



**Rural Electrification Authority v Akama & 2 others (Environment & Land Case E005 of 2021) [2022] KEELC 3526 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3526 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E005 OF 2021**

**AY KOROSS, J  
JULY 21, 2022**

**BETWEEN**

**RURAL ELECTRIFICATION AUTHORITY ..... APPELLANT**

**AND**

**BOAZ OKELLO AKAMA ..... 1<sup>ST</sup> RESPONDENT**

**MAUREEN CHERUTO ..... 2<sup>ND</sup> RESPONDENT**

**DICKENS ROBERT OTUGE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the Principle Magistrate Hon.J.P.Nandi delivered on 19/08/2021 in Bondo SPM ELC Case Number 13 of 20 18))*

**JUDGMENT**

1. The background of this appeal is paramount, the 1<sup>st</sup> respondent was and remained the registered proprietor of land parcel Asembo/Memba/3169 (hereinafter “the suit property”). Sometimes on 14/07/2016, the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents trespassed onto the suit property and erected electric poles and lines thereupon. As a result of the trespass, trees, fruits and a fence were damaged and thus, it posed a risk to the 1<sup>st</sup> respondent and his family.
2. The 1<sup>st</sup> respondent filed a suit dated 25/10/2017 against the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and prayed for several orders; the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents do reroute the electric lines from his homestead to a safer place, special damages of Kshs. 1,466,000/-, general damages, costs and interests.
3. The appellant filed a statement of defence dated 07/12/2017 and essentially denied the averments made in the plaint and contended that if there was any trespass or interference, the same was without the participation and knowledge of the appellant. It further stated that the 1<sup>st</sup> respondent had encroached on a road reserve. It averred that electrification was for public good which overrode the 1<sup>st</sup> respondent’s right to private property.



4. The office of the attorney general represented the 3<sup>rd</sup> respondent. It filed a statement of defence dated 06/06/2018 wherein it denied the averments made in the plaint and put the 1<sup>st</sup> respondent to strict proof thereof.
5. After hearing the parties, the trial court by its judgment dated 19/08/2021 entered judgment in favour of the 1<sup>st</sup> respondent and ordered the appellant, its agents or servants to re-route the electric lines from above the 1<sup>st</sup> respondent's home to a safer place, that the appellant do pay the 1<sup>st</sup> respondent special damages of Ksh 1,381,575/- and general damages of Ksh 400,000/-. The appellant was also to bear the costs and interest of the suit.

### **Appeal to this court**

6. Aggrieved and dissatisfied by the judgment of the lower court, the appellant appealed to this court on 5 grounds;
  - a. That the Learned Trial Magistrate erred in law and fact by awarding Ksh 1,381,575/- as special damages to the 1<sup>st</sup> respondent given that there were different assessments present contrary to the evidence adduced;
  - b. That the Learned Trial Magistrate erred in law and fact in holding that the 1<sup>st</sup> respondent proved ownership of the suit property upon which the poles were erected;
  - c. That the Learned Trial Magistrate erred in law and fact in awarding general damages that are inordinately high as to amount to an erroneous estimate of damages;
  - d. That the Learned Trial Magistrate erred in law and fact in failing to consider all the issues raised by the appellant in the written submissions; and;
  - e. That the Learned Trial Magistrate proceeded on demonstrably wrong principles in reaching his decision on the award to the 1<sup>st</sup> respondent.
7. The appellant prayed that the appeal be allowed, that the judgment of the lower court be set aside and that the 1<sup>st</sup> respondent's suit and award of damages be substituted with an order dismissing the suit with costs.

### **The appellant's submissions**

8. The law firm of Siganga & Company Advocates which represented the appellant filed its written submissions dated 30/03/2022. They condensed their grounds into two; grounds 1, 4 and 5 were consolidated into one ground, ground 3 was abandoned while ground 2 was sustained. They identified two issues for consideration; whether the appellant trespassed on the suit property and whether the respondent was entitled to special and general damages.
9. On the 1<sup>st</sup> issue, they submitted that the erected electricity lines were not on the suit property but on an access road bordering the suit property. On the 2<sup>nd</sup> issue, they contended that the award of general damages was inordinately high as to occasion injustice and unjustly enrich the 1<sup>st</sup> respondent. They cited the case of *Philip Aluchio v Crispinus Ngayo* [2014] eKLR where the court stated that assessment was pegged on the difference in the value of the property immediately after trespass or the costs of restoration. They also cited the case of *Ochako Obincho v Zachary Oyoti Nyamongo* [2018] eKLR where the claimant was awarded Ksh 100,000/- in general damages and urged this court to reassess general



damages based on this amount. They averred that the number of trees damaged were 68 and not 82 and that by applying the report of Kenya forest service, the estimated amount of special damages that the 1<sup>st</sup> respondent was entitled to was Ksh 881,305/-.

### **The respondents' submissions**

10. The 1<sup>st</sup> respondent was represented by the firm of Odhiambo B.F.O & Company Advocates which filed their written submissions dated 28/03/2022. They contended that the trial magistrate did not err in awarding special damages because he considered the assessment report of the ward agricultural officer and that of the sub county forest officers and did not consider any other extraneous figures.
11. On the issue of ownership, they contended that ownership of the suit property had been proved as evidenced by the surveyor's report, district land registrars report and official search. They urged the court not to disturb the award of general damages. They relied on the case of *MWM v JDK* Malindi Civil Appeal Number 39 of 2020 where the High Court stated that an appellate court should not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate.

