Mwandogho v Kenya Elecrticity Transmission Company Limited (Environment & Land Case 184 of 2018) [2022] KEELC 3923 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3923 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 184 OF 2018

LL NAIKUNI, J

JULY 28, 2022

BETWEEN

ELIAS MAGHANGHA MWANDOGHO ..... PLAINTIFF

AND

KENYA ELECRTICITY TRANSMISSION COMPANY LIMITED .. DEFENDANT

JUDGMENT

I. Preliminaries

1. On 15th August, 2018, the Plaintiff instituted this suit vide a Plaint and verifying Affidavit dated 4th June, 2018 against the Defendant herein. He held that at all times to the filing of this suit he was the registered and/or beneficial owner and entitled to the possession of all that parcel of land known as title No. Mbololo/Tauasa/2442 within Mbololo area Voi sub-County in Taita Taveta County, measuring approximately 1.2 Hectares (hereinafter referred "The Suit Property"). The Plaintiff averred that sometimes in the year 2017, the Defendant wrongfully entered into the suit property without the knowledge and/or consent of the Plaintiffs and erected poles and power transmitting lines or cables which traverse the suit property.

2. The Plaintiff further averred that the Defendant proceeded to connect and supply power to the neighboring areas through the said poles and the high and low voltage power transmitting lines which it was not in charge of operating and maintaining. By virtue of the acts of trespass the Defendant had misused damaged, wasted, destroyed and/or degraded the suit property by reason of which, the Plaintiff had been deprived of the use and enjoyment of it and the Plaintiff had suffered loss and damage.

3. The Defendant, a State Corporation established under the State Corporation Act, Cap 446 of the Laws of Kenya for the provision of transmission lines in Kenya filed a defence to the case. Pursuant to the mandate of Defendant to Sessional paper No. 4 of 2004 on Energy to Plan, design, develop, maintain and operate Kenya's national transmission grid, open up geographical areas in the nation that

were without access to national grid and provide much needed and desired power supply to every part of the Country. The suit land was on the Mombasa – Nairobi 400V transmission line.

4. According to the It denied all the allegations and held that they had entered into an agreement with the Plaintiff for the use of his land for the Way Leave and a compensation policy whereby all PAPs were compensated an amount of 30% of the total value of the limited land used for the right of way and Way Leave. Indeed, they held that the compensation amount was set aside for the Plaintiff which they were ready to pay anytime. They denied being trespassers onto the suit land. For these reasons, they wondered the reason the Plaintiff had instituted this suit at all.

II. The Plaintiff's Case.

5. From the filed pleadings, the Plaintiffs prayed that judgment be entered against the Defendant severally for:-

   a. A declaration that the Plaintiff was rightful and/or lawful owner of the property known as Title No. Mbololo/Tauasa/2442 within Mbololo area Voi Sub - County in Taita Taveta County measuring approximately 1.2 HA and the Defendant is a trespasser thereon.

   b. A Permanent injunction restraining the Defendant whether by its servants authorized agents, employee or through anyone deriving title through it or otherwise howsoever from continuing with the erection or laying of power transmission lines or cables, pylons and/or any other structures on the suit property and/or in any manner whatsoever dealing with the suit property.

   c. A mandatory injunction to issue compel the Defendant to remove the poles and the power transmitting lines and other structures erected on the suit property failing which the Plaintiffs be authorized to remove the same at the Defendant's expense.

   d. General damages for trespass.

   e. Special damages for Kshs. 50,000/= (from valuation Reports).

   f. In the alternative to prayer (b), (c) and (d) above. The Plaintiff be compensated by the defendant in the sum of Kshs. 600,000/= for the way leave trace area and/or such compensation as will be assessed by this Honorable Court for the way leave over suit property.

   g. Costs of this suit and interest at such rate and for such period of time as the Honorable Court may deem fit to grant.

   h. Any such other or further relief as this Honorable Court may deem appropriate.

6. On the 10th November, 2021 the Plaintiff's case commenced. He summoned two (2) witnesses who testified by tendering evidence in chief, cross examined and re – examined thereof. By the consent of the Learned Counsels of both the Plaintiff and the Defendant, it started with the evidence of the Land valuer.

Examination In Chief of Pw - 1 Harun Shake By Mr. Mwakireti. He is Sworn and Testifies in English Language

7. He testified that he was a Land Valuer by Profession working for a company trading in the names and style of Messrs. Njihia Mwaka Rashid. He stated that they had been in the market for over twenty (20) years. They were land valuers. He was a holder of a degree in Land Economics from the University of Nairobi. His certificates were attached to the Valuation Report dated 26th September, 2017. He also

attached his annual Practicing Certificate there. He testified that they received instructions to value all that parcel of land known as Plot No. Mbololo/ Tausa/2442 from Mr. Elias Maghanga Wandogho. The purpose for the instruction were for the valuation and inspection part of the land where the electricity transmission line were carried on it on the ground.

8. He informed Court that in the course of the valuation exercise, they found out that Ketraco had already erected power high voltage lines. This was on Page 7 of the valuation report where there are coloured photographs. According to the report, 0.47HA (Approximately 1.16 acres) of land was utilized by Ketraco. They established that the value of the land was a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/-) per acre as the market value in the year 2017. In the year 2012 they had been engaged by Ketraco for the Way Leave of Mtito Andei area. At that time the current value was Kshs. 600,000/=. That was the general consideration for valuation. He produced the Valuation report dated 26th September, 2017 and marked as the Plaintiff Exhibit No. 5. That was all.

Cross Examination of PW – 1 by Mr. Kiarie

8. His instructions by Ketraco was for purposes of Way Leave within the said area which included the suit land for the Plaintiff. Further, the Valuation exercise was the purposes of compensation of the Person Affected by the Project (PAPs). They were valuing as per the parcels of land and the payments. He never carried out any valuation for this particular parcel, the suit land. Referring to Page 11 of their Valuation Report dated 18th October, 2011, he informed Court that for this particular area, the value they apportioned for a sum of Kenya Shillings Two Hundred (Kshs. 200,000/=) per acre. That is the Ndome – Taita Hills Mbololo area.

