



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGYA

ELC CASE NO. 247 OF 2014

EPHANTUS GATHUA MUIYURO.....PLAINTIFF

VERSUS

KENYA POWER COMPANY LTD.....DEFENDANT

JUDGMENT

By his plaint filed herein on 18th August 2014, the plaintiff sought for judgment against the defendant in the following terms:-

- a. *A declaration that the defendant, by itself, its agents and/or servants have trespassed unto the plaintiff's land parcel No. INOI/KERUGOYA/471.*
- b. *General damages for trespass.*
- c. *An order for eviction from land parcel No. INOI/KERUGOYA/471 of the defendant by way of an order compelling it to forthwith relocate its high voltage power cables therefrom.*
- d. *An order for power reconnection to the plaintiff's building on land parcel No. INOI/KERUGOYA/471.*
- e. *Costs of the suit.*

The basis of the plaintiff's claim which is based on negligence is that whereas he is the registered proprietor of land parcel No. **INOI/KERUGOYA/471** (the suit property) which he has partly developed, the defendant has unlawfully, recklessly and negligently erected high voltage electric power cables over the plaintiff's building and on 27th March 2014, the defendant's servants and/or agents without reasonable cause disconnected supply to the plaintiff's property alleging that he had infringed into power line. And although the plaintiff wrote to the defendant complaining about that action, nothing came out of that complaint and the plaintiff has as a consequence thereof lost rental income and the cables are a danger to his workers and tenants.

Though served with summons to enter appearance and the plaint on 3rd September 2014, the defendant did not enter appearance or file any defence and upon application, on 7th October 2014, interlocutory judgment was entered against the defendant. The suit came up for formal proof on 2nd December 2014.

The plaintiff testified in support of his case and called one witness DAVID MURIMI (PW2) a quantity surveyor.

In his testimony, the plaintiff testified that he is the registered proprietor of the suit property and produced the title deed (Exhibit 1). He stated that the property is partly developed and one part is leased to Safaricom Company and he is now developing the 1st floor having completed the ground floor which is also rented to other tenants. He produced the lease agreements (Exhibit 4). He has been un-able to

complete construction on the 1st floor because the defendants allege that he has encroached on their power lines and his electricity supply has been disconnected. He told the Court that prior to commencing his development, he wrote to the defendant who asked him to meet the cost of Ksh. 1,031,240 to re-route the cables but he wrote back to them that they had trespassed onto his property – see Exhibits 5, 6, 7 and 8. He therefore wrote a demand to the defendant (Exhibit 9).

DAVID MURIMI MUTHII (PW2) testified that he is a professional surveyor and at the request of the plaintiff, he visited the suit property and prepared a map and report – see Exhibit 12 and 13 respectively. He testified that the suit property has a one storey building but there are electric cables interfering with it.

At the end of the plaintiff’s case, his advocate Mr. Magee filed written submissions in which he urged the Court to find that the defendant has trespassed onto the plaintiff’s property resulting in loss and damage for which I should award a sum of Ksh. 1,000,000 to compensate the plaintiff who is un-able to develop his land. Counsel referred me to the case of **PAUL AUDI OCHUODHO VS JOSIAH OMBURA ORWA (2014) e K.L.R.**

I have considered the plaintiff’s evidence together with that of his witness, the documentary exhibits and the submissions of his counsel.

It is not in dispute that the plaintiff is the owner of the suit property. The photographs show that electric cables traverse part of the suit property on which there is a partially developed building and the plaintiff has produced lease agreements (Exhibit 4) showing that he has tenants occupying part of the building. According to the plaintiff, he wrote to the defendant on 13th November 2013 prior to commencing the development on the suit property. In the letter (Exhibit 5), the plaintiff addressed the defendant in the following terms:-

“RE: WAY LEAVE IRREGULARITIES

Am the registered sole owner of plot No. KERUGOYA/INOI-471 situated next to Safaricom booster No. 1096 at Miringa-iri. There are two electrical posts leaning towards my plot and makes any development above ground floor almost practically impossible due to these life wires.

I am requesting K.P.L.C to do the necessary correction in a week’s time as am about to start developing the plot to the 1st floor”

In their undated response (Exhibit 6) the defendant replied as follows:-

“REF: RELOCATION OF ELECTRICITY SUPPLY TO EPHANTUS GATHUA MUYURO ON PLOT NO. 14 KAGUYU

Following our inspection and site visit to your premises on 20.03.2014, we are pleased to advise you that a provisional design has been prepared.

The cost is as follows:-

<i>Cost of supply</i>	<i>Ksh. 889,000</i>
<i>VAT @ 16%</i>	<i>Ksh. 142,240</i>
<i>Total</i>	<i>Ksh. 1,031,240”</i>

He was then directed on where to pay the sum upon which the defendant would ***“finalize our arrangements and execute the works at the earliest possible time”***

In a subsequent letter dated 28th March 2014 (Exhibit 7), the defendant wrote to the plaintiff accusing him of infringing on its 11 KV power line by constructing a building thereby interfering with its operations and maintenance of power line. He was cautioned that that was a contravention of **Section 65 of the Energy Act 2006** which could attract a fine not exceeding Ksh. 100,00 and given seven days notice to desist from further construction failure to which legal proceedings could be taken.

