



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC 258 OF 2016

PAUL WANJIGI NJOROGE.....PLAINTIFF

VERSUS

COME-CONS AFRICA LTD.....1<sup>ST</sup> DEFENDANT

MESHAK ISIKATI.....2<sup>ND</sup> DEFENDANT

KENYA POWER & LIGHTING CO. LTD.....3<sup>RD</sup> DEFENDANT

JUDGEMENT

**INTRODUCTION**

1. The Plaintiff instituted this suit by way of plaint dated **17<sup>th</sup> July, 2012**. The Plaint was subsequently amended on **27<sup>th</sup> August 2018**. The orders sought in the amended Plaint are as follows:

- a) Permanent injunction/restraining orders against the Defendants on land known as NAIVASHA TOWN BLOCK 2/859.*
- b) Eviction of the Defendants and removal of all illegal structures erected by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and removal of all illegal electricity connections installed by the 3<sup>rd</sup> Defendants.*
- c) Cost and interest of the suit*
- d) Mesne Profits.*

**FACTUAL BACKGROUND**

2. The Plaintiff describes himself as the registered owner of land known as NAIVASHA TOWN BLOCK 2/859, hereinafter referred as the suit land. He brings this suit against the Defendants who have allegedly trespassed onto the suit land and have erected illegal structures and illegal electricity connections

3. Subsequent to filing the Plaint, parties were served. The 1<sup>st</sup> Defendant was served by way of substituted service while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were served personally.

4. Appearance was entered for the 3<sup>rd</sup> Defendant; Kenya Power and Lighting Company and the Interested Party; Municipal Council of Naivasha

5. The 1<sup>st</sup> and the 2<sup>nd</sup> Defendant neither entered appearance nor filed a Statement of Defence. Consequently, interlocutory Judgement was entered against them.

6. Though the 3<sup>rd</sup> Defendant was served, it neither filed a written statement of defence nor tendered evidence.

7. It is also important to mention that on the day that the suit came up for hearing, counsel for the Interested Party brought it to the attention of the court that the purported Interested Party was not a party to the suit as it had not been formally joined to the suit and had never filed any

documents in relation to the suit. He then asked that the interested party be struck out from the suit. The court record of 25<sup>th</sup> March, 2019 also shows that Counsel for the Plaintiff had, on that day, prayed that the interested party be excluded from the proceedings as the Plaintiff had no claim against it. It was so ordered.

8. Another noteworthy fact is that that the Plaintiff is deceased and his son one John Mbugua Wanjigi was substituted to the suit vide a court order dated 15<sup>th</sup> March, 2021

9. The suit proceeded to hearing on 27<sup>th</sup> October, 2021. All the parties were served with the hearing notice notwithstanding entry of interlocutory judgement against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. The affidavits of service in respect of the hearing notice were filed and form part of the record.

#### **THE PLAINTIFF'S CASE.**

10. Two people testified in support of the Plaintiff's case. The first witness was one John Mbugua Wanjigi, hereinafter referred to as **PW1**.

11. **PW1** in his introduction stated that he has been living in America for the last 15 years and his father had also been living in The United States of America for 20 years, prior to his demise. He stated that his father died in September, 2020 while in the United States of America.

12. **PW1** went on to state that he is familiar with the claim adding that they are seeking orders of eviction against the Defendants and that they be cautioned not to enter into the suit property.

13. It was his testimony that since the year 1998, his father was not able to use the suit land and added that on account of this, he wants compensation for lost time because the Plaintiff was not able to develop the parcel of land. He explained that his father, the Plaintiff, had hoped to build a nursing home. He explained further that he was in court to pursue his father's case.

14. **PW1** relied on the witness statement filed and requested the same be adopted as evidence. He also testified that his father had appointed George Kamau Kariuki as his agent and executed a power of attorney in favour of George Kamau Kariuki.

15. **PW2** George Kamau Njoroge gave evidence and in his introductory remarks stated that he lives in Naivasha town adding that he knows the Plaintiff. It is his evidence that a power of Attorney was executed in his favour in the year 2015. He went on to state that before 2015 he was the Plaintiff's agent in respect of his Naivasha plot that is situated around Chatara road. Pw2 stated that the Plaintiff had intended to build a nursing home on the suit land.

