



Stephen Karanja Chege v Rural Electrification Authority (Environment & Land Case 869 of 2017) [2022] KEELC 2687 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2687 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 869 OF 2017**

**JG KEMEI, J
JUNE 30, 2022**

BETWEEN

STEPHEN KARANJA CHEGE PLAINTIFF

AND

RURAL ELECTRIFICATION AUTHORITY DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendant vide a Complaint dated December 14, 2017 and prayed for Judgment for;
 - a. Orders for the removal and relocation of the Defendant's power poles and cables from parcel No Gatamaiyu/kamuchege/69 (suit land) and/or eviction of the Defendant of from the suit property.
 - b. In The Alternative the Court orders for compensation of the portion of the suit property occupied by the Defendant's power poles and cables to the Plaintiff in the sum of Kshs. 60,000,000/=.
 - c. General damages for trespass.
 - d. Costs of the suit.
 - e. Interests on i and ii above from the date of filing this suit to its final determination.
 - f. Any such further order or other relief as this Honorable Court may deem fit and just to grant.
2. The Plaintiff is a Kenyan citizen residing and working for gain in the United Kingdom. It is his case that he is the registered owner of land parcel known as Gatamaiyu/kamuchege/69 in Kiambu County which he acquired in 2001 whereas the Defendant at all material times carried out a project referred to as AFD Rural electrification phase 11. That in May 2013, the Plaintiff discovered that the Defendant had



in the course of implementing the said project, laid down electricity poles and power cables across the subject land without notifying or procuring the necessary way leave consent from him. That through his wife, the Plaintiff wrote to the Defendant on the relocation of the said poles and cables which the Defendant has ignored hence his claim for trespass with particulars enumerated as; illegal fixing of poles and cables without the Plaintiff's consent, occupying the suit land without permission, failure to honor the demand letters for relocation.

3. That as a result of the said trespass, the Plaintiff has been deprived of his property and a source of livelihood on account that the land is now limited in its use.
4. The Defendant denied the Plaintiff's claim vide its statement of defence dated January 25, 2018. It admitted carrying out the project which it described as AFD Rural electrification Phase 2 but denied that it never notified or obtained the relevant way leave consent from the Plaintiff. It denied any allegations and particulars of trespass on its part and put the Plaintiff to strict proof. The Defendant contended that the plaintiff does not disclose any cause of action against it and urged the Court to dismiss the suit with costs.
5. In his Reply to Defence dated March 22, 2018, the Plaintiff reiterated his averments in the plaint and annexed photos of the power line on his land.
6. The matter was set down for hearing on November 30, 2021. Vide the Plaintiff's Power of Attorney dated October 22, 2020, Gladys Wambui Karanja the Plaintiff's wife testified as PW1. It was her testimony that the suit land measuring about 12 acres is registered in her husband's name and is divided into two portions by a public road. That the land was leased out in 2006 to a third party and when she visited it in 2013, she found high voltage power lines cutting diagonally across the land rendering it fit for agricultural use only. That she proceeded to Kenya Power to lodge a complaint because no consent had been sought from them. She met a Mr. Marete in charge of way leaves who directed her to Rural Electrification and produced P.ex1 & 2; letters dated May 15, 2013 and May 29, 2013 raising her complaints. That later she got a call from Mr Gitau of Rural Electrification who visited the suit land and told her that the contractor made a mistake and produced P.ex.3 & 4; letters dated July 23, 2013 and October 29, 2013 in support. That despite the admission no action was taken by the Defendant forcing them to come to Court for redress. That the electric poles have been erected on the most viable part of the land. That the land is sloppy and with the good part having been occupied by the poles, there is no place for her to construct houses/buildings.
7. In cross-examination, PW1 informed the Court that the land is leased to a third party who carries out agribusiness of dairy farming on the land under lease. She explained that the land is divided into two parts measuring 2 and 10 acres with the power lines passing through the larger parcel measuring 10 acres. That the power lines could have been erected sometime in 2012, 2 years before she discovered. PW1 admitted that she did not produce any valuation report in Court and her delay in filing the suit in 2017 despite discovering the power lines in 2013, was due to logistical issues. She informed the Court that though her advocate informed her that the Defendant had proposed to relocate the power lines to another place, no action has been taken to date.
8. The Plaintiff closed his case at that point. The Defendant elected not to call any witness.
9. On behalf of the Plaintiff, the firm of Wangari Ndirangu & Co. Advocates filed submissions dated December 14, 2021. Three issues were drawn for determination; whether the Defendant trespassed into the Plaintiff's property; whether the Defendant is liable for general damages and at what quantum and whether the Defendant is liable for costs.