9. He stated that he relied on the surveyors report prepared by Mr. Mwanyungu, an experienced Land Surveyor, to know the affected area. He admitted that they never had a Land Surveyor on the ground. They were working using the report by the said Surveyor. They were aware where the Way Leaves were but did not know the exact land for the Plaintiff. He said that he could not comment on another profession. If there any variances on the valuation, it should be sorted out by the profession. While responding to a query asked by the Honorable Court, on what was considered to determine the market value, he stated that these included the settlements within the area, the access and availability of service, water, roads, electricity and the types of soils suited for that area.

Re - Examination of PW – 1 by Mr. Mwakireti Nil

Examination in Chief of Pw - 2 Elias Maghanga Wandogho by Mr. Mwakireti. He is Sworn and Testifies In Kisawhili Language

10. He testifies that he lived at Mshangolini Taita Taveta. His identification card number was 16005796. The date of issue was on 24th May, 1996. He was a farmer and the named Plaintiff herein. He recorded a witness statement filed in Court on 13th March, 2017 and dated 7th March, 2019. The statement was adopted and admitted as evidence of this court with no objection. The list of documents admitted with no objection. The documents are Marked as "Plaintiff Exhibit 1 to 4".

11. In the year 2017, he found out that Ketraco had been on his land. He did not live on the land. He lived elsewhere upon getting old. He refuted having ever seen the document dated 26th October, 2012 by the Defendant. His postal address was 1010 Wundanyi yet the address used on the letter was for the number of his title deed, Tausa 2442. He averred that the amount of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) being offered by Ketraco was not sufficient. He sated that he had not even used that amount to buy the land which was awhile earlier. The area they have taken was not utilizable any more. It was now a road. He could not cultivate it anymore. They took an area

measuring 0.941 acres. He used the land for cultivation of food and other farm products. He now urged court to be paid a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) and costs of the case.

Cross Examination of PW – 2 by Mr. Kiarie:-

12. Before he used to live on the land. He had built on it but he moved out. He cultivated there upto the year 1992. They would grow food crops and some wood trees. The last time he planted trees from there was in the year 1982. He never left anyone on it. He knew his neighbors. He never met them occasionally. They were the ones who sold him the land. When meetings were convened by Ketraco, he never got to hear or know about them.

13. He was not aware of the height of the Transmission lines. He feared to cultivate under the transmission lines. His land was in the upper side which was taken and utilized by Ketraco. He once again refuted ever having seen the Letter of Offer by Ketraco dated 26th October, 2012. He was seeing for the first time. They would be taking it to the land. He had moved out from there. By that time, his land was not of that value of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=). He never bought it at that price.

    Upon finding out that Ketraco had constructed a line on his land he never went to their offices but he send others there.

Re - Examination of PW -2 by Mr. Mwakireti

14. There were trees planted and grown on it before Ketraco took over. He also had a shelter on the land. The area they took was different from the one they never took. From the demand letters written to Ketraco there were never any responses. That was the reason he filed the case. That is all.

III. The Defendant's Case.

The Defendant summoned one witness.

Examination in Chief of Dw – 1 - Edel Sharon Loko. She is Sworn and Testifies in English Language.

15. She was a Land Economist and a registered Land Valuer. She worked for Ketraco. She signed a witness statement dated 29th October, 2018 and filed in Court on 29th October, 2018.

    She testified being familiar with the Transmission line for Mbololo Taita area. It was started in the year 2011 and completed in the year 2017. For any project, they always had an action plan. It captured and involved the PAPs. They hold frequent meetings with PAPs and the location area Chief. In this case, the Kilo volts was 60 Meters radius. The Pillars were 30 meters on the left and 30 meters on the right. The team of Valuers value the area. She stated that if there were trees they recorded and if there were any plantations such as Maize they used the Agricultural experts. For land, it was the width that was used to estimate the acreage.

16. They engaged land valuers to take the measurements and valuation estimates. She informed Court that, the compensation policy for Ketraco was at 30% per for our framework for the Way Leave of the value of the limited land used. Its not compensation for compulsory acquisition of the land. Its for the limited use of the land. PAPs were not refused to use it but it had to be within an agreed radius. For instance, the only restrictions on the land use was they could not plant long trees or houses under the transmission line. The transmission line was 40 - 45 feet high. According to her, the land was still usable for other purposes apart from growing trees and construction of structures. For ½ an acre, the value was Kshs. 200,000/=. It was calculated at 50% which was even higher than what the Compensation

policy for Ketraco offered which was at 30% of the total value of the land. The Resettlement Plan for Ketraco we had not excising any land apart from meeting the two (2) conditions. If that land was the only portion for the PAPs had, then they would be compensated for the whole land and the affected PAP relocated elsewhere.

17. She produced the Valuation report and all the documents by the Defendants and marked as "Defence Exhibit No. 1 - 4" as evidence Ketraco. She emphatically stated that, Ketraco had always been and was ready to pay the Plaintiff a sum of Kenya Shillings Ninety Four Thousand One Hundred and Ninety Four and Fifty two cents (Kshs. 94,194.52). That was all.

Cross Examination of DW – 1 by Mr. Mwakireti Advocate:-

18. They got the Valuers to confirm the acreage of the land. They did not have a Surveyor's report to know the exact acreage utilized by Ketraco. The sketch map also did not have the acreage of the land utilized by Ketraco. She did not have evidence to show the PAPs were consulted as referenced from Page 13 of the Ketraco Policy report. As regards the Letter of offer, she admitted that there was no evidence of its receipt or service. Hence, she held that he may not have in any way accepted it. She indicated that they would normally use the Chief to dispatch letters as they were the ones who knew their people well. The Chief's barazas had been enough.

19. She confirmed that they had never been able to trace the PAPs to conclude the contract. On being referred to the averments of Paragraph 8 of her Witness statement, she admitted that the Plaintiff had never communicated his acceptance of the offer given by Ketraco and as a result, a grant of easement was never prepared for his execution. She held that the Defendant has never been able to trace the Plaintiff to conclude signing of easement prior to the filing of this case.

