



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC NO. 114 OF 2017

MOSES BII.....PLAINTIFF

VERSUS

KENYA POWER AND

LIGHTING COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. Before me for determination is a matter wherein the Plaintiff herein filed his amended plaint of 30th October 2018 on the 13th February 2019 seeking for judgment against the Defendant for both special damages assessed at Ksh 214,179/=, damages for trespassing on the Plaintiff's land parcel No Kericho/Tegat/1521, general damages, cost of the suit and interest thereon for maliciously trespassing on his land and cutting down one hundred and ten (110) different types of trees, which were at different stages of growth, while fixing electric cables along the Kembu /Merigi road.

2. The suit was defended by the Defendant through its amended defence of 15th March 2019 and filed on the 3rd April 2017 wherein he denied each and every allegation in the amended Plaint.

3. Upon compliance with the provisions of Order 11 of the Civil Procedure Rules, the matter was certified ready for hearing on the 25th June 2020 wherein it proceeded with the Plaintiff's case on the 30th September 2020.

The Plaintiffs case

4. The Plaintiff, Moses Kiplangat Arap Bii, the proprietor of land parcel No. Kericho/ Tegat/1521 testified as PW1 to the effect that he had filed the case against the Defendant because it had sent its employees to cut the down trees he had planted on his land along KEMBU/MERIGI road. That at the time he was in Mombasa and upon receiving information from his mother on the 12th November 2015, he had traveled to Bomet from Mombasa the following day in order to seek audience from the Defendant and get to know why he had done so.

5. Upon arrival, he had confirmed that indeed the trees had been cut wherein he had gone to the Defendant's office at Bomet and had lodged a written complaint there. He also reported the matter at Bomet Police Station which report had been booked vide OB NO 23/17/11/15.

6. His testimony was to the effect that no notice had been served either upon him or his mother before the trees were cut. That the trees, of which some were indigenous, while he had planted others, were not near the electric line. He put the total of trees cut as ninety-nine (99).

7. That he had even visited the site with the Kenya Power Manager in the area who had accepted that a wrong had been committed against him and promised to compensate him but since the manager was not committing himself, he had decided to pursue the matter in court. That he had also lodged his claim with the forest office in the area wherein an officer visited the site and made his assessment.

8. The Plaintiff lamented that the Defendant had only cut the trees on his land yet the neighbor also had trees which had not been cut and further that for those whose few trees had been cut, they had been compensated. He adopted his written statement as his evidence and produced the following documents as exhibits: photographs taken on 14th November 2015 as Pf exh 1, the OB as Pf exh 2, the demand letter dated 23rd November 2015 as Pf exh 3, a letter from Kenya Power dated 22nd December 2015 as Pf exh 4, a complaint letter by himself to the Defendant and received by Defendant on 17th November 2015 as Pf exh 5, photographs taken on 16th January 2016 as Pf exh 6, a copy of his title deed as Pf exh 7, a valuation report dated 13th September 2016 as Pf exh 8 and a receipt for Kshs. 10,199/= for payment for assessment report as Pf exh 9.

9. The Plaintiff's evidence was that he sought to be awarded his claim as per the Plaint for the 99 trees that were clearly away from where the

power line passed but which the Defendant had cut down. That in the demand letter, he had claimed compensation for a total of 110 trees including those that were found to be on the power line, which totaled to about Ksh. 1.1 million because he had projected that had the trees been left to mature well enough, he would have sold them for that amount of money. That the Respondent had also destroyed young trees for which he was not claiming compensation. That the trees in question had been left on the scene wherein they had dried up and had become firewood while others had been stolen.

10. That after he had reported the matter to police, he never got the result of police investigations but he was at a loss as to why the Defendant had cut down his trees.

11. The Plaintiff thus closed its case, the defense called no evidence and also closed its case wherein parties filed their respective submissions.

Plaintiff's written submissions.

12. The Plaintiff, upon summarizing the evidence adduced in court, framed his issues for determination as follows:

- i. Whether the Plaintiff's trees were cut down and/or destroyed by the Defendant
- ii. Whether the Defendant sought the Plaintiff's consent before cutting down/ destroying the trees
- iii. Whether the Plaintiff should be compensated as prayed for in the plaint.

13. On the first issue for determination it was the Plaintiffs submission that there was clearly no doubt that the Defendant through its agents cut down the Plaintiffs trees, which evidence was supported by a letter from the Defendant to the Plaintiff dated 22nd December 2015 herein produced as Pf exh 4 admitting liability and promising to do an assessment so as to compensate the Plaintiff. That the Defendants merely denied cutting down the trees, and tendered neither documentary nor oral evidence in support thereto. The Plaintiff's evidence therefore remained unchallenged.