10. On the first issue, the Plaintiff submitted that the suit property belongs to him and the Defendant put high voltage power cables as shown in the pictures annexed to Reply to defence. That there were several letters from the Plaintiff to the Defendant which show that the Defendant was trespassing on the suit land. He cited the governing provisions under Section 46 of the *Energy Act* as highlighted in the case of *Ajit Bhogal v Kenya Power & Lighting Co. Ltd* [2020] eKLR and submitted that the Defendant flouted the said provisions in erecting the power lines without following the law.
11. Secondly, the Plaintiff maintained that trespass is a tort and it accrues general damages as was held in the case of *Ajit supra* and *Philip Ayaya Aluchio vs Crispinus Ngayo* [2014] eKLR. That in a case as this one the Plaintiff need not proof that he has suffered any specific damages or loss to be awarded damages. That it is the duty of the Court to assess damages and award damages depending on the unique facts and circumstances of each case. That the sum of Kshs 20 million for damages is adequate on account that the land is rendered useless by the power lines crossing over the land and no building can be constructed on the land save for tiny houses, That the intentions of the Plaintiff to construct commercial buildings has been thwarted by the existence of the power lines.
12. Last but not least the Plaintiff submitted that generally costs follow the event. That the Plaintiff attempts to amicably settle the dispute out of Court bore no fruit and urged the Court to award him Kshs. 60M being the subject land value in 2017.
13. The Defendant filed its submissions dated February 25, 2022 through the firm of Ochieng, Achach & Kaino Advocates. Similarly, three issues were drawn for determination; whether the suit was filed out of time; whether the Plaintiff acquiesced to the alleged trespass and how much damages should be paid, if at all. The Defendant referred the Court to PW1's cross-examination evidence that despite learning of the trespass in 2013, the instant suit was filed in 2017 over a period of 12 months after the cause of action accrued.
14. The Defendant relied on the case of *Bosire Ogero vs Royal Media Services* (2015) eKLR where the Court stated as follows;

“ The law of limitation of actions is intended to bar the Plaintiffs from instituting claims that are stale and aimed at protecting Defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of Court to entertain claims and therefore if a Matter is statute barred, the Court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the Court cannot entertain a suit which it has no jurisdiction over.”
15. That the Plaintiff filed suit out of time thus ousting the jurisdiction of the Court in entertaining the matter.
16. On whether the Plaintiff acquiesced to the alleged trespass the Defendant submitted that it was admitted by the Plaintiff that the land was leased to a third party during the erection of the power lines and therefore the Plaintiff ought to have known about the erection of the power lines and that the fact of filing suit in 2017, 4 years later is a sign of acquiescence and also that the power lines had not affected the use of the land. That the act of the Plaintiff condoning the actions of the Defendant in erecting the power lines shows that he had no problem with the presence of the said power lines being on the land and the act of filing suit was an afterthought. That in so doing the Plaintiff has been caught up by the doctrine of laches in filing suit 4 years after the alleged cause of action hence the maxim equity favours the vigilant and not the indolent. That the Plaintiff's claim being based on tort, the same was extinguished after three years in line with Section 4(2) of the Limitations of Actions Act.



17. The Defendant referred to the case of *The Lindsay Petroleum Co vs Hurd* (1874) L.R 5 PC 221 where the Court stated as follows;

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material.”

18. That the claim of the Plaintiff is therefore waived by the conduct of the Plaintiff in failing to file the suit within the statutory timelines.

19. With respect to damages, the Defendant submitted that this claim should fail on account of ; lack of a valuation report to show the value of the land affected by the electric poles; Kshs 60 Million proposed by the Plaintiff is outrageous considering that the power lines affected only a Section of the piece of land; the land is leased and has been deployed for agricultural business and hence the argument that it is rendered useless is not correct; compensation sought by the Plaintiff is exploitative in nature and should be disallowed.

20. The Court was invited to apply the decision in *Fleetwood Enterprises Ltd vs Kenya Power & Lighting Co Limited* (2015) eKLR where the Court held that;

“The award of damages for trespass is discretionary in nature. The discretion by the Court should however be exercised judiciously and all relevant factors should be considered. The value of the land is a determinant factor where parties consent that the power-line should not be moved.”