20. On further on making reference to the contents to Paragraph 12 of her Witness Statement, she refuted that Ketraco had trespassed onto the suit land as the Plaintiff since the year 2012 had been aware of the Defendant's project and only went missing once he was issued with the letter of offer. Indeed, she stated that the Plaintiff's disappearance led to the construction on the suit property being done in the year 2017 yet it had been scheduled to be completed in the year 2014 on the suit land. That was all.

Re - Examination of DW – 1 by Mr. Kiarie Kariuki:-

21. The survey had been done on the land. I meet the PAPs through the Chief. This letter was my copy in the file. I do not have a returned letter by the Chief. From the area, everyone else was paid. That is all.

II. The Submissions

22. On 10th November, 2021, upon the closure of both the Plaintiff and Defendant case I direct that each party granted 21 days. Plaintiff file and serve and then Defendants to file and serve within the 21 days of written submissions. Matter to be mentioned on 18th January, 2022 for compliance and taking a judgment date.

A. The Plaintiff's written submissions

23. On 1st February, 2022, the Learned Counsel for the Plaintiff the Law Firm of Messrs. Mwakireti & Asige Advocates filed their written submissions dated 31st January, 2022. Mr. Mwakireti Advocate submitted that the Plaintiff was the registered and legal owner of the suit property. He held that in the year 2017 the Defendant wrongfully entered into the suit property without his consent or authority and erected poles and power transmitting lines which traversed the suit property.

He argued that by virtue of the trespass, the Defendant had misused, damaged, wasted, destroyed and degraded the suit property. In the process the Plaintiff had been deprived of the use and enjoyment of the property and hence suffered loss and damages. The damages were in form of deprived the use and enjoyment, cutting of trees which were growing along the area where the poles and the transmission lines traversed, the Plaintiff would no longer utilize the affected area to grow trees or put up development due to the erected poles and the transmission lines and the erection of illegal structures on the suit property had degraded and devalued the suit property.

The Learned Counsel contended that the Defendant on 19th October, 2018 filed its defence denying trespassing the suit property.

24. They asserted that in October, 2012 it had issued the Plaintiff with a letter of offer which set out the way leave trace of 60 meters wide corridor transmission line traversing approximately 0.941 acres of the suit property and that the Plaintiff would be compensated a sum of Kenya Shillings Ninety Four Thousand One Hundred and Ninety Four Fifty Two cents (Kshs. 94,194.52/=).

The Learned Counsel asserted that the Defence further pleaded that the Plaintiff failed to convey his acceptance of the offer within 14 days of receipt and by reason thereof payment was not done and hence a grant of easement was never done by the Plaintiff.

He submitted that the Defendant alleged to have explained its compensation policy to the Plaintiff during the presentation of the Letter of Offer that it did not undertake compulsory acquisition of way leave trace and compensation was for limited loss of land. The Defendant denied liability to compensate the Plaintiff in the sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=).

The Learned Counsel recounted the evidence adduced by the two witnesses by the summoned by the Plaintiff - PW-1 and 2 in Court. PW - 1 recorded his statement dated 7th March, 2019 and a list of documents produced and marked as Plaintiff Exhibits 1 to 4.

25. In further examination in Chief the PW - 1 stated that he had never seen the documents by the Defendant dated 26th October, 2012. He held his postal address was 1010 Wundanyi but the address on the letter was the number of the title deed, Mbololo/Tausa/2442. He stated that the amount of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/=) was not sufficient as the area the Defendant had taken was not utilizable being a road. He urged court to award him a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) plus costs of the case.

The PW - 2 stated that he was a land valuer who had received instructions from the Plaintiff to value the portion of the suit property on which the Defendant's Power transmission lines had traversed. He stated that the area affected was 0.47 HA (1.16acres) based on the survey report attached and he valued it at a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) based on the current market value in the year 2017. He produced the valuation report dated 26th September, 2017 and marked as Plaintiff Exhibit 5.

With regard to the Defendant's case and testimony in court the Learned Counsel held that on cross examination of DW-1 she confirmed not having a surveyor's report to know the exact acreage the sketch map produced did not have the acreage of the land.

26. Further, the Defendant did not show that PAP's were consulted. She further confirmed that there was no evidence to show service upon or receipt of the letter by the Plaintiff and that the Defendant had never been able to trace the Plaintiff to conclude the contract.

In summary, the Learned Counsel submitted: -

(a) That the Defendant never followed the procedure for acquisition of wayleave over the land for the Plaintiff – the laws applicable being Section 46 (1) of the Electric Act and Sections 148 (1) and (5) of the *Land Act* No. 6 of 2012. The counsel argued that the Defendant sought reliance on its policy to award the Plaintiff the sum of Kenya Shillings Ninety-Four Thousand One Hundred and Ninety-Seven Thousand Fifty-two cents (Kshs. 94,197.52/=). He argued that policy could not override statute.

From the evidence adduced the Defence never served the Plaintiff of its proposal to lay the transmission line on his land as DW-1 confirmed the letter dated 26th October, 2012 was never served. He never got to see the proposal and hence have an opportunity to assert or dissent it as provided for by law under Section 46 of the Electric Power Act.

(b) That by entering into the Plaintiff's land the Defendant trespassed as clearly the Defendant failed to follow the above procedure of law. He relied on the decision of Kenya Power & Lighting Company Limited – Versus - Joseph P. Kingara (2013) eKLR. Where court in similar circumstances held that:-

> " .....the case herein is one of trespass to land as it involves entry by the Plaintiffs into the Defendant's land albeit pursuant to statutory authority, and subject to payment of compensation"

27. With regard to the award of compensation the Learned Counsel held that the Defendant had already laid the electric transmission lines over the Plaintiff's land, upon discovering he under took surveying or the area which indicated an area of 0.49 (1.16 acres) had been utilized valued at a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=). The valuation was not disputed by the Defendant. He testified that the Defendant trespassed – cut down trees and he had had diminished its value as the line passed on the middle of the land. He valued all these at a sum of Four Hundred Thousand (Kshs. 400,000/=) and the land could not be reinstated. He urged court to award the general damages for trespass plus interest from the date of filing suit until payment in full and costs of the suit.

