



**Roki v Kenya Power & Lighting Company Ltd (Environment & Land  
Case 25 of 2020) [2022] KEELC 3754 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3754 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 25 OF 2020**

**JO MBOYA, J  
JUNE 30, 2022**

**BETWEEN**

**STEPHEN WANYEE ROKI ..... PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING COMPANY LTD ..... DEFENDANT**

**JUDGMENT**

1. Vide amended Plaintiff dated April 15, 2013, the Plaintiff herein approached the court seeking for Judgement to be entered against the Defendant on the following prayers:
  - i. Declaration that the Defendant is in law under a legal obligation to seek the Plaintiff's consent to the laying of electric supply lines on his land comprised in title number Dagoreti/Riruta/766 and that the Plaintiff is entitled to full compensation from the Defendant from such ceded rights of way and for the loss and interruption of land use in the laying of the said electric supply lines on the said land.
  - ii. General Damages and an order for payment by the Defendant to the Plaintiff of such compensation as shall be computed and payable in accordance with the law or as shall be professionally assessed for the losses incurred by the Plaintiff.
  - iii. Permanent Injunction restraining the Defendant by its servants, agents or work persons from constructing, laying, connecting and/or maintaining an electric power supply line across or passing all that piece or parcel of land know as title number Dagoreti/Riruta/766 without the Plaintiff consent as to wayleaves being first sought and obtained and full compensation paid.
  - iv. Cost of the suit.



2. Upon being served with the Summons to Enter appearance and Plaint, the Defendant herein duly entered appearance and thereafter filed a Statement of Defense on the April 8, 2013, whereby the Defendant denied and/or otherwise contested the Plaintiffs claim.

### **Evidence By The Parties:**

#### **The Plaintiff's Case:**

3. The subject matter came up for hearing on the February 23, 2022 whereupon same proceeded for hearing.
4. The Plaintiff herein testified as PW1 and same averred that he is the registered proprietor and/or owner of all that piece of land otherwise known as L.R No. Dagoreti/Riruta/766, measuring approximately 3.8 acres.
5. Further, the witness also testified that on or about the January 15, 2013, while in the course of visiting and inspecting the suit property, same came across and/or found workmen placing and/or erecting concrete Electric poles inside the suit property belonging to and registered in his name, albeit without his permission and/or consent.
6. It was the further evidence of the witness, that after finding out what was happening on the suit property, same made enquiry from the workmen to ascertain and/or authenticate why same were erecting the concrete electric poles and on whose behalf such poles were being erected.
7. Besides, the witness testified that same thereafter established that the concrete electric poles were being erected by and/or on behalf of the Defendant herein, albeit without the Defendant having sought for and/or obtain the consent of the Witness.
8. Further, the witness testified that as at the time when same inspected the suit property the Defendant's agents and/or workmen had already sunk three concrete holes and thereafter mounted the Poles, which were standing on a portion of the suit property.
9. Other than the foregoing, the witness testified, that at the same time there were other concrete poles which were lying on the ground and which the workmen were in the process of erecting on a portion of the suit property.
10. Notwithstanding the foregoing, the witness also testified that in the course of erecting the concrete poles, the Defendant's agents and/or workmen, had pulled the said poles on a portion of the suit property and in the process, the poles had destroyed the Napier grass which the witness had planted on a portion of the suit property.
11. In the circumstances, the witness contended that the actions and/or activities by the Defendant herein constituted and/or amounts to trespass and that in any event, the witness had been exposed to loss and damages.
12. Other than the foregoing, the witness proceeded to and adopted his witness statement dated the March 1, 2013, which was thereby constituted as part of the Evidence- in chief on behalf of the subject witness.
13. Besides, the witness also referred to the List of documents dated the March 1, 2013 and thereby sought to produce the Documents alluded to at the foot of the said list of documents.
14. For coherence, the documents at the foot of the list dated the March 1, 2013 were thereafter produced in evidence and marked as exhibit P1 to 6 respectively, save for document number 6 which was not availed to the Court.