### **Analysis and determination**

12. The role of an appellate court in determining an appeal was well postulated in the case in *Mwanasokoni v Kenya Bus Services Limited* [1985] eKLR where the court stated as follows;

“Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal...if the judgment of the trial court was one at which it could reasonably have arrived on the evidence then it should not be upset on appeal.” (Emphasis mine)

13. Having considered the lower court record, record of appeal, parties' submissions and authorities cited and proffered. The court will now proceed to address its mind on the two consolidated grounds of appeal.

I. That the learned trial magistrate erred in law and fact in holding that the 1<sup>st</sup> respondent proved ownership of the suit property upon which the electricity poles were erected

14. Section 24 of the *Land Registration Act*, provides that 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.

15. In its judgement, the trial magistrate stated thus;

“...the official search and copy of title deed show the plaintiff is the registered owner of the suit land...the land registrar report dated 26/1/2017 show that the electricity line passes over plaintiff's land”

16. The evidence tendered on the ownership of the suit property was never controverted by the appellant or any of the other respondents. The title deed that was produced demonstrated that the suit property was registered in the 1<sup>st</sup> respondent's name. The land registrar's report that was produced by consent of the parties which contained the district surveyor's report confirmed that the appellant had encroached on the suit property. Consequently, it is my finding that the trial magistrate did not err in finding that



the appellant had trespassed on the suit property that was owned by the 1<sup>st</sup> respondent. This ground fails.

II. That the learned trial magistrate erred in law and fact by assessing special and general damages at exorbitant amounts

17. The appellant contended in its submissions that it was satisfied with the assessment of the value of the trees by the Kenya forest service. However, the only bone of contention was the number of the trees that were destroyed. The Kenya forest service report dated 25/06/2017 stated that 82 trees were destroyed which was in tandem with the report of the directorate of agriculture, county government of Siaya which was produced in the trial court.
18. The appellant neither produced any report to demonstrate the number of trees destroyed nor lead evidence on the number of trees destroyed. In essence, it is raising new evidence on appeal that was neither pleaded nor canvassed in the trial court and this court is constrained from entertaining this ground. I rely on the case of *Kenya Hotels Limited v Oriental Commercial Bank* (2018) eKLR where the Court of Appeal stated thus;

“In *Openda v Abn*, (*supra*) this court identified some of the principles ... grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; .... a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point...”

I need not say more on this.

19. I will proceed to address my mind on the issue of general damages. I agree with the submission of the 1<sup>st</sup> respondent that an appellate court will hardly interfere with the trial court’s assessment of general damages. The case of *Kenya Bus Services & another v Frederick Mayende* [1991] 2 KAR 232 was cited with approval in the case of *Kenya Power and Lighting Company Limited v Phillip A M Kimondu* [2018] eKLR where the Court of Appeal held that: -

“The principles on which an appellate court will interfere with the trial judge’s assessment of damages are well settled in the Court of Appeal. The court will only interfere where an error of principle by the trial judge is shown, or where the damages awarded are so high or so low that they must be wholly erroneous estimate and an error of principle must be inferred.”

20. Trespass is an actionable tort for which damages are payable. The case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR, cited with approval *Halsbury’s 4th ed*, Vol 45, at para 26, 1503 which stated that where a defendant has made use of the plaintiff’s land, the plaintiff is entitled to receive by way of damages such a sum as would reasonably be paid for that use. If the specific figure cannot be ascertained, it is at the court’s discretion to award general damages for trespass. Such discretion must however be exercised judiciously. The appellant has contended that the assessment was too high. I have perused the two authorities he has cited; *Philip Aluchio v Crispinus Ngayo* [*supra*] and *Ochako Obinchu v Zachary Oyoti Nyamongo* [*Supra*]. These are decisions from courts of 1<sup>st</sup> instance, in both, the plaintiffs did not adduce any evidence to establish the exact value of the suit property before and after the trespass or how much damage was occasioned to them as a result of the actions of the defendants and the consequently the courts awarded nominal damages of Kshs.100,000/- The decision the trial court relied upon of *Nakuru Industries Limited v S S Mehta & Sons* [*supra*] similarly found itself in a similar predicament as these two authorities. However, in this particular case where



the defendant had excavated sand from the plaintiff's land, the court assessed general damages at Kshs.500,000/.

21. In the instance case, 1<sup>st</sup> respondent did not adduce any evidence to establish the exact value of the suit property before and after the trespass or how much damage was occasioned to him as a result of the actions of the appellant, 2<sup>nd</sup> and 3<sup>rd</sup> respondents and relying on the case of *Nakuru Industries Limited v S S Mehta & Sons* [supra] it awarded general damages of Ksh.400,000. The question that then arises is whether the trial magistrate exercised his discretion judiciously? My answer is in the positive, all these authorities are from the superior courts.
22. An analysis of these authorities, leads to the logical conclusion that in the absence of an establishment of the exact value of the suit property before and after the trespass or how much damage was occasioned, then general damages would be assessed depending on the unique circumstances of the case. Just because this court would give an alternative award is not enough to substitute the award given by the trial court. The only way the appellate court can substitute an award is on an error of principle or damages were too high or too low of which the appellant has failed to establish. Consequently, I am not inclined to interfere with the trial court's assessment of general damages. The 2<sup>nd</sup> ground of appeal fails.
23. The upshot is I hereby affirm and uphold the judgment of the trial court dated 19/08/2021. I find the appeal is not merited and it fails. It is trite law that costs follow the event and I award the costs of this appeal to the 1<sup>st</sup> respondent.
24. I ultimately issue the following disposal orders;
  - a. The appeal is hereby dismissed with costs to the 1<sup>st</sup> respondent.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 21<sup>ST</sup> DAY OF JULY 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**21/7/2022**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Mr. Dave Siganga for the appellant

Mr. Odhiambo B. F. O for the 1<sup>st</sup> respondent

Court assistant: Ishmael Orwa