B. The Written Submission by the Defendant

28. On 16th February, 2022, the Counsels for the Defendant the Law firm of Messrs. Kiarie Kariuki & Co. Advocates filed their written submissions dated 15th February, 2022, Mr. Kairuki Advocate submitted as follows:-

(a) The Defendant was not a trespasser on to the Plaintiff's land –

> He held that a way leave was right of way created for the benefit of the National or County Government, a local authority, a public authority or any corporate body to enable all such institutional organization, authorities and bodies to carry out their functions such functions included installation of power lines, gas pipes and oil pipelines, among others. He held that the Defendant was issued with a Letter of Offer dated 26th October, 2012 – marked as Defendant's Exhibit 1 for compensation of a sum of Kenya Shillings Ninety Four Thousand One Hundred and Ninety Four Fifty Two cents Kshs. 94,194.52/= for loss of use of a piece of land approximately measuring 0.941 acres.

29. He urged that according to the evidence of DW -1 prior to the issuance of letters of offer for compensation to land owners affected by the project (PAPs) the Defendant conducts valuation in specific areas affected by the transmission line. It's only the affected area that was valued.

This process was completed in December, 2011 as the cutoff date and hence no fresh valuations were acceptable to carter for the mischief of the land owners disappearing only to appear years later on with fresh valuation in an attempt to obtain more compensation.

He held that DW-1 stated that the Defendant's compensation police which was explained to the Plaintiff prior to and during the presentation of the letter of offer, the Defendant did not undertake compulsory acquisition of way leave trace but only compensated the Plaintiff for the limited loss of land use calculated at 30 % value of the affected area (way leave).

The Counsel argued that the Plaintiff disappeared before accepting the offer to avoid negotiations. Indeed, it is because of this disappearance that caused the Defendant to commence the transmission line project in the year 2017 several years down the line.

(b) That the Plaintiff was not entitled to general damages for trespass - The Learned Counsel submitted that DW-1 produced Defendant Exhibit – 2 being a valuation report dated 18th October, 2011 prepared by a Land Valuer – M/s. Njihia Mwika Rashid & Company Limited which indicated an acre within Mraru Taita Hills where the suit land was located was valued at a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) as at 18th October, 2011. He argued that through Defendant Exhibit 1 at Paragraph 3 line 2 the Plaintiff was offered compensation at 50% of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) for 0.941 which translated to a sum of Kenya Shillings Ninety Four Thousand One Hundred and Ninety Four Fifty Two cents (Kshs. 94,194.52) which according to the Defendants was already over and above the compensation limited of 30% offered by the Defendant.

30. On the other hand, the Plaintiff produced Plaintiff Exhibit – 5 being the valuation Report prepared by the same Land Valuers M/s. Njihia Muoka Rashid Company Limited where an acre of land at the same area was valued at a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) as at 26th September, 2017. With regard to the proposal by the Plaintiff to be awarded a sum of a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) for the portion of land affected by the power line measuring 0.49 HA (1.16acres) and a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) for General damages for trespass would amount to sale of the entire portion affected by the transmission line project and not compensating the Plaintiff for the limited loss of land use. If the market value of the portion of the suit property affected by the transmission line project was assessed at a sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) and the Defendant's interest on the land was only the affected area where the transmission line was affected and not the entre land. To buttress his argument, he relied on the decision of ELC (MERU) No. 46 of 2016 (OS) Kenya Electricity Transmission Company Limited –versus- Rachel Wangechi Watson. Where the court held "The easement right does not imply that there will be transfer of the Defendant Land to the Plaintiff. The right will only enable the Plaintiff to carry out its mandate in line with the Provision of the law. I am therefore inclined to believe that the compensation police of the Plaintiff which pegged at the rate of 30% of value of the affected land is grounded.

31. Hence, he urged court to hold that the Plaintiff was only entitled to a sum of Kenya Shillings Ninety Four Thousand One Hundred and Ninety Four Fifty Cents (Kshs. 94,194.52/=) which is compensation for limited loss of use of the 0.941 acres affected and not the entire marked value of the entire land as the other portion 12 feet away remains to be his land he could still grow trees and carry out other development works, farming, carry grazing, poultry among other on sound principles of law and hence the sum of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=) for trespass on the Plaintiff can no longer grow trees and construction structures is on the higher side he

relied on the decision of Peter Mwangi Kabue –Versus- Rural Electrification Authority (2018) eKLR where court held:-

> " The Plaintiff has stated that the erection of the Power line had led to limited use of land underneath. He avers that the total acreage affected by the pylons is approximately 1 acre. For example, he says he cannot build or grow trees underneath. Though there is clearly limited loss of use of the suit land underneath the power line, it does not prevent the Plaintiff in using it for other uses save for construction and tree growing and other uses that do not pose a danger to the power lines and life"

32. The Learned Counsel refuted the fact the land had appreciated. Nonetheless, if all they were to be awarded general damages, he conceded a sum of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) would be adequate for trespass. To support their case they relied on the decision of Phillip Olali Ocharo – Versus - Walter Odhiambo Ogwada t/a Marowa Hardware (2019) eKLR. and Philip Aluchio –Versus- where court held

> " The Plaintiff is entitled to General damages for trespass. The issue is as to what is the measure of such damages. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration whichever is less .... The sate of the property and after the trespass"

The Learned Counsel contended that the Plaintiff was not entitled to the special damages of a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) though the pleaded by the Plaintiff but it was never proved it as was required in law.

With regard to whether a mandatory injunction could be issued compelling the Defendant to remove the transmission poles already erected, the transmission lines and any other structures from the suit land, the Learned Counsel relied on the evidence of the DW-1 to the effect that the Defendant was a state owned corporation mandated to plan, design, develop, maintain and operate Kenya National Transmission grid and open up geographical areas in the nation that were without access to the National grid and provide transmission infrastructure that formed the backbone of the national electricity transmission network. Therefore, an order for mandatory injunction, as prayed by the Plaintiff would incorporate the whole line and cause untoward hardship and suffering to the general populace within Mbololo area and beyond who are benefiting from transmission line project – whereby many private and public businesses would be crippled for days if not months which included the Plaintiffs.