14. On the second limb of issues to be determined, it was the Plaintiff's submission that the Defendant entered onto his land and cut down his trees without first seeking his consent which was contrary to the provisions of Section 46 of the Energy Act which was applicable at the time and which stipulated that a person ought not to enter into another person's land in order to lay electric supply lines unless with the permission of the land owner. The Defendant did not avail any such notices as required by law or evidence to challenge the Plaintiff's case. Reliance was placed on the decided case in **Joseph Abraham Kefwa vs Kenya Power and Lighting Company Ltd [2014] eKLR**. That the failure by the Defendants to obtain consent from the Plaintiff therefore entitled the Plaintiff to compensation for loss of the trees that have cut down and to damages for the act of trespass by the Defendant.

15. On the last limb of matters for determination as to whether the Plaintiff should be compensated as prayed for in the plaint, it was his submission that he had sought for:

- a. Special damages assessed at Ksh 214,179/=
- b. Damages for trespass on the Plaintiff's parcel known as Kericho/Tagat/1521
- c. General damages
- d. Cost of the suit
- e. Interest on (a) and (b)

16. On the issue of special damages the Plaintiff submitted that they had proved special damages by producing a valuation report dated 30th September 2018 together with a receipt showing this payment of the assessment fee by the Plaintiff. That the report had indicated the value of trees as at the time to be Ksh 203,980/=. That a receipt had also been produced confirming that the Plaintiff had paid Ksh 10,199/= as professional fees. This claim was not disputed by the Defendant.

17. That on the issue relating to damages for trespass on the Plaintiff's parcel of land, the law required that once trespass was proved the Plaintiff needed not prove that there was any specific damage or loss. Reliance was placed on the case of **Park Towers Ltd vs. John Mithamo Njika & 7 Others [2014] eKLR** and **Joseph Abraham Kefwa vs Kenya Power and Lighting Company Ltd** (supra).

18. The Plaintiff pegged his prayer for damages for trespass, to Ksh 500,000/= considering the peculiar circumstance of this case where 99 trees were maliciously cut down by the Defendant, even when they were not affecting the route where the power lines were to be erected, about five years ago and whereby the Defendant had continuously left him in suspense over the promised compensation.

19. In respect to the general damages sought, the Plaintiff submitted that the same was a discretion of the court and that general damages was normally awarded for loss of future earnings. That in the Plaintiffs case, since the trees were still growing, which was an ordinary course of nature, he would have reaped at least Ksh 10,000/= for every tree upon maturity and since the trees that had been cut/destroyed were 99, this would have totaled to Ksh 990,000/=.

20. That the Plaintiff had proved his case on a balance of probabilities and in the absence of any evidence to the contrary, his suit should

succeed. He prayed for judgment against the Defendant.

Defendant's submission.

21. The Defendant's submission and while relying on the provisions of section 107(1) and (108) of the Evidence Act, was to the effect that it was incumbent upon the Plaintiff to establish his case on a balance of probability notwithstanding that no evidence was adduced on the part of the Defendant. That finding the Defendant therefore liable without validating the veracity and authenticity of the Plaintiffs claim and/or evidence just because the Defendant did not adduce any evidence, would be a total subversion of the law of evidence and the general provisions of the law.

22. That there was no evidence that the alleged damage had been caused by the Defendant and/or its agents. That the photographs produced herein as evidence depicting fallen trees did not prove that the trees had been cut by the Defendant and/or his agent who did not appear in the photographs and therefore the same could have been cut by any other person. The Defendant submitted that the Plaintiff relied on hearsay evidence advanced by his mother who was not called to testify and therefore it was clear that he was out to unjustly enrich himself at the expense of the Defendant.

23. That the letter herein produced as Plaintiff exhibit 4 and alleged to have been issued by the Defendant was not authentic as it did not bare the company seal or the stamp and therefore had no evidentiary value.

24. That initially the Plaintiff had sought for compensation of 110 trees at the value of Ksh. 1.1 million, however during his cross examination he had sought for compensation in respect of 99 trees at the value of Ksh. 214,179/= of which he had failed to issue a demand letter to the Defendant. That the failure to issue the said demand letter in effect rendered the Defendant inept to comprehend what awaited it and as such the Plaintiff's suit should be construed as incompetent and incurably defective.

