

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 111 of 2005

GERALD MBUTHIA MACHARIAAPPELLANT

VERSUS

KENYA POWER & LIGHTING AND CO.RESPONDENT

J U D G M E N T

This is an appeal against the judgment of T. Nzioki. Learned Resident Magistrate of 25th November 2005. Gerald Mbuthia Macharia, the appellant herein, put forward six grounds of appeal in his memorandum of appeal dated 14th December 2005. He argued these grounds together when the appeal came up for hearing.

The facts which gave rise to the appeal are brief and straightforward. By an amended plaint dated 3rd March 2003, the appellant sought for interalia:

- (a) *an order to remove the cables running over the plaintiff's building on plot no. 568/VI/MN.*
- (b) *Kshs.132,900/-*
- (c) *Mesne profits running from 1997 up to the date of judgment.*
- (d) *Interest and costs.*

The Respondent, Kenya Power and Lighting Co. Ltd. filed a defence to deny the appellant's claim. When the suit came up for hearing before the trial court, two witnesses testified in support of the appellant's case whereas the defendant tendered the evidence of one witness.

The plaintiff told the trial court that he acquired Plot NO. 568/VI/MN in 1971 and that by then there was no electricity. The plaintiff bought the plot with a house which he did many extensions so that by the time of filing this suit, the structure was comprised of 22 rooms. He said he used to reside in the plot until 1997 when he was transferred to Nairobi. When he came visiting he claimed he found the roof of his building had been damaged when one Ali Hamisi damaged the cables supplying electricity. He said he reported the complaint to the Respondent but no action was taken despite making many promises. The appellant further claimed that the Respondent disconnected power to his premises. As a result, some tenants moved out of his premises. When he made inquiries for the reasons of the power cut, the appellant said he was told that he had built below power lines. The appellant in his examination in chief told the trial court that he had connected power to the house he bought in 1976. On Cross-Examination he admitted having also connected power to the extensions which he made to the existing building. Banda Mensa (P.W.2) corroborated what the appellant told the trial magistrate. He however did not know why the applicant sued the Respondent.

The Respondent on its part tendered the evidence of Walter Akello Mboro (D.W.1) in support of its defence. He denied before the subordinate court that the Respondent had erected power lines across the appellant's land. In fact D.W. 1 said that the same was erected on the boundary between the appellant's land and that of Ali Hamisi. D.W. 1 stated that the appellant's electricity was disconnected when it was

discovered that the appellant had connected electricity to the extensions without its approval. On the basis of this evidence, the trial Magistrate dismissed the suit.

I have reconsidered the recorded evidence. It is clear from the evidence of D.W.1 that the appellant connected electricity to the structures he put up as extensions of his main house. It is not contested that the appellant did that without the consent of the Respondent. The law mandates the Respondent to disconnect such illegal power supply without notice. In fact the appellant should have been charged for illegally connecting power but it would appear the matter was not pursued by the Respondent. The appellant had pleaded to be paid Kshs.132,900/- as mesne profits. The evidence tendered did not show how the aforesaid sum was arrived at. There is no evidence to contradict the testimony of D.W. 1 which is to the effect that the power lines were erected along a common boundary. The appellant did not tender evidence to prove that the power lines were erected across his land. I have already stated that the appellant listed six (6) grounds of appeal in his memorandum of appeal dated 14th December 2005. On the 19th day of February 2007, the firm of N.J. Chudasama filed supplementary grounds of appeal in which five (5) grounds of appeal were put forward. Those grounds were argued together when the appeal came up for hearing. In the supplementary grounds of appeal, it is said that the trial magistrate admitted facts which were not pleaded by the respondent. It is also said that the trial magistrate erroneously erred in believing the Respondent and in disbelieving the Appellant. In the main grounds of appeal, though the grounds set out are six in total but the main issue raised is to the effect that the appellant's case was dismissed yet he had tendered evidence to prove his case on a balance of probabilities. The appellant argued his appeal in person. The Respondent's case was argued by Mr. Mwangi Njenga, learned advocate. It is the submission of the appellant that the trial magistrate considered extraneous matters and that he erred when he failed to find that he had proved his case to the required standards. Mr. Mwangi Njenga on his part urged this court to dismiss the appeal because the appellant had failed to prove his case to the required standard. After a careful reconsideration of the case before the trial court I am convinced that all the grounds set out on appeal must be dismissed. The trial magistrate came to the correct decision by dismissing the appeal. The appellant had failed to establish that the Respondent unlawfully disconnected his electricity. The appellant had connected power to his extensions without the approval of the Respondent. Such connections were legally cut by the Respondent. The appellant also failed to prove the mesne profits of Kshs.132,900/-/

For the above reasons I dismiss the appeal in its entirety with costs to the Respondent.

Dated and delivered at Mombasa this 23rd day of June 2008.

J. K. SERGON

J U D G E

In open court in the absence of the parties.