33. Finally, he submitted that the filing of the suit by the Plaintiff was unnecessary and hence it is the Defendant to be awarded costs.

II. ANALYSIS & DETERMINATION

34. I have keenly assessed all the filed pleadings by the Plaintiff and the Defendant herein being the Plaint, Defence, evidence and testimonies adduced herein by the summoned witnesses, written Submissions, the plethora of cited authorities, the relevant provisions of the Statute and *the Constitution* of Kenya.

35. In order to arrive at an informed, reasonable, just, fair and equitable Judgement, the Honorable Court has framed the following six (6) salient issues for its determination. These are:-

    a. Whether the Plaintiff was rightful and/or lawful owner of the suit property with all indefeasible right, interest and title.

b. Whether the Defendant is a trespasser on to the Suit land belonging to the Plaintiff thereon.

c. Whether the Plaintiff should be granted the Permanent injunction restraining the Defendant from continuing with the erection or laying of power transmission lines or cables, pylons and/or any other structures on the suit property and/or in any manner whatsoever dealing with the suit property.

d. Whether the Plaintiff should be granted a mandatory injunction order to compel the Defendant to remove the poles and the power transmitting lines and other structures erected on the suit property.

e. Whether the parties are entitled to the relief sought.

f. Who will bear the Costs of the suit.

Issue No. a). Whether the Plaintiff was rightful and/or lawful owner of the suit property with all indefeasible right, interest and title.

36. Under this sub heading, it is not in dispute that the Plaintiff is the absolute and legal registered owner to all the suit property. He was issued with a Certificate of title Deed on 21st August, 2006 under the Registered *Land Act*, Cap. 300 (now repealed) and which he produced as a Plaintiff Exhibit No. 1 during the hearing of the case.

As the registered and/or beneficial owner, he has all the indefeasible title, right and interest vested in him by the provision of Article 40 (1) of *the Constitution* of Kenya and Sections 24, 25 and 26 of the *Land Registration Act*, No. He was entitled to the possession of all that parcel of land.

37. To begin with, the provisions of Section 107 of "The *Land Registration Act*" of 2012, as a saving and transitional provisions with respect to rights, actions, dispositions and so forth, provides that the law applicable to this matter here and for the title deeds that were issued in the years 1974 and 2003 respectively would be the Registered *Land Act*, Cap. 300 (Now Repealed) and the relevant Sections being 27, 28 and 143 of the RLA.

> Section 27 (a) "Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"
>
> Section 28 of the Act provides that:-
>
> > "The rights of a proprietor, whether acquired on first registration or whether acquired 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..."
>
> Section 143 (1) of the Act provides thus:
>
> > "Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake
> >
> > (2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge

of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default"

38. Nonetheless, the effect of the Registration of Lands is founded in the provisions of Section 24 of "The Registration *Land Act* (Repealed) which provides as follows:-

> " Subject to this Act – 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 appurtenances thereto and;

The Certificate of Title held by the Plaintiff as the Land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of "The *Land Registration Act*" No. 3 of 2012 provides as follows:-

> " The right 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 interest and claims whatsoever....."

At the same time, I wish to cite the provisions of Section 26 (1) of the *Land Registration Act* Verbatim:-

> "(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un procedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."

39. In the case of "Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case Lease is doubtful suspect or obtained by fraud or forgery un procedurally, illegally or corrupt means or by mistake or omission as envisaged under the provision of Section 143 of RLA and currently Section 26 (1) of *Land Registration Act*, the Provisions of Section 80 (1) & (2) of *Land Registration Act* for the cancellation and rectification of the title comes to play – "Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others" ELC (Kjd) No. 204 of 2017." Under the provisions of Sections 104, 107 and 112 od the *Evidence Act*, Cap. 80. It holds that he who claims have to proof.

The provision of the right to acquire and protection of private property, restriction on State arbitrary acquisition unless its compulsory acquisition for public use but on being compensated fairly, adequately and promptly are provided for under the provisions of Article 40 (1), (2) and (3) of *the Constitution* of Kenya.

Issue No. b). Whether the Defendant is a trespasser on to the Suit land belonging to the Plaintiff thereon.

40. Under this sub heading, the issue of whether there existed any express or implied legal contractual relationship between the Plaintiff and the Defendant herein comes in handy here as provided for by law. The Letter of Offer and whether there was proper execution of the Easement grant terms and conditions stipulated hereof are critical issues for consideration by this Honorable Court at this juncture. Contracts are governed by the provisions of "The Laws of Contract, Cap. 23", the *Land Act*, No. 3 of 2012 among other Laws of Kenya. Conventionally, Contract is defined as an agreement entered between one or more than one person with another or others creating an obligation for a consideration and its enforceable or recognizable in law.

41. There are other definition of Contract as being a promise or a set of promise, for breach of which the law gives a remedy or the performance of which the law in some way recognized as a duty. It is trite law that Courts cannot re – write contracts for parties, neither can they imply terms that were not part of the Contract. In the case of "Rufale – Versus – Umon Manufacturing Company (Ramsboltom) (1918) LR 1KB 592, Scrutton L.J held as follows:-

> " The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract" .

42. Indeed, Courts do not make contracts to parties. Courts do not even try to improve the contracts which the parties have made themselves. If the express terms are perfectly clear and ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable. The validity of Contract in disposition of any interest in land are provided for under both the provisions of Sections 38 and 39 of the *Land Act*, No. 6 of 2012 which states:-

> Section 38 (1):- "Other than as provided by this Act or by any other written law no suit shall be brought upon a Contract for the disposition of an interest in land:-
>
> a. The Contract upon which the suit is founded:
>
> i. Is in writing;
>
> ii. Is signed by all the parties thereto; and
>
> iii. the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.