The plaintiff's response to that letter was vide his advocate's letter dated 1st April 2014 (Exhibit 8) in which he stated that it was the defendant's power line that had infringed his plot without his consent and at no time had the plaintiff signed a way leave allowing the said power lines. The said letter continues in paragraph 2, 3, 4 and 5 to state as follows:-

2: "That our client only signed one way leave which allowed the initial power lines which your agents moved to the current position without our client's consent.

3: That it was a condition of the way leave that our client would not be supplied with power if constructed under the power lines and he was supplied with power a clear indication that the building was not under the power line.

4: That it is your agents who are in clear violation and infringement of the way leave agreement as a result of which our client is suffering loss and damages.

5: That the power disconnection to our client's plot was therefore un-called for, unfair and the situation ought to be regularized without demanding for any costs for relocation from our client"

The issue that calls for determination is whether the defendant has trespassed onto the plaintiff's property or whether it is the plaintiff who has obstructed or interfered with the defendant's power lines by constructing a building beneath them thus contravening with the provisions of **Section 65 of the Energy Act**. When cross-examined by the Court, the plaintiff stated that it was the defendant who put their cables over his plot. The plaintiff's evidence was not rebutted as the defendant did not file any defence. His oral evidence is therefore un-controverted. According to his letter (Exhibit 8), the plaintiff was not to be supplied with power if he constructed under the power lines and since he was supplied with power, this was a clear indication that the building was not under the power lines and it is therefore the defendant's agents who are in clear violation and infringement of the way leave agreement. The plaintiff also produced the approved plans for his construction (Exhibit 10). It is un-likely that the plan would have been approved if the building was going to interfere with the defendant's power lines and if indeed the plaintiff was supplied with power as he states, which is not denied, it is un-likely that the defendant would have supplied him with power if he had constructed his building under the power lines.

Then there is the report of the surveyor (PW2) who states therein that the building is not on the road. At paragraph 4 he makes these specific findings:-

"The most recent development is the pole nearing the plot, this pole was not aligned with the existing line this makes the wire of high voltage power line to align itself with the building"

The import of the above is that the defendant's agents moved its power cables from the existing line thus trespassing onto the suit property. A casual glance at the photographs of the building and the lines shows that indeed there is an additional post further from the original post. This evidence is not rebutted as the defendant filed no defence. It is a clear demonstration of trespass. If the plaintiff was at fault, the defendant should have been the first to institute criminal proceedings against the plaintiff for infringing **Section 65 of the Energy Act**. The fact that the defendant did not do so suggests that it was them who laid their cables over an existing construction which amounts to trespass. **CLERK & LINDSELL ON TORTS 18th Edition** defines trespass as "***any unjustifiable intrusion by one person upon land in the possession of another***". Proof of ownership of the property is prima facie proof of possession and a victim of trespass is entitled to damages to compensate him. On the plaintiff's un-controverted evidence, I

am satisfied that it is the defendant which trespassed onto his property and he is therefore entitled to the orders sought in his plaint,

With regard to damages for trespass, the plaintiff is entitled to a reasonable sum to compensate him. There is no mathematical formula to guide the Court in assessing the quantum payable and each case has to be considered on its own peculiar circumstances remembering always that no two cases can ever be the same. However, in assessing the damages payable, the Court will consider among other factors the size and location of the property and the length of time that the trespass has taken. If there is damage to the property, then that would have a bearing on the amount of damages. From the photographs produced (Exhibits 11A to 11C), the property is not situated in a prime location. It is certainly not within the Central Business District of Kerugoya Town. And from the leases (Exhibit 4a to 4d), the monthly rental income for the shops range from Ksh. 3,000 to Ksh. 5,000 per month. These are crucial guides in assessing damages and going by them, I would consider the sum of Ksh. 1,000,000 suggested by the plaintiff's advocate as quite high in the circumstances. Doing the best I can, I would assess general damages for trespass at Ksh. 100,000.

Ultimately therefore, this Court is satisfied that the plaintiff has proved his case against the defendant as required in law. Judgment is entered for the plaintiff against the defendant in the following terms:-

- a. *A declaration that the defendant by itself, its agents and/or servants have trespassed onto the plaintiff's land parcel No. INOI/KERUGOYA/471.*
- b. *General damages of Ksh. 100,000 for the trespass.*
- c. *An order for eviction from land parcel No. INOI/KERUGOYA/471 by compelling the defendant to forthwith relocate its high voltage power cables therefrom.*
- d. *An order for power reconnection to the plaintiff's building on land parcel No. INOI/KERUGOYA/471.*
- e. *Costs of the suit.*

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Judgment delivered in open Court this 26th day of February, 2016

Ms Kiragu for Plaintiff present

No appearance for Defendant

Right of appeal explained.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016