



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1236 of 2007

KENYA POWER & LIGHTING COMPANY LIMITED..... PLAINTIFF

VERSUS

JOSPHAT P. KINGARA..... DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff brought the suit herein by way of a Plaint dated 14th November 2003 filed in Nairobi High Court Civil Case No. 1179 of 2003, which case was later transferred to the Environment and Land Division of the High Court at Nairobi and given a new case number being ELC Suit No 1236 of 2007. The Plaintiff sought the following substantive prayers.

- a) A permanent injunction to restrain the Defendant by himself, his servant or agents from stopping or in any way however interfering with the laying of electric power transmission lines on L.R. No. Ndumberi/Ndumberi/2296.
- b) A declaration that the Plaintiff has offered adequate compensation to the Defendant for the wayleave over L.R. No. Ndumberi/Ndumberi/2296.
- c) In the alternative to (b) hereof, an assessment by the court of compensation payable to the Defendant under the Electric Power Act.

The Plaintiff's claim is that in the year 1999, and thereafter, it sought the Defendant's consent for a wayleave through his land L.R No. Ndumberi/Ndumberi/2296 for purposes of laying an electric power supply line thereon as part of the said Olkaria to Dandora Project, and in consideration therefore offered to pay compensation to the Defendant in accordance with the Electric Power Act. However, that the Defendant has without justifiable cause unreasonably withheld consent for wayleave and has actively incited neighbours to repulse the Plaintiff's works of laying the power transmission line on his parcel of land as well as the neighbours' lands. Further, that the Defendant's parcel of land comprises part of the route designated for the Olkaria-Dandora powerline, which route was designed in 1998-1999 and of which the Defendant's neighbours have signed wayleave agreements and compensation has already been made either in part of fully.

The Defendant thereupon filed a Defence and Counterclaim dated 9th July 2004 wherein he averred that he is the registered owner of the Title Number Ndumberi/Ndumberi/2296 which measures approximately 1.1 acre, and that the total area of the said land falling on the said wayleave trace is approximately 40m by 13.6m. Further, that the Plaintiff is under the law obligated to compensate the Defendant fully and at market rates not only for the trace area of the wayleave but also for the rest parcel of the land, to the

extent the said parcel of land has been affected by the said wayleave rendering it uneconomical for any other purpose.

The Defendant in his counterclaim averred that the Plaintiff has completed its work of laying the high voltage electric power lines over his land and the said lines are now fully operational. Further, that he had as a result suffered loss and damages, whose particulars he stated to be as follows:.

- a) Loss of future earnings from half the Parcel of the subject land that has been rendered uneconomical due to:-
 - i. The severance.
 - ii. The adverse visual impact.
 - iii. The general effect of the Electric and Magnet fields (EMFs) emanating from the lines.
- b) Health Hazard as a result of the said Electric and Magnetic fields (EMFs) emanating from the lines.
- c) The Plaintiff's interference with the quiet possession of the Defendant over the said land.
- d) The Defendant waiver of his rights to the Plaintiff over the said land to enter the said land and construct any structure and to use any machinery and to return at any future date to carry out its works.

The Defendant claim against the Plaintiff is for general damages and/or compensation as will be assessed by this Honourable court for the grant of the said wayleave to the Plaintiff over the said land.

The Plaintiff in its Reply to the Defence and Defence to Counterclaim dated 12th August 2004 stated that whereas the Electric Power Act obligates it to compensate in event of loss, the said Act states that injury or loss must be proven and compensation sought be reasonable, and that the Defendant has not proven injury in this event. The Plaintiff denies that the requirement of law is that compensation be made before power lines are laid out, and stated that in any event the Defendant had demanded unreasonable and unjustified compensation. Further, that this is not a claim in the nature of general damages and that if any loss has been suffered, the same ought to be quantified as special damages.

When the suit came for hearing on 26th February 2008, the parties indicated that they were exploring settlement and that the only outstanding issue was that of the quantum of damages. The parties were thereupon directed on 15th April 2004 to file and serve their respective submissions on the issue of quantum of damages. The parties duly filed their submissions and judgment was reserved by Kubo J. for 24th June 2008. Kubo J. however retired before the said judgment was delivered, and the Honourable Chief Justice Gicheru on 16th September 2009 directed Sitati J. to write and deliver judgment in this matter. This file appears not to have been placed before Sitati J. who was subsequently transferred to the Kisii High Court. The Honourable Chief Justice Dr. Willy Mutungi subsequently gave directions on 19th February 2013 that I write the judgment herein.