The provision of Section 40 of the *Land Act*, No. 6 of 2012 provides for the damages from the breach of Contract. It provides:-

40

(1) "Nothing in Section 39 of the Act prevents a vendor from claiming damages and Mesne Profits from the Purchaser for the breach of a Contract of sale or for breach of any other duty to the Vendor which the Purchaser may be under independently of Contract or effects the amount of damages that the Vendor may claim.."

(2) Any term express or implied in a contract or other instrument that conflicts with this section shall be inoperative.

43. In the instant case, the law applicable at the time of the acquisition of the land was "The Electric Power Act", "the *Land Act*, No. 6 of 2012 and "The *Energy Act*, Cap. 1 of 2019".

The provisions of Section 46 (1) of the Electric Power Act provides that:-

"(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 thereform within the 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 Sub – section (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 the nature of being fully compensated by money, the Court or arbitrator shall proceed to assess the compensation and apportion it amongst the owner, occupier and other parties in his or their Judgement entitled thereto, and 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 the nature to admit of being fully compensated by money the licensee shall be entitled to lay the proposed electric supply line.

c. If the decision is that no injury will be caused to the owner, occupier party interested to the land, the licensee, may forthwith proceed to lay the electric supply line.

d. 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 Sub - Section 4".

Section 148 (1) and (5) of the *land Act* provides that:-

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 be in cases of private land, be based on the value of the land as determined by a qualified Valuer"

(5). If the person entitled to compensation under this Section and the he land of 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 is 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.

44. The provisions of Section 171 (1) and 173 (1) of the *Energy Act* provides:-

> " A person who wishes to enter upon, other than his own to a). undertake exploratory activities relating to exploitation of energy resources and development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, or drilling exploratory wells b). carry out a survey of the land for the purposes of paragraph (a); shall seek the prior consent of the owner of such land, which consent- shall not be unreasonably withheld. Provided that where the owner cannot be traced, the applicant shall have fifteen days notice through appropriate mechanisms including public advertisement in at least two newspapers of nationwide circulation and an announcement in a radio station of local coverage for a period of two weeks" (Emphasis is Mine).
>
> > 173 "An owner, after receiving the request for the consent and under Section 171 may consent in writing to the development of energy infrastructure, upon agreement being reached with the applicant as to the amount of compensation payable, if any, and any consent so given shall be binding on all parties having an interest in the land, subject to the following provisions a). that any compensation to be paid by the licensee giving notice to the owner, in case where the owner is under incapacity or has no power to consent to the application except under this Act, shall be paid to the legal representative of the owner; and b). that an occupier or person other than the owner interested in the land shall be entitled to compensation for any loss or damage he may sustain by the development of energy i infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, drilling geothermal wells or coal long as the claim is made within three months after the development"

45. Undoubtedly, this Honorable Court finds that the Defendant was in total contravention with all these requirements of law. They never obtained the prior consent or authorization of the Plaintiff before entering the land. They claimed to have served the Letter of Offer dated 26th October, 2012 through the Locational Chief but never received any responses as the Plaintiff deliberately disappeared and could not be traced for any acceptance or execution of the Grant Easement agreement. I find this explanation rather not convincing at all. The law envisages such peculiar situations. These include placing an advertisement in the local newspapers of wide nationwide circulation or making announcement over the radio. None of these mitigation measures were taken up by the Defendant herein upon not receiving any responses from the Plaintiff. In my view, the Defendant was a trespasser without consent or authority of the Plaintiff. According to the provision of Section 3 of the *Trespass Act*, it stipulates that:-

> " 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 (1). Where any person is charged with an offence under Sub – Section (1) of this Section the burden of proving that he had reasonable excuse or the excuse or consent of the occupier shall lie upon him".

45. Thus, in arriving at this conclusion, I have based it on all the surrounding facts, inferences of this case, relied on the above cited legal provision, and the plethora of decisions on similar facts being: "George Joseph Kang'ethe & another – Versus – Kenya Power & Lighting Company, (2020) eKLR; "Eliud Njoroge Gachiri – Versus – Stephen Kamau Ng'ang'a ELC No. 121 of 2017" and Kenya Power & Lighting Company Limited – Versus – Fleetwood Enterprises Limited (2017) eKLR", I find that the Defendant's unauthorized and illegal entry and continued invasion of the Plaintiff's suit property by constructing the transmission power lines and remaining in occupation therefrom the year 2017 todate, almost five (5) years down the line, as evidenced from the exhibits produced amounts to continuous trespass which has interfered with the rights to occupation and enjoyment and were in contravention of the law as stipulated above. The Defendant has no basis on being in occupation on the suit land.

Issue No. d). Whether the parties are entitled to the relief sought.

47. The answer to the query posed under this sub heading should be in the affirmative. Relying on the facts of this case, it has been demonstrated clearly that the Plaintiff was the registered owner to the suit property. He lived elsewhere. He used it for cultivation of food crops and grown trees. He never entered into any agreement nor execute any Easement grant with Ketraco. Indeed the PW – 2 testified having seen the Letter of Offer dated 26th October 2012 ostensibly addressed to him for the first time in Court when the suit was filed. The letter is addressed using his title deed reference numbers instead of his known postal address numbers. DW – 1 in her testimony holds that the Letter was passed through the Locational Chief as they were the ones who knew their people well. Definitely this was a significant fact. Under the averments of Paragraphs 8 and 12 of the witness statement by DW – 1 affirms to that fact of non service and receipt of the Letter of Offer. It unfortunate that the Chief whose details such as names and staff numbers were never provided. Further, he/she was never prepared an Affidavit of Service as envisaged under the provision of Section 5 Rule 15 of the Civil Procedure Rules, 2010 nor was he/she summoned to affirm to this fact. A quick glimpse of the said letter it holds that ".....please convey your acceptance of this offer within fourteen (14) days to facilitate payment...". But this never happened and therefore there was no execution of the Easement Grant. In other words the process was never completed. which set out the way leave trace of 60 meters wide corridor transmission line traversing approximately 0.941 acres of the suit property and that the Plaintiff would be compensated a sum of Kenya Shillings Ninety Four Thousand One Hundred and Ninety Four Hundred Fifty Two Cents (Kshs. 94,194.52).