15. On cross examination, the witness herein stated that same discovered the sinking of the holes and the erection of the poles, when he visited the suit property and while in the course of inspecting his Land, namely, the Suit Property herein.
16. On the other hand, the witness asserted that the poles in question were erected on a portion of the suit property, belonging to him and not on a road reserve.
17. Besides, the witness further stated that there were crops which were destroyed when the Defendant's agents and/or workmen were pulling the poles. Nevertheless, the witness admitted that same did not have any evidence to show the value of the crops that were damaged and/or destroyed.
18. Finally, the witness stated that the trespass by the Defendant herein later stopped and the offensive poles were also removed from the locus in quo.
19. On re-examination, the witness reiterated that the concrete poles, were dragged inside his land and that in the course of dragging same the crops/Napier grass were affected.
20. With that, the Plaintiff's case was closed.

**Defendant's Case:**

21. The Defendant herein, called one witness, namely, Julius Matelong, who testified as DW1 and indicated that same is a wayleaves officer, working with the Defendant herein.
22. Further, the witness testified that the Defendant herein had proposed to construct a 66KV power line to supply electricity to Lavingtone Sub-station from Kabete Sub-station.
23. It was further stated that towards the construction of the said power line, the Defendant projected to run the Electricity poles and the cables along the existing line, along the River riparian reserve and that where no wayleaves existed, new ones were to be obtained. Nevertheless, the witness stated that the construction of the electricity supply line begun on or about May 2012 along the Road reserve and the existing powerline Wayleaves.
24. Be that as it may, the witness continued and stated that subsequently the construction of the electricity supply lines was suspended after some residents of Lavington filed and/or lodged a Complaint with NEMA and the Water Resource Authority Management.
25. Other than the foregoing, the witness also testified that later on the license which was issued by NEMA and on whose basis the electricity supply line was being erected was revoked and as a result of the revocation, the construction of the powerline aborted.
26. Notwithstanding the foregoing, the witness testified that the poles which were erected and which attracted the complaint by the Plaintiff herein were indeed erected along the Road reserve, approximately 2 meters from the road barrier, which is adjacent to the Plaintiff's property. However, it was pointed out that the powerlines and/or poles were never constructed on a portion of the Plaintiff's land.
27. Further, the witness reiterated that there was no encroachment and/or trespass onto the Plaintiff's property and in the premises, the claim by the Plaintiff herein is not only misconceived, but is similarly misguided.
28. Other than the foregoing, the witness adopted the written statement dated the September 7, 2020, and which statement was thereby constituted as part of the witness' Evidence- in chief.



29. Besides, the witness herein also referred to the List of Documents dated the January 31, 2022, containing two documents and same sought to rely on the said Documents. Consequently, the documents at the foot of the list dated the January 31, 2022, were produced in evidence and marked as exhibits D1 and D2, respectively.
30. On cross examination, the witness stated that the Plaintiff's land, which is the subject of the instant proceedings lies adjacent to the Road.
31. Besides, the witness also stated that the electricity supply line, which was being constructed by the Defendant did not encroached to the Plaintiff's property. For clarity, the witness maintained that the poles and the electric cables were erected and laid along the road reserve, approximately two meters from the road barrier.
32. Other than the foregoing, the witness testified that upon receipt of the complaint by the Plaintiff herein, the Defendant sent a Wayleaves officer to check out on the Plaintiff's complaint and thereafter a report was prepared. However, the witness submitted that same did not avail a copy of the report to court.
33. On re-examination, the witness testified that the construction of the electricity supply line was not completed and/or finalized because the residents of Lavington Area lodged a complaint with NEMA and the complaint culminated into the revocation of the Environmental Impact Assessment that had hitherto been issued by NEMA.
34. Nevertheless, the witness further averred that there were no poles that were erected and/or laid on a portion of the Plaintiff's land at all.
35. Finally, the witness stated that there was no incident of trespass into the Plaintiff's land, that is the Suit Property, and therefore the Plaintiff's claim is not only misconceived, but is legally untenable.
36. Pursuant to the forgoing, the Defendant's case was closed.

