



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC. CASE NO. 93 OF 2013**

**MUIWAN LIMITED ..... PLAINTIFF/APPLICANT**

**- V E R S U S -**

**KENYA POWER AND LIGHTING CO. LTD. ....  
DEFENDANT/RESPONDENT**

**RULING**

[1] There are three Notice of Motions filed herein by the parties in this case. The first notice of motion is by the applicant/plaintiff filed on 5th April, 2013. In that motion he seeks for judgment against the defendant and requests that the case be fixed down for formal proof against the defendant. The applicants claim is that he is the registered owner of Mombasa/Block/MS/90 situated at Likoni area of Mombasa County. That the respondent without any clear right of way, permission or consent from the applicant trespassed on the applicants property and caused to be dug numerous trenches and proceeded to construct and/or erect poles at the centre of the applicants piece of land causing the applicant to file the present suit. It is stated that while the defendant was served with the summons of this suit and had filed a defence, he without permission or consent re-entered the suit land to remove the electricity poles he had duly erected therein thereby trespassing onto the suit land yet again. It is argued that the act of re-entering the land to remove the electricity poles was an admission of trespass to the applicants land and that the applicant is therefore entitled to judgment as per para (a) (b) and (c) of the applicants' plaint dated 16th April 2012.

[2] The second application is by the defendant dated 26th August, 2013. The defendant applies for leave to issue a third party notice to Ali Munya Salim, Francis Mtawali Charo, Juma Omari and Mwinyi Kashaha. It argues that the said persons were in occupation of Mombasa/Block V/M.S/90 and duly executed agreements for the supply of electricity by the defendant. The applicant states that it is entitled to indemnity and/or contribution by the said persons in respect of the petitioners claim.

[3] The third application is also by the defendant. It is dated 26th August 2013. It seeks for orders that the defendant be granted leave to amend the defence. The grounds upon which that application is premised are inter alia to plead in the defence the fact that by the time the poles were erected on the suit property, there were structures on the land and four people in occupation applied for supply of electric power. In the attached intended amended defence the names of the four people cited in that defence are the same with the names in this application.

[4] The plaintiff attacked the defendants chamber summons for leave to file third party notice dated 26th August, 2013. It argued that the application is fatally defective in that it is filed out of the mandatory 14 days after close of the pleadings and that the defendant/applicant had not sought the courts leave to

extend time provided to file 3rd party notice. It argued that the alleged cause of action between the defendant and the alleged third party was caused by the negligence of the defendant. That the relationship between the plaintiff and the defendant is not the same as between the defendant and the intended third party. That Section 46 of the Energy Act demands that the defendant seeks permission from the owner of the property before the defendant can enter into the property to commence laying of electric poles. That the defendant did not do the due diligence and was negligent and therefore not deserving of the courts discretion. And that, the act of re-entering the suit property to remove the offending poles from the said suit property was itself an act of admission of liability on the part of the defendant.

[4] On the application by the defendant to amend the defence dated 26th August, 2013 the plaintiff submitted that, the defendants amended defence, admits that the defendant did not adhere to provisions of section 46 (1) of the Energy Act that the said amendment shall only serve the purpose of delaying this case. The plaintiff relied on the case of **Gachoka & 3 others v Kenya Power & Lighting Co. Ltd 1KLR (E&L) 550** which stated that;

*"statutory duties of the respondent do not entitle it to arbitrarily enter into the private land to execute those duties without the consent of the parties".*

The defendant on its part alleges that their defence dated 6th June, 2013 does not have an admission of trespass by the defendants at any paragraph. Further that the plaintiff has not produced any communication from the defendant to itself bearing an admission which can form the basis of the application sought. They argue that the test applicable on application for judgment on admission is that the admission ought to be plain obvious and unambiguous. It relied on the case of **Choitram -vs- Nazari (1984) KLR pg, 328** which held inter alia

*"Admission of fact under Order XII rule 6 need not be on the pleadings, they may be in correspondence or documents which are admitted or they may even be oral as the rule uses the words "otherwise" which are words of general application and are wide enough to include such other admissions"*

[5] The defendants admit that judgment on admission is discretionary but state that discretion should be exercised judiciously. They urge the court to rely on Section 1A and 1B to ensure the overriding objective is met in determining these applications.

