



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 26 OF 2012

BETWEEN

CELTEL KENYA LIMITED APPELLANT

AND

FRANCIS NYAOSI MOKUA 1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD. 2ND RESPONDENT

(Being an appeal from the judgment of Hon. . Wanjala, SPM

delivered on 7th June, 2012 in Nyamira SPMCC No. 74 2010)

JUDGMENT

1. The Respondent herein was the defendant in Nyamira PMCC No.74 of 2010 while the 1st Respondent herein was the plaintiff. By the plaint dated 28th June 2010, the 1st Respondent Francis Nyaosi Mokua sued the appellant seeking the following reliefs:-
 - a. *An order for the removal of the power transformer from the parcel of land NO. NORTH MUGIRANGO/MOKOMONI/1399;*
 - b. *General damages aforesaid;*
 - c. *An order for the compensation of damaged trees, tea bushes and plot where the power transformer was constructed;*
 - d. *Costs of the suit;*
 - e. *Interest thereon at court rates;*
 - f. *Any other relief this honourable court may deem fit to grant.*
2. The plaintiff's case in the lower court was that the appellant unlawfully and without the consent of the plaintiff trespassed into L.R. North Mugirango/Mokomoni/1399, (the suit) land and erected thereon a power transformer to be used by the appellant in installing, transmitting cables on the plaintiff's private land, and that in the course of the trespass, the appellant unlawfully cut down 50 gum trees and 40 tea bushes all valued at an estimated Kshs.300,000/=. Through an amended plaint dated 17th February 2011 the 2nd respondent was enjoined in the suit. It is noted that the amended plaint does not form part of the Record of Appeal.
3. The appellant entered appearance and filed defence dated 8th July 2010 on the 16th July 2010. The appellant denied all the allegations made by the 1st Respondent and averred in the alternative that the 1st Respondent consented in writing and granted to the appellant a way leave permitting the

- appellant to lay or erect the transmitting cables on the suit land. The appellant also denied the allegation that the 1st respondent had suffered any loss as alleged in the plaint or at all. The appellant asked the trial court to dismiss the 1st Respondent's suit with costs.
4. The 2nd respondent, Kenya Power & Lighting Co. Limited also entered appearance and filed defence dated 2nd June 2011 in which it denied all the averments in the plaint save for the contents of paragraphs 1, 2, 3, 9 and 11 thereof. The 2nd Respondent further averred that the suit was bad in law, an abuse of the process of court and that same ought to be struck out with costs to the 2nd respondent. The 1st respondent filed Reply to defence dated 6th September 2010.
 5. During the trial, the plaintiff's case was premised on the testimonies by Francis Nyaosi Moku, PW1 and Zachariah Arisi Kimonge, PW2. PW1 stated that sometime in June 2010 when he was away from home, he received information that some people were on his land cutting down gum trees and uprooting tea bushes and also putting up a transformer. Not being aware of such an arrangement, PW1 consulted his area chief who confirmed that indeed the situation on the suit land was as told to PW1. PW1 further stated that despite his pleas to Celtel people who had trespassed on the suit land to stop the trespass they failed to do so, hence the filing of the suit in the lower court. PW1 produced the title deed to the suit land to confirm ownership thereof. PW1 further stated that he protested to the work that was being done by appellant.
 6. During cross examination, PW1 stated that though he did not produce a search certificate in respect of the suit land, he was in no doubt that the same belonged to him as per the title deed produced as **P. Exhibit 1**. In answer to questions put to him by counsel for the 2nd respondent, PW1 stated that as far as he knew, it was only the 2nd respondent who could erect power poles and construct power lines. He also stated that over 200 big gum trees were cut down while 60 – 70 tea bushes were uprooted.
 7. PW2 testified that he was the assistant Chief for Mokomoni Sub Location where PW1 resides. He stated that Chief Ezekiel Omwanza dispatched him to the suit land after PW1 complained to the Chief that some people were trespassing on the suit land. On the suit land, PW2 said he witnessed the cutting down of trees and digging of holes and the construction of a transformer which still stands on the suit land to date.
 8. When taken to task during cross examination, Pw2 stated that whereas the transformer was put up on PW1's land, a satellite was put up on the neighbouring piece of land which belongs to one Mr. Ogero. In PW2's view, the trespassers cut down over 100 trees, may be up to 1000, although admittedly he did not count the number of trees allegedly cut

down. Pw2 also stated that during his interaction with the appellant's

and the 2nd Respondent's people, he was assured that the 1st respondent had been consulted and had in fact given his consent.