The DW – 1 asserted that the Plaintiff failed to convey his acceptance of the offer within 14 days of receipt and by reason thereof payment was not done and hence a Grant of easement was never done by the Plaintiff.

48. The Defendant alleged to have explained its compensation policy to the Plaintiff during the presentation of the Letter of Offer to wit the 50% offer of the Valued sum and the awarded sum that it did not undertake compulsory acquisition of way leave trace and compensation was for limited loss of land. They alleged that upon receipt of the Letter of Offer he disappeared from the year 2012 to 2017 when the project was completed. So as a solution what did the Defendant do, they wrongfully entered into the suit property without his consent or authority and erected poles and power transmitting lines which traversed the suit property. The Defendant also sustained continuous trespass, from the year 2017 todate, which is defined in the Black Law Dictionary, 8th Edition as ".....A trespass in the nature of a permanent invasion on another's property".

Having stated all these, therefore, this Court fully concurs with the Plaintiff where was no consent nor authority, the acts by the Defendants tantamount to trespass and the consequences therefrom.

Issue No. c). Whether the Plaintiff should be granted the Permanent injunction restraining the Defendant from continuing with the erection or laying of power transmission lines or cables, pylons and/or any other structures on the suit property and/or in any manner whatsoever dealing with the suit property.

49. Under this sub – heading, for clarity sake, it is important to critically assess the two forms of injunctions herein. A mandatory injunction is different from a prohibitory injunction. While a prohibitory injunction the Applicant must, as was stated in the celebrated case of "Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358, establish the existence of a prima facie case with high chances of success, and that he would suffer irreparable loss/damage which could not be adequately compensated by an award of damages if the injunction was not granted, and further that the balance of convenience tilted in his favour. For the orders of mandatory Injunction, an Applicant must in addition, establish the existence of special circumstances. Furthermore, the applicant must prove the case on a standard higher than the standard in prohibitory injunctions.

50. Generally speaking, an Applicant is entitled to be granted the Permanent and/or Mandatory Injunction restraining the Defendant herein on his suit property. Unlike Temporary Injunction which are granted only to be in force for a specified time or until the issuance of further orders from Court, Permanent Injunction are rather different, in that they are perpetual and issued after a Suit has been heard and finally determined.

Legally, permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances.

It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of "Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR as follows:-

> " The test for granting a Mandatory Injunction is different from that enunciated in the "Giella – Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of "Kenya Breweries Limited – Versus - Washington Okeyo (2002) EA 109" had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-
>
> > "A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application".

Further the same Court of appeal in the case of "Jay Super Power Cash and Carry Limited –Versus - Nairobi City Council and 20 others CA 111/2002" held that:-

> "This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken balance he can pay for it".

51. In the case of 'Kenya Breweries Ltd & Another – Versus - Washington O. Okeya [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions.

> " A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

The above-cited cases lay down the principles of law to be considered in both an application for a prohibitory injunction and mandatory injunction, the different that stands out between these two orders is that for mandatory injunction, the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction.

In this instant application, the Plaintiff through his affidavit in support of the application together with the annextures demonstrated that he was the registered owner to the suit land. He never duly executed or entered into any Grant easement with the Defendant for the erection of the transmission lines on his land. Instead of the Defendant ameliorating the situation by seeking other mitigatory measures as stated herein which also include seeking for a Court order to allow them the right of entry or way under the provision of Section 148 of the *Land Act*. Instead, they decided on their own oblivion to irregularly, wrongfully and illegally entered into the land and caused the construction without the consent nor authority of the Plaintiff. They were in breach of the law. In the given special circumstances, therefore, the conditions for the grant of prohibitory injunction and mandatory injunction have been met.

Issue No. c). Whether the Plaintiff should be granted a mandatory injunction order to compel the Defendant to remove the poles and the power transmitting lines and other structures erected on the suit property failing which the Plaintiffs be authorized to remove the same at the Defendant's expense.

52. The PW - 1 stated that he was a land valuer who had received instructions from the Plaintiff to value the portion of the suit property on which the Defendant's Power transmission lines had traversed. He stated that the area affected was 0.47 HA (1.16acres) based on the survey report attached and he valued it at Kshs. 600,000/= based on the current market value in the year 2017. He produced the valuation report dated 26th September, 2017 and marked as Plaintiff Exhibit 5.

53. With regard to the Defendant's case and testimony in court the Learned Counsel held that on cross examination of DW-1 she confirmed not having a surveyor's report to know the exact acreage the sketch map produced did not have the acreage of the land.

Further, the Defendant did not show that PAP's were consulted. She further confirmed that there was no evidence to show service upon or receipt of the letter by the Plaintiff and that the Defendant had never been able to trace the Plaintiff to conclude the contract. This court fully agrees with the summary made by the Learned Counsel for the Plaintiff to wit:-

(a) That the Defendant never followed the procedure for acquisition of wayleave over the land for the Plaintiff – the laws applicable being Section 46(1) of the Electric Act and Sections 148 (1) and (5) of the *Land Act* No. 6 of 2012. The counsel argued that the Defendant sought reliance on its policy to award the Plaintiff the sum of Kenya Shillings Ninety Four Thousand One Hundred and Ninety Seven Thousand Fifty two cents (Kshs. 94,197.52/=). He argued that policy could not override statute.

54. From the evidence adduced the Defence never served the Plaintiff of its proposal to lay the transmission line on his land as DW-1 confirmed the letter dated 26th October, 2012 was never served. He never got to see the proposal and hence have an opportunity to assert or dissent it as provided for by law under Section 46 of the Electric Power Act.

(b) That by entering into the Plaintiff's land the Defendant trespassed as clearly the Defendant failed to follow the above procedure of law and the cited decision of Kenya Power & Lighting Company Limited – Versus - Joseph P. Kingara (Supra).

As indicated above, the Plaintiff herein has established all the ingredients set out being special circumstances to grant Mandatory Injunction orders herein.

Issue No. d). Whether the parties herein are entitled to the relief sought.