16. **PW2** explained that the 2<sup>nd</sup> Defendant an employee of the 1<sup>st</sup> Defendant is currently on the suit land and has put up semi-permanent structures which he has rented out. He explained that the 1<sup>st</sup> Defendant vacated the suit land before the suit was filed.

17. Pw2 prayed that the court issues an eviction order against the Defendants and that the Defendants be restrained from entering the suit land.

18. **PW2** prayed that his witness settlement be adopted as evidence and also prayed that the documents listed in the Plaintiff's list of documents dated **17<sup>th</sup> July, 2012** be produced as exhibits. The documents were produced and marked as **Exhibit P1-P4**. The document listed in the plaintiff's supplementary list of documents dated **6<sup>th</sup> September, 2018** were produced and marked as **Exhibits P5-P16(a-h)**.

19. **PW2** in conclusion states that the suit property belongs to the Plaintiff and that the Defendants have not produced any documents to explain why they are in occupation of the suit land. Consequently, he urged the court to grant the Plaintiff the orders as set out in the amended Plaintiff. The Plaintiff's case was closed.

20. The Defendants did not participate in the trial despite being served with various hearing notices. In their absence, the defence case was closed and the suit was reserved for submissions and subsequently for Judgment.

#### **ISSUES FOR DETERMEINATION**

##### **PLAINTIFF'S SUBMISSIONS**

21. The Plaintiff filed his submissions on the **15<sup>th</sup> November, 2021** wherein he framed four (4) issues for determination. They are as follows:

*a. Whether the Plaintiff is the proprietor of the parcel of land known as Naiavasha Town Block 2/ 859;*

*b. Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have trespassed on the subject land;*

*c. Whether the 3<sup>rd</sup> Defendant has illegally supplied power to the illegal structures;*

*d. Whether the Plaintiff is entitled to the reliefs sought.*

22. The 3<sup>rd</sup> Defendant filed their submissions on 17<sup>th</sup> November, 2021. They are not explicit on the issues for determination but from reading their submissions, I have identified two issues for determination:

**a. Whether suit discloses a cause of action against the 3<sup>rd</sup> Defendant;**

**b. Whether the prayers sought can/or should issue against the 3<sup>rd</sup> Defendant.**

23. Another issue for determination as identified by me is:

**a. Whether the Plaintiff is entitled to mesne profits**

24. In my view, therefore, the the issues for determination are those as set out by the Plaintiff, those deduced from the 3<sup>rd</sup> Defendant's submissions and set out as prayers in the Plaintiff

## ANALYSIS AND DETERMINATION

25. The first issue for determination is whether the Plaintiff is the proprietor of the parcel of land known as Naivasha Town Block 2/859. The Plaintiff has submitted that he is the owner of the suit parcel and adduced evidence to prove ownership i.e the Certificate of Lease. He further submits that this evidence has not been challenged. In support of this proposition, the Plaintiff relied on **Section 26 of the Land Registration Act** which provides that the certificate of title shall be held as conclusive evidence of proprietorship. He also relied on the decisions in **Janeth Chepkoech and another (2019) eKLR and Elizabeth Chemutai Chepkwony Vs Janeth Chepkoech and Another (2019) eKLR**. Both decisions are to the effect that the Plaintiffs' evidence was not challenged and the court found them to be the absolute proprietors of their respective parcels of land.

26. I find, therefore, that the Plaintiff has proved the fact of ownership of the suit land and is therefore properly before this court to assert his rights as the proprietor of the suit parcel.

27. The second issue for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have trespassed on the subject land. **PW1** and **PW2** testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered the suit property and erected several wooden structures thereon and caused the 3<sup>rd</sup> Defendant to supply electricity to the said structures.

28. According to the Plaintiff, the 2<sup>nd</sup> Defendant also lets out the wooden structures and uses part of the suit land as a yard for parking buses and motor vehicles. Various photographs [Exhibit p 16 (a)-(h)] we produced as evidence of this fact.