9. At the close of the plaintiff's case, neither the appellant nor the 2nd respondent adduced any evidence. All the parties however filed written submissions, copies of which form part of the Record of Appeal.
10. After carefully analyzing all the evidence on record and after considering the submissions filed by parties, the trial court was satisfied that the 1st Respondent had proved his case against the appellant on a balance of probabilities. The trial court was satisfied that a transformer and a power line were erected on the 1st Respondent's land without any consent first being had and obtained. The trial court found that the 1st respondent had not proved his case against the 2nd respondent on a balance of probabilities. In its judgment, the trial court awarded Kshs.500,000/= as general damages plus costs and interest as against the appellant alone. The suit against the 2nd respondent was dismissed with no order as to costs.
11. The appellant was aggrieved by the judgment of the trial court and filed this appeal on the following 10 grounds:-
 1. *The Learned Magistrate erred in Law and in fact in reaching his decision on liability and quantum of damages without analyzing the entire evidence on record.*

2. *The Learned Magistrate erred in Law and in fact in holding that the appellant was wholly to blame for the loss suffered by the first appellant when the available evidence clearly absolves it from blame.*
3. *The Learned Magistrate misdirected himself in law in failing to*

consider and make a finding on the issue of causation and blameworthiness.

4. *The Learned Magistrate misdirected himself in law in finding the appellant wholly liable for a trespass to the first respondent's land parcel when the respondent did not offer any evidence at the hearing to show that the trespass had been committed solely by the appellant.*
5. *The Learned Magistrate erred in his analysis of the evidence in holding that the appellant was wholly liable for the trespass when there was sufficient evidence on record to show that the respondent was wholly responsible for the trespass.*
6. *The Learned Magistrate erred in making an award for General damages for damage sustained where the plaintiff led no evidence at all on the issue.*
7. *The Learned Magistrate erred in Law and in awarding damages that were so grossly excessive as to be [a]misdirection in law.*
8. *The Learned Magistrate proceeded on demonstrably wrong principles in reaching his decision, as the provisions of the Energy Act and the Way Leaves Act were wantonly disregarded.*
9. *The Learned Magistrate erred in dismissing the suit against the second respondent without regard to the applicable law as regards Way Leaves and Construction of Transformers.*
10. *The Learned Magistrate erred in Law and Fact in converting an unproven claim for Special Damages to one for General Damages whereas the First Respondent had not adduced any evidence to justify such an award.*

12. The appellant therefore prays that this appeal be allowed and the judgment of the Principal Magistrate's Court dated 1st February 2012 be set aside and the order allowing the First Respondent's claim and awarding him damages be substituted with an order dismissing the said suit with costs.

13. This is a first appeal. As a first appellate court, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. What is important to note however, is that this court has no opportunity of seeing and hearing the witnesses who testified before the trial court. In essence therefore this court has to exercise caution in determining whether or not to overturn the findings of the trial court. It is an established principle that where it is clear to the appellate court that the trial court erred in matters of law or that the facts on record do not support the conclusions reached by the trial court, then the appellate court should not hesitate to interfere with those findings. See generally **Peters –vs- Sunday Post Limited [1958] EA 424** and **Selles & another –vs- Associated Motor Boat Co. Ltd. [1969] EA 123; Butt –vs- Khan [1977] 1 KAR 1.**

14. I have now carefully reconsidered and evaluated the evidence afresh. I have also weighed and considered the judgment of the learned trial court. I have also considered the parties' submissions which are on record together with the authorities cited by the parties respectively. From an analysis of the above, the points that arise for determination are on (a) liability, causation and blameworthiness (b) quantum and nature of damages (c) whether the learned trial magistrate properly appreciated the provisions of the Energy and the Way Leaves Acts respectively (d) Whether the dismissal of the suit against the 2nd Respondent was well founded.

15. On the issue of liability, causation and blameworthiness, the

appellant, through its counsel, M/s Siganga & Co. Advocates submitted that the 1st Respondent failed to show the nexus between the appellant and the presence of the transformer on the suit land. It was also submitted that the 1st Respondent did not offer any evidence at the hearing to show that the trespass, if any, had been committed solely by the appellant, and therefore that the learned trial court misdirected itself as to the link between the appellant who was a consumer of

electricity and the transformer which was provided by the 2nd Respondent. Further that the 1st Respondent did not adduce evidence as to who exactly constructed the line, or whether those who constructed the power line obtained the necessary way leave consent.