In regard to the application for judgment by the plaintiff, is there any admission of the claim in the pleadings, correspondents or documents submitted to court following **Choitram v Nzarari?**

In the Notice of Motion dated 26th August, 2014 and filed in court the same day, the defendant in the grounds supporting the application states,

*" A The defendant seeks to amend the defence and plead the fact that by the time the poles were erected on the suit property, there were structures on the land and four people in occupation who applied for electric power" (underlining mine)*

On para 4 of the supporting affidavit to the motion Mr. Richard Ouyo Ottaro swears;

*", , , I visited the suit property in November 2010 there were four people in the occupation namely Ali Muya Salim, Francis Mtawali Charo, Juma Omari and Mwinyi Kashaha all of whom executed the way leave agreements . . ."*

In para 4 of the Amended Defence the defendant states

*"The defendant avers that in November 2010 when its way leave officers went to the suit property, they found four people in occupation namely . . ."*

It is plainly clear that

- (a) the defendant erected poles on the suit land.
- (b) their way leave officer Mr. Richard Ouyo Ottaro visited the suit land.
- (c) Various way leave officers visited the land in November 2010.

[6] It is stated in the submissions and also averred in the intended amended defence that owing to the unique concept of 'house without land' that exist only in the Coastal Region of Kenya, the defendant had no need to doubt the veracity of ownership of the suit premises occupied by the person mentioned in the application and the intended defence. With profound respect to that submission by counsel, I disagree. The defendant was well aware of the statutory duty imposed on it by statute to verify the proprietor of land before it enters the land. Infact one only needs to peruse the way leave agreements allegedly signed by the intended 3rd parties. The same starts with words:-

*"We ..... of ..... in Kenya being the proprietor of the land composed in Title No. .... "*

This underscores the importance of proprietorship to the defendant. It also imposes the duty to prove ownership to the person applying for connection. This to my mind is and can easily be done by producing a certificate of official search or a certificate of ownership signed by the Land Registrar or Registrar of Titles. These documents are readily available in Land Registries and are not expensive.

[8] All the way leaves annexed to the application do not have Title numbers of applicants properties at all. This would have raised alarm bells to the defendant his agents or the way leave officers. They should not have gone to the suit land without such proof or without concrete proof that this was a case of 'house without land' in which case the landlord or his representative who receives the rent would then have given the consent. Not all properties in the Coast Region are without title. For the defendant to find out which is which it must, and is mandated by law to conduct due diligence. It did not do so. It entered private land without permission of the owner. On its admission not once and not twice. It dug trenches and put poles. It went there again to remove them. To my mind this is a clear and plain case of trespass. It does not matter that it was lured to go into the suit land by third parties. If it so wishes it can have its re-course on those other third parties in a separate suit. This should not concern the plaintiff at all. I have no hesitation to enter judgment for the plaintiff as prayed in the application against the defendant. The case shall proceed to formal proof on merits. The defendant has filed its application and applied for leave to issue a third party notice to the four persons named. Unfortunately under Order 1 rule 15 (a) (b) and (c) the law mandates such application to be filed within 15 days. That was not done. The defence was filed on 6th of June 2012. It is nearly two years after the defence was filed. There is no application for extension of time for leave before me to consider. The application is therefore bad in law and misconceived. The same is dismissed with costs.

[9] Having dismissed the application for leave to file a third party notice on Ali Muya Salim, Francis Mtawali Charo, Juma Omari and Mwinyi Kasheha for the reasons I have given. I am unable to grant leave to amend the defence to include a third party claim against the same persons as stated in para 4 of the intended amended defence. That application is also dismissed with costs.

It is so ordered.

**Dated and delivered in open court in Mombasa on this 26th day of May, 2014.**

**S.MUKUNYA**

**JUDGE**

26.5.2014

Miss. Obura for the defendant/applicant

Mr. Anyimba Advocate for Dr. Khaminwa for plaintiff/applicant