**Submissions by the Parties:**

37. At the conclusion of the hearing, the Parties agreed to file and exchange written submissions and in this regard, the court proceeded to and decreed timelines for the filing and exchange of the written submissions.
38. Pursuant to the foregoing, the Plaintiff proceeded to and filed written submissions on the March 28, 2022, whereas the Defendant filed written submissions on the May 26, 2022. For clarity, both sets of written submissions are on record.
39. Briefly, the Plaintiff submitted that the offensive poles and the electric cables which are complained of, were erected on and laid across a portion of the suit property, belonging to and registered in the name of the Plaintiff.
40. Further, it has also been submitted that even though the poles were erected on a portion of the suit property, the Defendant herein did not procure and/or obtain the consent or permission of the Plaintiff.
41. At any rate, it was further submitted that the acts of sinking holes and erecting the concrete poles on a portion on the suit property, albeit without the consent of the Plaintiff, constituted and/or amounted to trespass.



42. In support of the foregoing submissions, the Plaintiff relied on various decisions including the decision in the case of *Joseph Kipchirchir Koech v Philip Cheruiyot Sang* (2018)eKLR, *Ochako Obinju v Zachary Oyoti Nyamongo* (2018)eKLR, *Simeon Nyachae & Another v County Government of Mombasa* (2020)eKLR, *Kenya Power & Lighting Company Ltd v Fleetwood Enterprises Ltd* (2017)eKLR and *Rhoda S. Kiilu v Giangxi Water & Hydro Power Construction K Ltd* (2019)eKLR.
43. On her part, the Defendant submitted that the Plaintiff herein had not established and/or proved the claim of trespass onto the suit property, either as claimed or at all.
44. It was the Defendant's further submissions that even though the Plaintiff had contended that the concrete electric poles had been erected on a portion of the suit property, no survey report, was ever adduced and/or tendered before the court to show whether the poles were erected on a portion of the suit property and not on the Road reserve.
45. Further, it was submitted on behalf of the Defendant herein that the Plaintiff also did not avail and/or tender to the court any assessment report, relating to the damage occasioned to the crops or otherwise by the requisite Experts.
46. Owing to the fact that the Plaintiff did not tender any agricultural assessment report, it was the Defendant's submission that no Damage to crops, was therefore established and/or proved, as required under the Law.
47. Other than the foregoing, it was also submitted on behalf of the Defendant that the poles which were erected and which attracted the complaint by the Plaintiff herein were actually erected within the road reserve, approximately 2 meter from the road barrier. Consequently, the Defendant maintained that there was no proven incident of trespass.
48. Finally, the Defendant submitted that the Burden of proof laid on the shoulders of the Plaintiff and in the premises, it was incumbent upon the Plaintiff to lay before the court sufficient and credible material, to warrant a finding in his favor. In this regard, the Counsel for the Defendant invited the Court to take cognizance of the Provisions of Sections 107 and 108 of the *Evidence Act*, Chapter 80, Laws of Kenya.

#### **Issues for Determination:**

49. Having reviewed the Pleadings filed by the Parties, the Witness Statements attached thereto, as well as the Documents filed by the Parties and having similarly reviewed the oral evidence that was adduced during the trial, coupled with the written submissions filed, the following issues are pertinent and thus germane for Determination;
  - i. Whether the Plaintiff has proved trespass, to warrant a positive finding in his favor.
  - ii. Whether the Pictures/Photographs produced by the Plaintiff have any probative value in light of Sections 106 A and 106 B of the *Evidence Act*, Chapter 80 Laws of Kenya.
  - iii. What Reliefs ought to be granted.



## Analysis For Determination

### Issue Number 1 Whether the Plaintiff has proved trespass, to warrant a positive finding in his favor.

50. From the evidence tendered by the parties and essentially by the Plaintiff, it is common ground that indeed the Plaintiff herein is the lawful and registered proprietor of the suit property, namely, L.R No. Dagoreti/Riruta/766.
51. By virtue of being the registered proprietor and/or owner of the suit property, it is obvious and beyond contest that the Plaintiff is therefore entitled to protection under the law, as far as his property rights are concerned.
52. At any rate, it is imperative to note that the rights and interests of a registered proprietor of land are underscored vide the provisions of Sections 24 and 25 of the [Land Registration Act, 2012](#).
53. For convenience, it is worthy to reproduce the foregoing Sections and same are reproduced as hereunder;
24. Interest conferred by registration Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
25. Rights of a Proprietor
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
54. Be that as it may, the critical issue herein is really not about whether the Plaintiff is the registered owner and/or proprietor of the suit property. For clarity, the issue of ownership of the suit property is not in contest and was indeed, admitted by the Defendant.
55. However, the substratum of the dispute is whether or not the offensive concrete poles which are complained against by the Plaintiff were laid on a portion of the suit property or otherwise.