I therefore principally relied on the pleadings and submissions filed by the parties in writing this judgment. The Plaintiff's Counsel in its submissions dated 14th April 2008 and filed on 15th April 2008 argued that the Plaintiff is a licensee authorized to undertake public supply and distribution of electrical energy in the Republic of Kenya. Further, that in exercise of its statutory mandate as a power supply and distribution licensee, the plaintiff was in the process of laying a 220KV power distribution line from Olkaria to Dandora in Nairobi aimed at boosting the capacity of the national power grind. The said line was to pass through various parcels of land which included land parcel L. R. No. Ndumberi/Ndumberi/2296 which is owned by the Defendant.

It was submitted that the total acreage of the Defendant's land that was to be affected by the trace area of

the wayleave aforesaid is 0.1186 acres which represented 10.79% of the Defendant's parcel of land, and that the Plaintiff agreed to pay compensation to the Defendant in consideration for wayleave. The Plaintiff though a letter dated 23rd June 2003, asked the Defendant to permit the laying of the power transmission line through his parcel of land and the Plaintiff offered to pay sum of Kshs.11,860/= being compensation for grant of wayleave. The Plaintiff attached a valuation report by its valuer, Metrocosmo Valuers Limited, showing the value of the portion of the Defendant's land affected by the power lines to be Kshs.400,000/=. The Plaintiff also submitted that both its and the Defendant's valuers are in agreement as to the portion of land affected being 40m by 13.6m out of about 0.445 hectares (1.1 acres) which represents 10.79% of the whole portion.

The Plaintiff urged the court to consider the fact that the laying of the power lines does not take away the Defendant's land, but only restricts the Defendant from growing trees/crops which exceed twelve feet from the ground or putting up structures which constitute a hazard to the electric line or occupier within the trace area of the power line. Further, that this was not a compulsory acquisition and therefore the Plaintiff ought not to purchase the whole parcel. It was submitted that in arriving at the amount of compensation payable, the court should be guided by the following:-

- a) That the trace area affected by the wayleave is approximately 10.79% of the total acreage.
- b) That the compensation payable therefore ought to represent this percentage.
- c) That the land still belongs to the Defendant and the Plaintiff will only register an easement.

The Plaintiff also urged the court to order that each party do bear its own costs for this suit.

The Defendant's Counsel in submissions dated 16th May 2008 and filed in court on the same date, argued that the facts of the Defendant being the duly registered owner of the parcel of land known as LR. No. Ndumberi/Ndumbeir/2296 and of the construction and installation of a 220KV power transmission line over the said property are not in dispute. Further that the only issue that now remains is the assessment of reasonable compensation to the Defendant.

The Defendant's submissions on the quantum of compensation were that section 75(1) of the repealed Constitution provided that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except under very specific conditions. Such a condition include where possession or acquisition of land is necessary in the development or utilization of property so as to promote the public benefit. Further, that the Constitution provided that in situations where private property is acquired for public benefit, the holder of such private property is to receive prompt payment in full compensation of the interest compulsorily acquired in his land.

The Defendant further submitted that section 45 through to 46 of the Electric Power Act No. 11 of 1997 spells out the procedures that should be followed by the Plaintiff in the way it obtains way-leaves over private property, and the recourse to be taken where a land owner refuses to grant permission. Further, that the Wayleaves Act (Chapter 292 of the Laws of Kenya) (since repealed) under sections 4(2) and 4(3) required any notice served on a land owner to describe the nature of intended work and the notice should be served on every land owner to be effected by the proposed work. Section 6 of the said Act also provided for compensation to any land owner of any tree or crops destroyed or damaged in the execution of any power conferred by the Act.

The Defendant submitted that he rejected the Plaintiff's offer of compensation of Kshs.11,860/= as it had misrepresented the location of the power lines. Further, that this was the reason the Defendant refused to give wayleave permission to the Plaintiff who in turn filed this suit and obtained orders that facilitated the erection of the power lines on the Defendant's land. The Defendant presented two valuation reports by Daytons Valuers Limited dated 23rd January 2004 and 15th May 2008 and which showed the value of the portion of the Defendant's parcel of land affected by the power supply lines to be Kshs 700,000/= and Kshs 800,000/= respectively.

The Defendant argued that the valuation reports showed that the wayleave trace not only occupies at least a third (1/3) of the portion of the subject land, but also effectively severs the Defendant's parcel of land into two parts, and as a result the development value and future earning capacity of the subject land has been reduced in the upper portion of the land and effectively extinguished in the lower portion of the Defendant's property. Further, that Daytons Valuers in their valuation report opined that in their estimation half of the Defendant's parcel of land will be rendered uneconomical by the severance and particularly for subdivision.