21. Further on the issue of damages awardable the Court was invited to apply the dictum in *John Kiragu Kimani vs Rural Electrification Authority* (2018) eKLR; *Peter Mwangi Kabue vs Rural Electrification Authority* (2018) eKLR; *Duncan Nderitu Ndegwa vs KPLC & Anor* (2013) eKLR; *Rhoda S Kiilu vs Jiamgxi Water & Hydropower Construction Kenya Limited* (2019) eKLR.

22. Finally, the Defendant submitted that a sum of Kshs 200,000/- would be sufficient in compensation should the Court be minded to award damages to the Plaintiff.

23. Having considered the pleadings on record, the evidence adduced at the hearing, the written submissions and all the materials placed before I find the issues that commend themselves for determination are;

- a. Whether the claim of the Plaintiff is time barred
- b. Whether the Plaintiff has proved trespass.
- c. Whether the power lines should be relocated
- d. Whether the Plaintiff is entitled to loss of profits and or damages for trespass.
- e. Who meets the costs of the suit?



Is the suit time barred?

24. It is on record that an objection was raised by the Defendant before my Sister the Hon Lady Justice Gacheru on the 27/6/2018 inter alia arguing that the Plaintiff's suit was time barred. Hon Lady Justice Gacheru heard and determined the objection and vide a ruling dated the 14/6/2019, pronounced herself on the matter and found it unmerited and dismissed with costs. That Ruling was not appealed against or reviewed and thus still in force.
25. The Defendant again raised this objection in its final submissions and it is my firm view that the objection is *res judicata* and is not available for determination.

Has trespass been proved?

26. Section 3(1) of the *Trespass Act* defines trespass as follows;

“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.”
27. According to the 10th Edition of *Black's Law Dictionary* trespass is defined as follows;

“An unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
28. *Clark & Lindsell on Torts*, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.
29. In *Clerk and Lindsell on Torts* 16th Edition Paragraph 23-01 a continuing trespass is defined as;

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”
30. It is the Plaintiff's case that he is the registered owner of the suit land. A copy of the title deed issued in his name was annexed to his pleadings and produced in evidence. That the Defendant has erected power lines on his land dubbed AFD Rural Electrification Project Phase 11 on the land spanning 10 acres. That as a result the user of the land has been limited to only agricultural and no commercial buildings can be constructed as it will interfere with the power lines. That even trees cannot grow tall as they have to be cut to avoid interfering with the power transmission lines.
31. It is to be noted that this case remains by and large undefended. I say so because the Defendant elected not to call any witnesses to rebut the case of the Plaintiff. It is trite that submissions cannot take the place of evidence as submissions as the name suggests is the summation of a party's case. That be the case the Plaintiff bears the onus of proving his case before the Court.
32. The Plaintiff led evidence that on discovery of the power lines in May 2013, through his investigations he established that it is the Defendant that had erected the power lines and immediately instructed his wife to write to the Defendant to demand the removal of the same. See the letter dated the 29/5/2013. It was his evidence that no response was received from the Defendant prompting PW1 to lodge her



complaint at Kenya Power & Lighting Limited. On the 15/5/2013 the said Kenya Power responded to the PW1 and stated as follows;

“Complaint on parcel Gatamayu/Kamuchege/69.

Your letter dated the 6/5/2013 on the above subject matter refers.

Our investigations in this matter reveal that the power line that traverses your land is meant to supply Nyamuthanga market. It is an AFD Phase 11 project which was commissioned under the management of MOE & Consultants. Any issues arising on this project are addressed to REA. REA is based at the Chancery Towers Valley Road. Kindly consult with them.”

33. On the 23/7/2013 Rural Electrification Authority (REA) wrote to the Managing Director NGM Company Limited a letter addressed to its Managing Director Eng. Muturi and stated as thus;

“AFD Rural electrification project phase 11; Gatamayu/Kamuchege/69 -Gladys Wambui Chege.

We are in receipt of a letter of complaint from Mrs Gladys Wambui Chege regarding an AFD Phase II power line traversing thru her property L.R. Gatamaiyu/Kamuchege/69. The complainant stated that she did not give wayleave consent for the power line and wishes that the power lines are removed from their land and an alternative route be sought. See attached copy for your ease of reference.

Our office referred the matter to the consultant M/S Aberdare Engineering Ltd to request your office to sort out the matter. See a copy of the letter attached.

The AFD line has been confirmed by Kenya Power. See a copy of the letter attached herewith. Your company NGM Company Limited was handling the Central Province Region. We have had discussions with your Mr. Gitau on the same issue but no action has been forthcoming you're your office.