56. To my mind, it was incumbent upon the Plaintiff to lay and/or place before the court evidence to show that indeed the portion of land, wherein the impugned poles, were erected fell within and/or formed part of the suit property.
57. To be able to confirm and/or authenticate whether the impugned concrete poles encroached onto a portion of the suit property, it behooves the Plaintiff to avail to the court a surveyors report, which would show the extent of the Road reserve and by extension whether the offensive concrete poles went beyond the demarcated Road reserve or not.
58. In the absence of a surveyor's report, which is the only expert report that would determine the extent of encroachment, if any, it is difficult to arrive at a conclusion that indeed there was a trespass onto and/or encroachment upon the suit property.
59. On the contrary, it is important to note that the Defendant herein contended and reiterated that the impugned electric poles were not erected on a portion of the suit property, but on the road reserve.
60. In the premises, there is a serious contest as to whether the impugned concrete poles were laid within the Plaintiff's parcel of land or within the Road reserve, the latter being the position adverted to by the Defendant.
61. Given the foregoing situation, what becomes apparent is whether or not on a balance of probabilities, the Plaintiff has proved and/or established the incidence of trespass onto the suit property.
62. To be able to answer the foregoing question, it is appropriate to recall that the burden of proof lies on the shoulders of the Plaintiff and that where the burden is not discharged by the Plaintiff then the claim ought and should fail.
63. To vindicate the foregoing position it is imperative to take cognizance of the holding in the case of *Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard)* [2018] eKLR, the Court expounded on section 107 and 109 of the *Evidence Act* as;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller vs Minister of Pensions* (1947) explained as follows:-“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

64. Other than the foregoing decision, the incidence of burden of proof and on whom same lies was succinctly espoused vide the decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the Court of Appeal held as hereunder;

On perusing the judgment and hearing Mr. Mwangi, what comes through clearly and was repeated several times over, was the position that since the appellant did not deny the facts stated in the affidavits of the 1<sup>st</sup> respondent then he was deemed to have admitted those facts. With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence , when the 1<sup>st</sup> respondent came to court, he was bound by law and practice to lay the evidence



to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1<sup>st</sup> respondent that:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

That he did not do. The claim he put forth that three limited liability companies existed, they had shareholders including himself, each holding a certain percentage of shares, were not proved. The claim that those companies held certain properties which were sold and transferred was also not proved. Accordingly, the learned judge fell in error to assume that those facts indeed existed.

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

65. Based on the jurisprudence flowing from the foregoing position, it is crystal clear that the Plaintiff must discharge the Evidential burden, before the Defendant can be called upon to answer and not vice-versa.
66. In respect of the subject matter, I note that the Plaintiff has contended that the Defendant witness did not produce before the court the report made by the wayleaves office, namely, Mr. Francis Njoroge and that such failure, would connote that there was assumed trespass.
67. However, it is settled law that it is the Plaintiff who is supposed to prove his/her case and where the standard of proof is not met and/or satisfied, the Plaintiff cannot seek to rely on any defect, whether real or imagined, in the Defense case.
68. In a nutshell, I find and hold that the Plaintiff has not discharged the burden of proof, placed upon same as required vide the Provisions of Sections 107, 108, and 109 of the *Evidence Act*, Chapter 80, Laws of Kenya as read together with the Legion of case law in respect of the Burden of proof.