The Defendant contended that he will no longer exploit the full potential of the land as the electric lines thereon carry power with very high voltage and with pronounced electric and magnetic fields which will subject the Defendant and his family to great risk and restricted access to the unutilized portions of the remaining land. Further, that the routine maintenance and upgrades of the power lines will also deprive the Defendant quiet and peaceful enjoyment of his property.

It was also submitted that the Defendant's land is next to an urban area namely Ndumberi Township, and that its value would have appreciated annually due to the proximity to main urban services and the adjacent road. The Defendant relied on the decision in **Limo –vs- Commissioner of Lands (1990) KLR 562** in this respect.

The Defendant in addition submitted that he will also lose the anticipated income he might have earned from the sale of mature trees grown on the affected portion of his land, which he estimated would have been 60 in number and valued at Kshs.10,000/= per mature tree. It was submitted that the photographs attached to the valuation report dated 15th May 2008 prepared by Daytons valuers, showed that that the presence of the electric pylons had led to the cutting down of trees that the Defendant had planted in the wayleave trace area, and which were clearly visible in the photographs attached to the valuation report dated 22nd January, 2004.

In conclusion, the Defendant submitted that taking into consideration the value of the land as shown in the valuation reports, the spiraling cost of land; the scarcity of the same especially in Kiambu District of Central Province and the opportunities that the Defendant has lost of realizing the full potential of his very fertile and arable land, Kshs.1,500,000/= would be adequate to compensate him for the loss he has incurred and will continue to incur by the continuing presence of power lines in his land. The Defendant also prayed that the requested amount of compensation be marked up by 15% in line with the decision in **New Munyu Sisal Estate Ltd – vs- Attorney General (1972) E.A.L.R. 88** and for interest on the assessed amount from 14th November 2003 until payment in full.

It was also argued by the Defendant that as this suit and the subsequent Counterclaim were necessitated by the Plaintiff in failing to offer the Defendant reasonable compensation for the loss he was to suffer, the Plaintiff should pay the costs of these proceedings.

I have carefully considered the pleadings and arguments made by the parties. The main issue for determination is the quantum of damages payable to the Defendant for the laying of electric power supply lines over his land by the Plaintiff. The principles governing quantum of damages differ depending on the cause of action and the first question that his court will need to answer is the nature of the cause of action herein.

The Defendant claims that the principles that should govern are those applicable to compulsory acquisition under the Constitution. It is however my finding that the actions by the Plaintiffs were undertaken pursuant to the provisions of the Electric Power Act No. 11 of 1997 and the Wayleaves Act (Chapter 292 of the Laws of Kenya) (since repealed) as this is not disputed by the Defendant, and the procedures for compulsory acquisition under the Constitution did not therefore apply. The principles on quantum of compensation stated in the judicial authorities cited by the Defendant also do not apply for this reason, as the said authorities were dealing with cases of compulsory acquisition of land.

It is also my finding that the case herein is one of trespass to land as it involve entry by the Plaintiff into the Defendant's land albeit pursuant to statutory authority, and subject to payment of compensation. The

statutory authority in this case was at the material time found in sections 45 of the Electric Power Act, Act No. 11 of 1997 and section 4 and 5 of the Wayleaves Act (Cap 292) (since repealed). Section 46 (1)-(3) of the Electric Power Act, Act No. 11 of 1997 provides for the procedures to be followed for payment of compensation in such circumstances:

“(1) An owner shall be deemed to have assented to a proposal to lay an electric supply line on his land if he fails to notify the person desiring to lay an electric supply line in writing of his dissent therefrom within sixty days after the service on him of the notice required by this section; and in the event of dissent the court, on the application of the licensee, shall decide:

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

(b) whether any injury that will be caused is capable of being fully compensated for by money, unless the owner requires those questions to be decided by arbitration.

(2) The result of a decision under subsection (1) shall be as follows:

(a) if the decision is that injury shall be caused to the owner, occupier or other party interested in the land, but that the injury is of a nature capable of being fully compensated by money, the court or arbitrator shall proceed to assess the compensation and to apportion it amongst the owner, occupier and other parties in his or their judgement entitled thereto, and on payment of the sum so assessed the licensee may proceed to lay the proposed electric supply line;

(b) if the decision is that injury will be caused to the owner, occupier or other party interested in the land, and that the injury is not of a nature to admit of being fully compensated by money, the licensee shall not be entitled to lay the proposed electric supply line;

(c) if the decision is that no injury will be caused to the owner, occupier or other party interested in the land, the licensee, may forthwith proceed to lay the electric supply line.

(3) If any difficulty or question arises as to the person entitled to the compensation payable under this Act, the court shall order the compensation to be paid into court pending the making of an application under subsection 4.”

