loss of 5,852,831/=.

The loss of profits from the Supermarket was estimated at Kshs.9,598,262/=. The loss from food court and bar estimated at 3,513,458/=. That Actual construction picked up in October 2002 and the escalation of the construction costs was estimated at Kshs1,617,786/=.

He stated that the totals attracted interest at Court rates giving a sum of Kshs.41,564,378. The witness said that by the time he gave evidence the total loss was Kshs.51 million because of the interest rates. The witness on cross examination said that the losses between 2001 and 2002 is calculated by looking at the period and looking at the prevailing rates. The same is calculated at the point construction was concluded. Further, the assumption is that all the 60 shops were occupied and the amounts were arrived at by comparative analysis of other buildings in the area. He said that the report is not exact. The witness said that he did not have any document to show that the plaintiff borrowed any money.

[8]. George Obondo Ogutu the Land Registrar Bungoma County gave evidence and informed the court that the owners of Bungoma Municipality/608 are Altaf Abdullahi with 37.5% share, Feroz Sharrif with 25% share and Nazmudin Sharrif with 37.5% share as at 16/12/2011. That they acquired the ownership on 16/2/2000 and that the original owner was Peter Justice Kisuiya and that the title was a leasehold. They were issued with a title on 16/2/2000.

[9]. Altaf Abudulahi Sharrif gave evidence and among other things said that he was given a power of Attorney by his brother Feroz who had relocated to Canada in mid 2006. He produced the same in Court. He explained how they purchased the property and what they do therein. He said that the construction started on the property in July 2002 but the main work started in September and was completed in August 2004 he confirmed the evidence of PW1 on how the defendant trespassed on their plot and laid power cables and prevented them from constructing. He confirmed what was said by Nazimudin and how they obtained a court order in July, 2002 compelling the defendants to remove the cables. Further he confirmed that the defendant were in the premises for about 15 months before construction.

[10]. He stated that they ran the food Court and bar. Khetias Supermarket pays them Kshs.428,250/= per month, Faulu Bank pays 100,000/= per month and there are 50 shops paying Kshs.6,000/= per month. He said that he gets profits from his businesses. He urged the Court to help them get what is due to them because KPLC illegally trespassed on their property and made them suffer loss. He also prayed for costs and interests.

[11]. The plaintiffs later applied to amend their plaint. On 12/2/2013 by consent of the parties the plaintiff was allowed leave to amend his plaint and the defendant was given 14 days corresponding Leave to amend the defence. On 14/3/2013 Mr. Swaleh advocate for the defendant told the court that they did not need to amend the defence. The parties agreed to have the plaintiff recalled to produce further documents and he was so recalled on 29/4/2013. He purported to produce a receipt for Kshs.414,000/= as professional fees for PKF but was overruled by court after objections from the defendants. The receipts were marked as MFI 6. The case was by consent fixed for hearing 1/7/2013. The case could not proceed due to the unavailability of Counsel for the defendant. The case was fixed for hearing on 27/2/2014. On that date the receipts for Kshs.411,000/= were produced as evidence in court by consent of the parties. Then the plaintiffs case was closed. The defendants advocate prayed for an adjournment saying that he did not have his witnesses and also because he did not know the plaintiffs were closing their case. An adjournment was granted. The case was fixed for hearing on 30/6/2014. On that date Mr. Were advocate holding brief for the defendant said that Mr. Swaleh advocate who had the conduct of the case on behalf of the counsels for the defendant had told him that he was unwell. He applied for adjournment. The case was adjourned and fixed for hearing on 23/10/2014.

[12]. In the meantime, Lady Justice Omolo who was hearing the case was transferred to Mombasa and I was also transferred to the station. The matter came before me for directions on 9/12/2014. Directions were taken and the suit was ordered to proceed from where it stopped since the handwriting of the outgoing Judge was legible. The case was fixed for Hearing on 4/5/2015. On that date the defendant and their counsel did not attend, the counsel for the plaintiff prayed to the court that the case be closed and a date be taken for submissions. The case was closed. Case was fixed for submissions on 10/6/2015.

[13]. On 27/5/2015, the parties herein had filed a consent in court that their application dated 8/5/2015 be allowed in terms of prayers 3 and 4. The application was to reopen the case. The parties fixed the case in Court on 10/6/2015 to adopt that Consent and it was adopted as an order of the court to reopen the case. On 8/4/2016 the case was fixed by consent of the parties for Hearing on 28/9/2016. On that date Mr. Otsiula advocate holding brief for the advocates for the defendant said that the case was in court for the arguing of a Preliminary Objection which had been filed 11 years before. Further that Mr. Atundo advocate for the defendant who was to argue it could not come to court since his father got sick. Madam Lunani advocate objected to the adjournment application and applied for the application to be rejected and the Preliminary Objection be dismissed. The court in upholding Madam Lunani advocates' objection held that the said Preliminary Objection had been filed eleven (11) years before, should have been heard before the hearing started. Further, that there was nothing that prevents the issue raised in the Preliminary Objection being raised and canvassed during the further hearing of the suit. That the suit was filed on 30th September 2005 and it was 11 years old. That to adjourn the case for a Preliminary Objection that should have been raised a decade ago was occasioning injustice to the plaintiff who was in court and ready to proceed with his case. I held that, this was one of the causes of delay and backlog in our courts. I struck out the notice of the Preliminary Objection with costs to the plaintiff. On 3/3/2017 the case was fixed for hearing on 4/10/2017 by consent.