**Issue Number 2 Whether the Pictures/Photographs produced by the Plaintiff have any probative value in light of Sections 106 A and 106 B of the *Evidence Act*, Chapter 80 Laws of Kenya.**

69. During and in the course of the Plaintiff's case, the Plaintiff tendered in evidence and produced photographs showing some of the concrete poles lying down on what was said to be a portion of the suit property.
70. On the other hand, it was also contended that the concrete electric poles had been pulled across a portion of the suit property and that in the course of doing so, the Plaintiff's Napier grass which were growing on the suit property were damaged.
71. Though the photographs were admitted as evidence before the court, the question however, is not about admissibility, but on the probative value, if any, attachable thereto.
72. Before endeavoring to ascertain whether the pictures/photographic images have any probative value, it is worthy to recall that there was no Electronic Certificate, which was attached and/or adduced by the Plaintiff in respect of the impugned photographs.



73. To my mind, in the absence of electronic certificate duly signed by the author and/or originator of the photographs, the said photographs though produced as Evidence, are devoid of probative or meaningful value.
74. Consequently, even though same were adduced in evidence and it is discernable that there are electric poles lying on the ground, the court cannot be able to put the meaning to the photographs and thereby arrive at a conclusion that same had occasioned any damage (sic) the Napier grass that was growing on the suit property.
75. In the premises, I am afraid that yet again there was no evidence tendered to show whether the concrete electric poles were pulled across a portion of the suit property or whether any damaged accrued or arose from any such actions complained of.
76. As to the centrality and significance of electronic certificate, where one seeks to rely on photographs, which are generally electronically produced, it is important to take cognizance of the holding of the court in the case of *Samwel Kazungu Kambi vs Nelly Ilongo & 2 Others* [2017] eKLR where the court said:
21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.
  22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.
  23. The conditions set down in Section 106B were not met by the Petitioner. He could not therefore be allowed to produce the photographs. His claim that the respondents were estopped by virtue of Section 120 of the *Evidence Act* from challenging the evidence having not raised the issue at the pre-trial conference is not valid. The production of evidence did not feature in the pre-trial conference. Knowing the kind of the evidence he intended to rely on, it was upon the Petitioner at that early stage to bring up the discussion. He did not do so. The respondents never gave him any hint that they would not be opposing the production of the photographs. The estoppel envisaged by Section 120 of the *Evidence Act* is therefore not applicable in the circumstances of this matter.
77. Based on the foregoing, it is my finding and holding that the photographs/ pictures, adduced in evidence were little, if any, or no probative value at all.

### **Issue Number 3 What Reliefs ought to be granted.**

78. The Plaintiff herein had contended that the electric poles had been laid and/or erected on a portion of the suit property. Consequently, the Plaintiff submitted that there was trespass onto the suit property herein.
79. Suffice it to note, that trespass connotes a non-consensual entry and/or intrusion onto the land or property of another, in this case the Plaintiff.



80. Perhaps, at this juncture it is appropriate to take cognizance of the provisions of Section 3 of the Trespass Act Chapter 294 of the Laws of Kenya, which provides as hereunder;

3. Trespass upon private land

- (1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
- (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

81. However, having reviewed the evidence that was adduced herein, I have come to the conclusion that the Plaintiff did not adduce sufficient and/ or credible evidence to prove trespass. Nevertheless, I must point out that trespass is actionable per se and therefore, if the Plaintiff had proven trespass (which is not the case), I would have been constrained to make an award to and in favor of the Plaintiff.

82. For the avoidance of doubt, the award would have been nominal taking into account that the alleged trespass,( which has not been proven did), did not occasion any material damage to the land/suit property.

83. Simply put, I would have been constrained to award to and in favor of the Plaintiff the sum of Kshs.200,000/= only, on account of Nominal Damages.

**Final Disposition:**

84. Having dealt with and/or addressed the issues that were outlined for determination, it is evident and/ or inescapable that the Plaintiff's suit has not been proven to the requisite standard.

85. Consequently and based on the foregoing, the Court comes to the conclusion that the Plaintiff's suit herein, is devoid and bereft of merits and thus courts Dismissal.

86. In a nutshell, the Plaintiff's suit be and is hereby Dismissed, albeit with no orders as to Costs.

87. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022.**

**HON OGUTTU MBOYA,**

**JUDGE**

**In the Presence of;**

**Kevin Court Assistant**

Mr. Nyangena for the Plaintiff.

N/A for the Plaintiff.

