

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT

CIVIL SUIT NO. 13 OF 2007

JEREMIAH WACHIRA ICHAURA.....PLAINTIFF

VS

KENYA POWER & LIGHTING CO. LTDDEFENDANT

JUDGMENT

In this matter it was agreed that the defendant had trespassed on the plaintiff's land by consent recorded on 14/10/2009 and therefore this court's duty is to assess damages to be paid for trespass.

The plaintiff submits that he is entitled to mesne profits of Ksh.5000 per month for 6 years thus a total of Kshs.360,000/=.He further prays for aggravated damages of Kshs.700,000/= and Kshs.35,722 as special damages.

On his part the defendant submits that the plaintiff has not proved that he is entitled to mesne profits of Kshs.5,000/= as he has not presented to Court a valuation report. The defendant also argues that mesne profits were not pleaded hence the same cannot be granted. Moreover, the plaintiff seeks special damages but the same were not pleaded and were not prayed for.

Lastly the defendant submits that the only claim pleaded by the plaintiff was general damages for trespass. This court finds the following issues for determination:-

- 1. Is the plaintiff entitled to mesne profits?**
- 2. Is the plaintiff entitled to special damages?**
- 3. Is the plaintiff entitled to a general damages?**
- 4. How does the court assess general damages for trespass?**

On the issue of mesne profits I agree with counsel for the defendant that the same is not pleaded. Parties are bound by their pleadings and the court cannot grant what is not pleaded in the plaint. I have perused the plaint and do find that the plaintiff has not pleaded mesne profits but has prayed for the same in his submissions. On this basis the court cannot grant mesne profits as prayed in the submission.

On special damages, the same was neither prayed for nor particularized by the plaintiff in the plaint. It is trite Law that special damages ought to be specifically pleaded and proved. Though the plaintiff has annexed a report by the Agricultural officer that trees worth 35,722/= were destroyed the same was not specifically pleaded.

On general damages this court finds that on or about 22/1/2007, the defendant entered into the plaintiff's land thus OTHAYA/ITEMEINI/1534 without the letter of consent and damaged his parcel fence, trees, wasted his soil and planted distribution posts and continued with trespass until the filing of this suit. On 14/10.2009 It was agreed that the defendant removes the power lines within 30 days and compensates the plaintiff. The import of the consent was that the defendant vacates the parcel of land and the quantum of damages be assessed. Though no valuation report has been availed by the plaintiff there is no dispute that he has suffered general damages for trespass, the plaintiff has not assisted the court to know how he has reached to the figure of Kshs.700,000/- he has referred to the case of Isaac **Gathungu Wanjohi & Another vs AG** where the court awarded Kshs.1,000,000/= however the authority is not

relevant as the award was not for trespass but breach of fundamental rights. Before the consent the defendant was illegally on the land for 2 years and nine months.

Having considered all facts in totality, this court is guided by the the legal understanding that there is no wrong without a remedy a nominal figure of Kshs.300,000/= is awarded to the plaintiff against the defendant for trespass plus costs and interest.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER 2014

ANTONY OMBWAYO

JUDGE