55. Under this sub heading, the Honorable Court based on all the pleadings filed, the empirical oral and documentary evidence adduced the Court has concludes that the Plaintiff is entitled to the orders sought. and the empirical documentary. With regard to the award of compensation it was held that the Defendant had already laid the electric transmission lines over the Plaintiff's land. Upon making this discovery he under took surveying or the area. The exercise indicated an area of 0.49 (1.16 acres) had been utilized. It was valued at Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=). The Defendant disputed this valuation. According to them land never appreciated. The current market value was Kenya Shillings Two Hundred Thousand (Kshs. 200, 000.00). Further, they argued that pursuant to their Compensation Policy by KETRACO, they only paid for the limited parcel that they used and it was at 30% ratio. However, for the Plaintiff they had given him a slight higher rate of 50%.

56. Coincidentally, I have noted that the Plaintiff and the Defendant used the same company of Land Valuers. The only variation is the timing, as one was conducted in the year 2012 while the other was in the year 2021. I have keenly also considered the evidence of PW – 1 who testified that the Defendant trespassed – cut down trees and he had had diminished its value as the line passed on the middle of the land. The Plaintiff argued that by virtue of the trespass, the Defendant had misused, damaged, wasted, destroyed and degraded the suit property. In the process the Plaintiff had been deprived of the use and enjoyment of the property and hence suffered loss and damages. The damages were in form of deprived the use and enjoyment, cutting of trees which were growing along the area where the poles and the transmission lines traversed, the Plaintiff would no longer utilize the affected area to grow trees or put up development due to the erected poles and the transmission lines and the erection of illegal structures on the suit property had degraded and devalued the suit property.

57. PW – 1, the Land Valuer valued all these at a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/=). He emphatically held that the land could not be reinstated. Therefore, this Court fully

concurs that the Plaintiff is entitled to an award of general damages for trespass for this amount plus interest from the date of filing suit until payment in full and costs of the suit. On arriving at this conclusion, the Court wishes to further rely on the decision In the case of "Kinake Co – operative Society – Versus - Green Hotel (1988) KLR 242, where the Court of Appeal held that where damages are at large and cannot be quantified, the Court may have to assess damages upon some conventional yardsticks. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages. This is a position also taken in the now famous Court of Appeal (Malindi) case of "Civil Appeal No. 80 of 2016 Kenya Power & Lighting Company Limited – Versus – Fleetwood Enterprises Limited" and "Nyamongo & Nyamongo Advocates – Versus – Barclays Bank of Kenya Limited (2015) eKLR.

58. Finally, the Court has taken cognizance of the claim for a sum of Kenya Shillings Fifty Thousand (Kshs. 50, 000.00) as special damages. I fully concur with the Learned Counsel for the Defendant that its now trite law that Special damages has not only to be pleaded but also proved. In the instant case, the special damages was specifically pleaded but I am afraid never proved. I have relied on the decision of the Court of Appeal - "Capital Fish Kenya Limited – versus – The Kenya Power & Lighting Company Limited (2016) eKLR. Where the Court held:-

> " No evidence whatsoever was led by the Appellant on this aspect. This, as we already stated elsewhere, was an abstract figure which was thrown to Court with a mere statement that "this is the loss the appellant has suffered. Please award it to the appellants".

Thus, in the given similar circumstances, this Court declines to award it to the Plaintiff accordingly.

Issue No. e). Who will bear the Costs of the suit.

59. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. It is trite law that the issue of Costs is the discretion of Courts. In the case of "Reids Heweet & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

> "The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

60. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The events in the instant case is whereby Plaintiff has succeeded from the filed case. This entails from the preparation of all the pleadings, the time of filing it, court attendances, preparing witnesses, prosecuting it upto now leaving it to Court to make a decision. For that very fundamental reason, therefore, the costs of this suit will be borne by the Defendant herein.

II. Conclusion & Disposition

61. Ultimately, upon holding an indepth discourse of the stated framed issues herein, the Honorable Court finds that the Plaintiff on preponderance of probability has proved and established his case. Therefore Judgement has been entered in his favour against the Defendant herein. For avoidance of doubt, the Honorable Court proceeds to grant the following orders. These are:-

a. That a declaration be and is hereby made to the effect that the Plaintiff is the absolute, registered and legal owner of all that property known as Title No. Mbololo/tauasa/2442 situated within Mbololo area Voi Sub - County in Taita Taveta County measuring 1.2 HA (approximately 2.97 acres) with all the indefeasible rights, title and interested vested in him by law.

b. That the Defendant be and is hereby found to be a trespasser on the suit land thereon.

c. That an order of Permanent injunction be and is hereby granted in favour of the Plaintiff restraining the Defendant whether by its servants authorized agents, employee or through anyone deriving title through it or otherwise howsoever from continuing with the erection or laying of power transmission lines or cables, pylons and/or any other structures on the suit property and/or in any manner whatsoever dealing with the suit property.

d. That an order of mandatory injunction be and is hereby issued compelling the Defendant within the next ninety (90) days of this date to remove all the poles and the power transmitting lines and other structures erected on the suit property. In default, the Plaintiffs shall be at liberty to remove them the Defendant's expense.

e. That the Plaintiff awarded general damages for a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400, 000.00) for the trespass and loss of plantations.

f. That in the alternative to prayer (b), (c) and (d) above, the Defendant to compensate the Plaintiff by paying him a sum of Kenya Shillings Six Hundred Thousand (Kshs.600 ,000/=) for the 0.49 HA (1.16 acres) of the area utilized for purposes of the Way Leave within the next ninety (90) days from this date.

g. That the Costs of this suit and interest at the Courts rate of 14% from the time of filing of this suit to be borne by the Defendant.

JUDGEMENT DELIVERED, SIGNED AND DATED ON THIS 28TH DAY OF JULY 2022

HON. JUSTICE MR. L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:-

a. M/s. Yumnah, Court Assistant.

b. Mr. Mwakireti Advocate for the Plaintiff.

c. M/s. Kabole holding brief for Mr. Kiarie Kariuki Advocate for the Defendant.