29. The Plaintiff has made reference to Halsbury's law of England 3d edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

***A person trespasses upon land if he wrongfully sets foot on, Or rides or drives over, it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another's land, or sends filth or any injurious substance which has been collected by him on his own land to another's land.***

30. The said text at Paragraph 1213 explains the nature of extent of possession that is sufficient to support an action of trespass thus:

***What possession is sufficient? Any form of possession, so long as it is clear and exclusive and exercised with the intention to possess, is sufficient to support an action of trespass against a wrong doer.***

31. From the foregoing, it is clear that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have committed an act of trespass and the Plaintiff is entitled to remedies as sought in paragraph (a) and (b) of the Plaintiff.

32. The third and fourth issue for determination is whether the Plaintiff discloses a cause of action against the 3<sup>rd</sup> Defendant and whether the 3<sup>rd</sup> Defendant on account of illegal instructions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have illegally installed power on the Plaintiff's land. I shall analyze and make a determination on both issues together.

33. On the issue of failure, by the Plaintiff to disclose a cause of action against the 3<sup>rd</sup> Defendant, the 3<sup>rd</sup> Defendant contends that it could not possibly have defended a suit in which claims against it are unspecified. It is its contention that they refrained from making an application to have the Plaintiff's suit struck out. They now pray that the suit against the 3<sup>rd</sup> Defendant be struck out and the claim against it be dismissed with costs.

34. The 3<sup>rd</sup> Defendant relies on the decision in **Crescent Construction Co. Ltd Vs Delphis Bank Ltd 2007 Eklr**. The decision speaks to the discretionary power of the court to strike out pleadings and that such power should be exercised with the greatest caution. The decision also acknowledges that it is unfair to drag a person to the seat of justice when the case brought against him is a non- starter.

35. The plaintiff at paragraph 7 is explicit as to the claim against the third Defendant. It states:

*That at all material times to the suit, the 3<sup>rd</sup> Defendant was an associate of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and through the Defendants' illegal instructions has installed power and erected electricity on Plaintiff's land which is illegal and actionable and the same should be removed.*

36. The prayer sought against the 3<sup>rd</sup> Defendant is for removal of illegal electricity connections installed by it.

37. Having found that the Plaintiff discloses a cause of action against the 3<sup>rd</sup> Defendant, I will proceed to make a determination on whether the claim against 3<sup>rd</sup> Defendant sustains.

38. The Plaintiff submitted that without his authority the 3<sup>rd</sup> Defendant illegally connected power to the structures for profit and that photos produced by PW2 and marked as **Exhibit P16** was sufficient proof of the illegal connections. The Plaintiff in the Plaintiff prays that the illegal electricity connections installed by the third Defendant be removed.

39. The 3<sup>rd</sup> Defendants in their submission states that the activities complained of by the Plaintiff are regulated by the Energy Act No 6 of 2006 (Amended in 2012) and fall within the dispute resolution mechanism provided for under the Act i.e the Energy (Complaints and Dispute Resolution) Regulations 2012.

40. The 3<sup>rd</sup> Defendant draws the courts attention to the provisions of sections 46, 47 and 48 of the Energy Act 2012 (now repealed). The provisions are as follows:

**46. Permission to survey and use land to lay electric supply lines**

*(1) No person shall enter upon any land, other than his own—*

*(a) to lay or connect an electric supply line; or*

*(b) to carry out a survey of the land for the purposes of paragraph (a), except with the prior permission of the owner of such land.*

*(2) The permission sought in subsection (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry.*

**47. Assent to proposal**

*(1) An owner, after receipt of the notice and statement of particulars under section 46, may assent in writing to the construction of the electric supply line upon being paid such compensation as may be agreed and any assent so given shall be binding on all parties having an interest in the land, subject to the following provisions—*

*(a) that any compensation to be paid by the licensee giving notice to the owner, in cases where the owner is under incapacity or has no power to assent to the application except under this Act, shall be paid to the legal representative of the owner;*

*(b) that an occupier or person other than the owner interested in the land shall be entitled to compensation for any loss or damage he may sustain by the construction of the electric supply line, so long as the claim is made within three months after the construction of the electric supply line.*

*(2) No assent expressed in writing in accordance with subsection (1) shall be void by reason only of non-compliance with any statutory requirements as to registration.*