Mrs. Chege has threatened legal action. Please treat this matter as urgent to avoid litigation.

Urgently revert to us on the progress made soonest.

Yours faithfully

For: Rural Electrification Authority

Eng. David Rogoncho

Chief Manager, Design

CC. The Managing Director,

Aberdare Engineering Limited – Attn: Eng. Njaaga

CC. Mrs. Gladys W. Chege

Box 55853, Nairobi.”

34. The Plaintiff counsel wrote a letter dated the October 29, 2013 addressed to REA and copied to Aberdare Engineering Limited and demanded the removal of the power lines in default file suit in Court.



35. Under para 3 of the statement of defence the Defendant admits that it was in charge of carrying out a project referred to as AFD Rural electrification project phase 2. In its submissions the Defendant has not denied entering the Plaintiffs land and erecting the power lines only to state that the Plaintiff acquiesced to its actions and blamed the Plaintiff for filing suit outside the 3 years limitation period with respect to trespass. In further submissions the Defendant urged the Court to order the removal of the power lines thus fostering the finding that the said trespass was acknowledged and admitted by the Defendant.
36. In summary it is the finding of the Court that trespass has been proven.

Whether the power lines should be relocated

37. The Defendant is permitted by the provisions of Section 46 of the *Energy Act* to enter into a person's land for purposes of laying or connecting electric supply line. The Section provides as follows;
- “(1) No person shall enter upon any land, other than his own—
- a. to lay or connect an electric supply line; or
- b. to carry out a survey of the land for the purposes of paragraph (a), except with the prior permission of the owner of such land.
- (2) The permission sought in Subsection (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry.”
38. The Plaintiff's case is that the Defendant entered his land and erected power lines without his knowledge and consent; the erection of the power lines has limited his usage of the land; renders the land uneconomical in terms of construction of high rise buildings and limited it to farming of crops excluding trees.
39. There is no evidence on record that the Defendant complied with the provisions of Section 46 set out above. The erection of the power lines were therefore illegal and contrary to the law. The Plaintiff led unchallenged evidence that no permission was sought; no particulars of entry were given; no compensation was paid for the entry and erection of the power lines.
40. I shall make the appropriate orders in the end.

Damages for trespass

41. The Plaintiff has sought loss of profits. In leading evidence, the Plaintiff argued that the sum of Kshs. 60 million is payable as compensation for the land. I find that this claim was not proved. The Plaintiff failed to produce any valuation report to support the averments. This claim is dismissed given that it is an alternative claim.
42. Having established that there was trespass the next question is the quantum of damages. It is trite that the award of damages is discretionary on the part of the judge. Being discretionary the judge is called upon to so exercise discretion judiciously and consider all relevant factors and disregard irrelevant ones. The Plaintiff has urged the Court to grant him Kshs 20 Million under this heading.
43. It is also trite that trespass is actionable *per se* even when a party has not suffered actual loss. In this case it is has been proven that the Defendant trespassed onto the land of the Plaintiff without any permission nor notice and proceeded to erect a power line comprising of countless electric lines over his land. Unchallenged evidence has been led that the power lines bisects the land into two halves making



development planning a practical challenge especially in construction of high rise buildings and tree planting given the sloppy terrain of the land. I have considered the claim as a whole and the fact that the land has not been wholly affected as can be seen in the activities ongoing on the land of dairy farming. I have also considered that the claim of the Plaintiff is not denied. Discussions with respect to removal of the power line has not met with any serious commitment from the Defendant leaving the Plaintiff to seek legal redress which in my view was totally unnecessary. The time that the continuous trespass has been ongoing without any remedy by the Defendant has also been considered as a factor. Given the totality of the above considerations I grant the Plaintiff the sum of Kshs 5 Million being damages for trespass.

Costs

44. Costs follow the event and in this case I see no reason to deny the Plaintiff costs of the suit.
45. Final orders and disposal;
 - a. The Defendant be and is hereby ordered to remove and relocate its power poles and cables from the Plaintiff's property namely Gatamaiyu/kamuchege/69 within the period of 90 days. In default eviction to ensue.
 - b. Prayer b is declined.
 - c. The Defendant be and is hereby ordered to pay the Plaintiff the sum of Kshs 5 Million being general damages for trespass.
 - d. The Plaintiff shall be paid the costs of the suit and interest of c above at Court rates from the date of this judgment until payment in full.
46. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 30 TH DAY OF JUNE 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Wangari Ndirangu for Plaintiff/Applicant

Amemba for Defendant

Court Assistant – Phyllis Mwangi