Section 6(1) of the Wayleaves Act (since repealed) also provided for compensation to be paid to landowners as follows:

“(1) The Government shall make good all damage done, and shall pay compensation to the owner of any tree or crops destroyed or damaged, in the execution of any power conferred by this Act.

The provisions for compensation with respect to wayleaves are now provided under section 148 (1) – (5) of the Land Act, Act No. 6 of 2012 which provides as follows:

“(1) compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.

(2) Compensation relating to a wayleave or communal right of way shall not be paid to a public body unless there is a demonstrable interference of the use of the land by that public body.

(3) Damage caused as a result of the creation of a wayleave shall include any preliminary work undertaken in connection with surveying or determining the route of that wayleave, and whether the trees, crops or buildings so damaged were included in the route of the wayleave as delineated in the order of the Cabinet Secretary.

(4) The duty to pay compensation payable under this section shall lie with the State Department, county government, public authority or corporate body that applied for the public right of way and that duty shall be complied with promptly.

(5) If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.”

The normal measure of damages for purposes of compensation in the case of trespass to land is the cost of reinstatement, and where this is not practical or sensible, then the amount of the diminution in value of the land is considered (See ***McGregor on Damages, Eighteenth Edition, paragraphs 34-003 to 34-022***). The value of land is also now the determinant factor for compensation under the Land Act, Act No. 6 of 2012. In the present case the land cannot be reinstated to its previous position as the electric power supply lines are already in place, and the parties herein have consented to their remaining on the Defendant's land. The applicable principle in the present case is therefore that of diminution in the value of land, and the question that this court needs to answer is the nature and extent of the said diminution in value.

The first aspect of the diminution of value of the Defendant's land to be considered is with respect to the portion of the said land on which the power supply lines have been laid and which it is agreed cannot be utilized for any other purpose. The valuation reports presented by both parties herein state that the said portion of land measures 40 metres by 13.6 metres. It is also agreed that the Defendants parcel of land, Ndumberi/Ndumberi /2296 measures 0.445 hectares which is approximately 1.1 acres.

From the court records, the said power lines were laid after orders granted by this court on 17th November 2003. A perusal of the valuation reports presented by the parties shows that the Plaintiff's valuer's valuation of this portion of land as at December 2003 was Kshs 400,000/=. The Defendant's valuer's valuation of the same portion of land in January 2004 was Kshs 700,000/=. It would therefore appear to me that an average value of Kshs 550,000/= would be a reasonable value of the said portion of land as at January 2004.

The second aspect of diminution in value to be considered is the argument made by the Defendant that the remaining part of his parcel of land has been rendered uneconomical by being divided into two parts that has restricted their use and subdivision. As the remaining part of the Defendants land is still capable of being used, I consider the diminution in value in this respect to be minimal as the value of land is likely to appreciate. I am of the view that a global amount of Kshs 250,000/= would be a reasonable compensation of the diminution in value of the remaining part of the Defendant's land, and hereby award the said sum.

The Defendant also claims consequential loss for the loss of trees on the wayleave trace. The valuation reports presented by both the Plaintiff and Defendant noted that the portion of land covered by the electric power lines was not developed and had napier grass. The Defendant has produced photographic evidence of some trees planted on his land. He in addition stated that he would have planted approximately 60 trees on the portion covered by the electric power lines. I find that this is a claim for loss of profits which is allowed in an award for damages for trespass of land (see ***McGregor on Damages, Eighteenth Edition, paragraphs 34-023 to 34-024***). I hereby allow the Defendant's claim for loss of the said trees, and value the loss of profit of each tree and find a value of Kshs 5,000/= for each tree as at January 2004 to be reasonable, which results in a global amount of damages of Kshs 300,000/=.

As regards the claim for damages for the continuing nuisance posed by the electric power supply lines and the continued interferences with the Defendant's right to quiet and peaceful enjoyment of his property, I find this claim to be one for prospective losses. I however decline to grant this head of damages as prospective damages for continuing wrongs or torts cannot be awarded in law (see ***McGregor on Damages, Eighteenth Edition, paragraphs 34-031 to 34-033***). It is also my view that the

compensation for the prospective losses claimed is already adequately catered for in the heads of damages awarded in the foregoing.

Arising from the above-stated reasons, this Court enters judgment for the Defendant as against the Plaintiff, and hereby orders the Plaintiff to pay the Defendant general damages of a sum of Kshs 1,100,000/= as compensation as assessed in the foregoing, with interest at court rates with effect from 1st January 2004 until the date of full payment.

Each party shall bear their costs of the suit as there was a consent reached in this matter.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____16th____ day of____April____, 2013.

P. NYAMWEYA
JUDGE