**48. Objection to proposal**

*(1) An owner shall be deemed to have assented to a proposal to construct an electric supply line on his land if he fails to notify, in writing, the person desiring to construct an electric supply line, of his objection thereto within sixty days after the service on him of the notice required by section 46 and in the event of an objection, the Commission, on application by the licensee, shall determine—*

*(a) what loss or damage, if any the proposed electric supply line will cause to the owner, or to the occupier or other person interested in the land;*

*(b) whether any loss or damage that may be caused is capable of being fully compensated for by money.*

*(2) The result of a determination under subsection (1) shall be as follows—*

*(a) if the Commission determines that loss or damage will be caused to the owner, occupier or other party interested in the land and that the loss or damage is—*

*(i) of a nature that may be fully compensated for by money, the Commission shall proceed to assess the compensation and to apportion it amongst the owner, occupier and other parties who may in the judgment of the Commission be entitled to compensation and on payment of the sum so assessed the person giving notice may proceed to construct or lay the proposed electric supply line;*

*(ii) not of a nature that may be fully compensated for by money the person giving notice shall not be entitled to construct or lay the proposed electric supply line;*

*(b) if the Commission determines that no loss or damage will be caused to the owner, occupier or other party interested in the land the person giving notice may forthwith proceed to construct or lay the electricity supply line.*

41. It is important to note that at the time that this suit was filed, the law governing the matters complained of by the Plaintiff against the 3<sup>rd</sup> Defendant was the Energy Act No. 12 of 2006 (Amended in 2012).

42. The 3<sup>rd</sup> Defendant in its submission also makes reference to Regulation 2 of the Energy (Complaints and Dispute Resolution) Regulations 2012 which provides as follows:

*These Regulations shall apply, to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct, practice or operation of any party or any matter regulated under the Act.*

43. It is the 3<sup>rd</sup> Defendant's contention that the Plaintiff's claim was ill advised and that the Plaintiff should have exhausted the dispute resolution mechanism provided under the Energy Act.

44. Section 107 of the Energy Act No. 12 of 2006 ( Amended in 2012) provides as follows:

**107. Appeals from decisions of the Commission**

*Where under this Act the provision is made for appeals from the decisions of the Commission, all such Appeals shall be made to the Energy Tribunal, in accordance with the provisions of this Part.*

45. The 3<sup>rd</sup> Defendant has relied on the decisions in **James Mwaura Ndungu Vs Kenya Power & Lighting Company Ltd Nairobi CA NO. 228 OF 2011**. In this case the Learned Judge of Appeal dismissed the appeal and held as follows:

*“After careful consideration of rival submissions, I have come to the conclusion that the decision of the Learned Senior Magistrate cannot be faulted. She came to the correct conclusion. The Provisions cited i.e. Section 61 of the Energy Act and the Energy (Complaints and Dispute Resolution) Regulations 2012 clearly shows that matters relating to energy should be heard before the Energy Regulatory Commission previously the Energy Regulatory Board. For this reason, I find no merit in the Appeal. The same is dismissed with costs to the Respondent.”*

46. The 3<sup>rd</sup> Defendant has also made reference to the decision in **Alice Mweru Ngai -vs- Kenya Power & Lighting Co**. In this case, the Learned Judge found that the Plaintiff had chosen the wrong forum to agitate her claims. The suit and the application were struck out with costs to the Defendant.

47. I have seen photographs of electricity poles and power cables connecting into makeshift structures made from timber and iron sheets. Evidence has been led that the structures are built on the suit land. However, no evidence has been led as to the process culminating to the supply of power to the structures so as to aid me in determining whether the process is tainted with illegality. In any event, and as has been stated in the submissions by the 3<sup>rd</sup> Defendant, the process of surveying land, laying electric supply lines, objections thereto and resolution of disputes that might arise from that process are governed by the Energy Act No. 6 of 2006 at section 46, 47, 48 and 107.