[14]. Come 4/10/2017 the defendants and their advocates did not attend the hearing. The advocates for the plaintiff asked that the case to be closed as there was no defence being offered. It was then 12.15p.m. there being no attendance by the defendant or his advocate and taking into account the history and conduct of the defendant and his advocates in this case, I obliged the counsels prayers, the case was finally closed and a date for Judgment was given.

[15]. That being the case the evidence and its history, the issue for determination is whether the plaintiff has proved his case, on the required standards.

[16]. There is no dispute that land parcel number Bungoma/Municipality/608 is owned by Altaf Abdullahi Sharrif, Feroz Abdullahi Sharrif, Nazmudin Abdullahi Sharrif all of P. O. Box 31 Bungoma. They were issued a title of the same on 16th December 2011. It is also not disputed that the defendant Kenya Power & Lighting Co. Ltd the defendants herein entered the premises and erected electric cables therein without the consent of the owners.

[17]. The owners protested to the KPLC Offices immediately, here in Bungoma. When no action was taken they went to the area office in Kakamega. The plaintiffs alleged that they were not treated kindly. They were embarrassed and humiliated. They had to file a case in the Magistrates Court to have an order directing the defendants to move and vacate the suit land. By this time, it was some fifteen months since the entry. The plaintiff allege that the entry was unlawful and without any colour of right and with undue regard to the plaintiffs proprietary rights. They state that they have suffered loss and damage. The claim on the plaint is quantified as Kshs.32,743,721/=.

[18]. The plaintiffs called PKF an international audit firm with offices in Kenya. In his evidence Enock Barongo a member of PKF International CPA Kenya and a masters in Finance and a bachelors in Commerce gave a break down of the loss caused to the plaintiffs and caused by the delay of construction for 15 months. He produced PFK report on the figures of loss incurred. The figures were arrived at after discussing with the management and lawyers. It was worked out as follows 50 shops at 6000 each all totaling at 5,852,831/= loss of profits from Supermarket 9,598,262/= Loss from Food Court and Bar 3,513,458/= Escalation costs in Construction Kshs.1,617,786/= Interests in Borrowing Kshs.2.5 million. Interests at Court rates. He said the total loss was Kshs.41,564,378/= as at May 2009. He said that the loss as at the time he gave the evidence was Kshs.51 million.

[19]. There was therefore, a very Large difference between the sum claimed in the plaint of Kshs.32,329,197/= and 51 million that, the witness claimed in his evidence as the loss. What is more, the amount claimed in his evidence was totaling to Kshs.41,564,378/= and not 51 million. Out of this sum of Kshs.41,564,378/= there is what he called interest at Court rates of Kshs.18,482,041. No court had issued any Judgment and/or had given an order for such interest by the time this claim was made.

In the sum claimed, there is also Kshs.2.5 million as costs of borrowing. There was no evidence before the court, that any money was borrowed by the plaintiffs. The witness was unable to produce any documents to support such loss. The question of interest on borrowing does not, therefore, arise. There was equally no evidence before the court that there was an escalation of costs of materials for the period of 15 months claimed to the extent of Kshs.1,617,786/= neither was there any evidence produced in court that there was loss from Food Court, Bar and Restaurant for 15 Months of Kshs.3,982,001/=. This was an estimate of what the business would have made. Although it is admitted that there would have been a loss, I take it to be too speculative and I disallow the same.

[20]. The plaintiffs were prevented from using their premises for 15 months. They had to go to court to have the defendants remove the cables from their premises. They definitely suffered exemplary and aggravated damages for mental distress on the illegal occupation for 15 months. They were embarrassed and humiliated by the defendants. I will award them Kshs.500,000/= against the defendants for the same. They will also have the costs of SPMCC No. 333 of 2002. I have had the benefit of perusing the report of PKF produced herein by the plaintiffs. The report on loss of rental income from the shops for 15 months of Kshs.5,852,831 and the loss from the supermarket over the same period Kshs.9,598,261. These items are based on what is actually received now. I think those amounts are justified. In any case, there is no contrary evidence produced by the defendants. I will therefore award the plaintiffs the following as prayed.

(a) Kshs.5,852,831/=

(b) Kshs.9,598,261/=

(c) Kshs.414,524/= duly agreed by the parties

(d) Exemplary damages Kshs.500,000/=

Total Kshs.16,665,616/=

Plus costs and Interests from the date of this Judgement.

Judgment read in Open Court.

Dated at Bungoma 18th day of December, 2017

S. MUKUNYA

JUDGE

In the presence of:

Hon. S. Mukunya (Judge)

Joy: Court Assistant

Mr. Okwi for Masinde for the Plaintiff

Atendo on record for the defendant - Absent

Representative KPLC - Present