16. On his part, the 1st Respondent submitted that it was the appellant who erected a transformer on the suit premises on the instruction of the 2nd respondent who is the sole supplier of [electric] power in Kenya.
17. From the record, the 1st Respondent's own testimony does not point a finger at the appellant as the person who installed the transformer on the suit land. He also stated the following: **"I am claiming for way leave wherever Kenya Power and Lighting Company as I understand when they come they erect something they were to seek for consent. A way leave is payment for KPLC putting their power within your property."**
18. PW2 stated the following regarding the persons who were on the suit land at the material time:- **"I found people who were cutting down trees and digging holes on the shamba of Nyaosi (plaintiff's shamba). I tried to tell them to stop but they told me that the owner had allowed them to do that work by the plaintiff. They continued and put up a transformer which is there to date."**
19. From the above evidence, it is not clear who the people who were cutting down trees and digging holes on the 1st Respondent's shamba were. Neither the 1st Respondent nor PW2 stated that those people were the appellant's people. It is my finding therefore that though truly some people trespassed on the suit land, it was not clear that it was the appellant's people who did so. It appears more likely that the people who were cutting down trees and digging holes were agents of the 2nd respondent herein. In the circumstances, I find and hold that the 1st respondent did not prove on a balance of probabilities that it was the appellant who cut down the trees and dug the holes on the suit land. In any event, PW2 stated during cross examination that **"the Satellite was erected on the shamba of Mr. Ogero, but near the shamba of Nyaosi"** so that any complaint touching on the transformer ought to have been made against the 2nd respondent. Even then, the 1st respondent did not adduce any evidence that indeed the works concerning the transformer were being undertaken by the 2nd respondent. In effect therefore I find that there was no evidence establishing a nexus between the appellant and the transformer. I also find that the liability and blameworthiness attached to the appellant was a misdirection by the learned trial magistrate. See **Samuel M. Wahome & 3 others –vs- Harris Gigi EA Ltd. & 3 others [2006] e KLR.**
20. As rightly submitted on behalf of the appellant, the 1st Respondent needed to do more to bring on board relevant third parties, namely the Rural Electrification Authority, a body corporate with power to sue and be sued as duly established under **section 66 of the Energy Act, Cap 12 of the Laws of Kenya**. If the provisions of the Energy Act had been properly put into perspective, the appellant herein would not have been found liable for the alleged trespass and for the alleged loss suffered by the 1st Respondent herein.
21. The next issue for determination is the nature and quantum of damages. It is submitted on behalf of the appellant that the 1st Respondent did not produce any documents to authenticate the claim for special damages and that this being the case, the claim should have been dismissed as the same was not proved. Reliance was placed on two cases:- **Atogo –vs- Agricultural Finance Corporation [1990-1994] 1 EA 31** and **Siree –vs- Lake Turkana El Molo Lodges Ltd. [2000] 2 EA 521.**
22. The principles upon which an appellate court will interfere with the award of damages of the trial court are now well settled. In the case of **Kenya Bus Services –vs- Samuel W. Njoroge, Civil Appeal No.133 of 2001 at Nairobi**, the Court of Appeal stated as follows:-

"What then are the principles on which an appellate court will interfere with a trial judge's assessment of damages? These are now well settled in Kenya. Kneller, J-A, as he then was, put it thus in Robert Mosioki Kitavi –vs- Coastal Bottlers Ltd. [1985] KLR 470:

"The Court of Appeal in Kenya, then, should, as its forerunners

did, only disturb an award of damages when the trial judge has taken into account a factor he ought not to have taken into account or failed to take into account something he ought not to have taken into account or the award is so high or so low that it amounts to an erroneous estimate.”

23. Further in the case of Idi Ayub Shabani & Yusufu Juma –vs- City Council of Nairobi & another [1985] KLR 516, Hancox JA restated the principles in the following words:-

“The test as to when an appellate court may interfere with an award of damages was stated by Law JA in Butt –vs- Khan [1977] 1 KAR 1 (a case referred to in another context by the learned judge) as follows:-

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

24. I am persuaded that these principles have a place in the present case, and I have no hesitation in moving to interfere with the award made by the learned trial court. First of all, the learned trial magistrate misapprehended the evidence and the pleadings by making an award for general damages when there was no iota of evidence to assist the court in making the said award. It would appear to me that the learned trial magistrate converted an unproven claim for special damages to one for general damages. Throughout the entire testimony of PW1, I see nowhere where he wanted to be paid a certain amount of money in lieu of the transformer being removed. What may have been contained in the submissions is not evidence and the learned trial court fell into error in purporting to base the award of Kshs.500,000/= on the submissions without the relevant evidence to support the same. For the above reason, the award of Kshs.500,000/= as general damages had no basis and the same is therefore disallowed.

25. Further, if the claim was for Kshs.300,000/= for spoilt tea bushes

and gum trees, which was a claim in special damages, the 1st Respondent was obliged to show how many tea bushes and how many gum trees were spoilt and what their respective values were. It was not a matter of simply stating that so many gum trees or tea bushes were spoilt or cut. The exact number of tea bushes and gum trees had to be given and a value assigned to each. I therefore agree with the position taken by the appellant in its submissions that to succeed on a claim for special damages, the same ought to have been pleaded with particularity and specifically proved.

26. Having determined the first and second issues in favour of the appellant and which issues also have a direct bearing on the third and fourth issues, I do not find it necessary to labour the last two issues. I have already reached the conclusion that the learned trial magistrate did not properly appreciate the provisions of the Energy Act and the Way Leaves Act and as a result thereof reached the wrong conclusions. From what I have set out in the preceding paragraphs, I am satisfied that the dismissal of the suit against the 2nd Respondent was well founded.

27. In the premises and for the reasons above stated, this appeal must succeed. The same is allowed and accordingly the judgment of the principal magistrate rendered on 1st February 2012 in Nyamira PMCC No.74 of 2010 be and is hereby set aside and in lieu thereof, I make an order dismissing the 1st Respondent's claim against the appellant. The appellant shall have the costs of this appeal and of the suit in the court below.

28. Orders accordingly.

Dated and delivered at Kisii this 30th day of January, 2014

R.N. SITATI

JUDGE.

In the presence of:

Ms Siganga & Co (absent) for Appellant

Mr. J.O. Soire for Mokaya (present) for 1st Respondent

N/A for 2nd Respondent

Mr. Bibu - Court Clerk