48. In **Samson Chembe Vuko Vs Nelson Kilumo & 2 Others [2016] eKLR**, the court held that ;

*“It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.”*

49. Similarly, in the case of **Geoffrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others [2015] eKLR** it was held that;

*“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”*

50. From the forgoing I am unable to make a determination on whether the erection of the electric poles and the laying of the power supply lines to the structures on the suit parcel is illegal or not. Importantly, any disputes that might have arisen out of that process were in the first instance to be resolved in accordance with section 48 and 107 of the repealed Energy Act. The net effect of the foregoing is that the prayers

as against the 3<sup>rd</sup> Defendant fail. The Plaintiff is at liberty to engage the dispute resolution mechanism as provided in the Energy Act No. 12 of 2006 (Revised in 2012).

51. The fifth issue for determination is whether the Plaintiff is entitled to mesne profits. The Plaintiff contends that he is entitled to mesne profits and cites the decision in **Rajan Shah T/A Rajan S. Shah & Partners Vs Bipin P. Shah (2016) eKLR** where the court held as follows:-

***“The term ‘mesne profits’ relates to damages or compensation from a person who has been in wrongful possession of immovable property...they are the rents and profits which a trespasser has or might have received or made during his occupation of the premises and which therefore he must pay over to the true owner as compensation for tort which he has committed.”***

52. The Plaintiff further submits that the evidence of PW1 and PW2 show that the Defendants have denied the Plaintiff possession of the suit land but are also benefitting from activities carried out on the suit parcel.

53. In the case **Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) eKLR**, the Court of Appeal held as follows:

***“As regards the payment of mesne profit, we think the Applicant has an arguable Appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”***

54. In **Nakuru Industries Ltd Vs S.S. Mehta and Sons (2016) eKLR** it was held that mesne profits are a form of special damages which must be specifically pleaded and strictly proved.

55. No evidence was led by the Plaintiff as to the specific amounts received by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant as rent and profits during their occupation of the suit land. It follows therefore, that the Plaintiff has failed to meet the criteria for an award of mesne profits. Consequently, the prayer for mesne profits is declined.

56. Lastly, on the issue of costs, 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. This was the holding in **Hussein Janohamed & Sons Vs Twentsche Overseas Trading Co. Ltd (1967) EA 287**.

57. Further, costs are granted at the discretion of the court.

58. Justice Kuloba (Retired) in his book *Judicial Hints in Civil Procedure* (4<sup>th</sup> Edition) Volume 10, Para 16 states that

***Costs are awarded at the unfettered discretion of the court subject to such conditions and limitations as may be prescribed and the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise.***

59. In the decision of **Jabir Singh Rai & Others Vs Tarlochan Rai & others**, the supreme observed that

***In the classic common law style, the courts have to proceed by a case to case basis to identify good reason for such departure, an examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.***

60. Retired Justice Kuloba in his book cited above observes that

***The fact that the unsuccessful party did not contest the case is not in itself a ground for refusal of costs but is a factor that can be taken into account if no other good reasons exist.***

61. The 3<sup>rd</sup> Defendant is successful to the extent that the suit is dismissed as against them. They have prayed for the suit to be dismissed with costs. The participation of the 3<sup>rd</sup> Defendant in the trial was limited to filing a Memorandum of Defence and Submissions. I decline to award them costs for the reason that the circumstances of this case do not merit the award of costs to them.

## **DISPOSITION**

62. The Upshot of the foregoing is that the Plaintiff suit as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant succeeds and I grant orders as follows:

***a. A permanent injunction/restraining orders do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant on land known as Naivasha town Block 2/859.***

***b. Orders of eviction and removal of all illegally erected structures do issue against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.***

***c. The eviction orders in (b) above, to be effected after 90 days of service of this court order.***

***d. The claim for mesne profits fails.***

*e. The suit as against the 3<sup>rd</sup> Defendant is dismissed with no order as to costs.*

*f. The Plaintiff shall have the costs of the suit as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.*

63. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19<sup>TH</sup> DAY OF JANUARY, 2022

L. A. OMOLLO

JUDGE

**IN THE PRESENCE OF: -**

**MR. KAGUCIA FOR THE PLAINTIFF**

**NO APPEARANCE FOR THE 1ST DEFENDANT**

**NO APPEARANCE FOR THE 2ND DEFENDANT**

**NO APPEARANCE FOR THE 3RD DEFENDANT**

**COURT CLERK. JENIFFER**