25. Parties were bound by their pleadings and evidence which turned and to be at variance with the pleadings was for ejection. Reference was made to the decided case in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others[2014] eKLR**

26. That a claim for general damages and damages for trespass were one and the same thing and therefore it was illogical to plead both at the same time. That despite the Plaintiff having had a reasonable quantifiable figure of the alleged damaged trees he had deliberately ignored/and or failed to particularize with precision the same in his pleadings and therefore his suit was ripe for dismissal. Reference was made to the decided case in **Provincial Insurance Company East Africa Ltd. vs. Nandwa 1995-1998 2EA 288 at page 291**

27. That the Plaintiff was not entitled to the amount claimed as the same was based on a mere report, the Plaintiff's speculation, hypothesis and conjecture. The Defendant sought for the Plaintiffs suit to be disallowed

Determination.

28. I have carefully considered the Plaintiff's claim against Defendant, the evidence adduced as well as the submissions, the law applicable and the authorities herein cited.

29. I find the issue arising herein as being:

- i. Whether the Plaintiff is the owner of the suit land.
- ii. Whether the Plaintiff is entitled to compensation from the Defendant for the trees cut.
- iii. What amount of compensation is the Plaintiff entitled to.
- iv. The consequences of a party failing to adduce evidence in support of its case

30. The Plaintiff's case is that he was the proprietor parcel of land No. Kericho/Tegat/1521. That sometime on the 12th November 2015 while at his workplace in Mombasa he had received information from his mother that the Defendant's employees had gone on his land and cut down trees he had planted on his land along KEMBU/MERIGI road. That he had traveled to Bomet from Mombasa the following day in order to seek audience from the Defendant and get to know why he had done so when no notice had been served either upon him or his mother before the trees were cut.

31. That he had reported the matter to Bomet Police Station which report had been booked vide OB NO 23/17/11/15. That he had later the visited the site with the area Kenya Power Manager who had accepted that a wrong had been committed against him (Plaintiff) wherein had promised to compensate him. That he had also involved the forest office in the area wherein an officer had visited the site and made his assessment. It was therefore after the Defendant had reneged on his promise that he decided to file suit against it wherein he claimed for;

- a. Special damages assessed at Ksh 214,179/=
- b. Damages for trespass on the Plaintiff's parcel known as Kericho/Tagat/1521
- c. General damages

d. Cost of the suit

e. Interest on (a) and (b)

32. His evidence was supported by documentary evidence including photographs taken on 14th November 2015 as Pf exh 1, the OB as Pf exh 2, the demand letter dated 23rd November 2015 as Pf exh 3, a letter from Kenya Power dated 22nd December 2015 as Pf exh 4, a complaint letter by himself to the Defendant and received by Defendant on 17th November 2015 as Pf exh 5, photographs taken on 16th January 2016 as Pf exh 6, a copy of his title deed as Pf exh 7, a valuation report dated 13th September 2016 as Pf exh 8 and a receipt for Kshs. 10,199/= for payment for assessment report as Pf exh 9.

33. It is worth noting that although the Defendant filed its amended defence denying each and every allegation in the Plaintiff's amended Complaint and had also participated in the proceedings, it did not call any evidence.

34. On the first issue for determination therefore, I find that it is not in contention that the Plaintiff is the proprietor of the suit land, him having produced a copy of his title deed as Pf exh 7 in support. This issue shall rest.

35. On the second issue as to whether the Plaintiff is entitled to compensation from the Defendant for the trees cut, I find that the Plaintiff's evidence was cognate to the effect that upon receipt that the Defendant's employees had gone on his land and cut down his trees, he had visited the Defendant's office to lodge his complaint wherein later in the company of the Defendant's area Manager they had visited the suit land wherein he had accepted liability and had been committed to compensate him via a letter dated 22nd December 2015 produced as Pf exh 4, the Plaintiff also produced photographs of the cut/ destroyed trees as Pf exh 6 and further testified that the said destruction was meted on his trees without Notice. Given the above chronology of events, I am satisfied that the Plaintiff is entitled to compensation from the Defendant for the trees cut.

36. On the next issue for determination as to what amount of compensation the Plaintiff entitled to, on the plea for special damages, I have considered the valuation report dated 13th September 2016 herein produced as Pf exh 8 which had indicated that the value of the damaged trees as at the time was Ksh 203,980/=. There was a receipt herein produced as Pf exh 9 confirming that the Plaintiff had paid Ksh 10,199/= as professional fees for assessment report confirming the amount in special damages as at Ksh 214,179/=. I find that the special damages have **not only been specifically pleaded but have been proved.**

37. The Plaintiff has also sought for damages for trespass on his land parcel known as Kericho/Tagat/1521. Indeed from the evidence herein adduced there had been no Notice served upon the Plaintiff prior to the Defendant's agents proceeding to his land and cutting down his trees.

38. The Provisions of Sections 46 of the Energy Act, CAP 314, Laws of Kenya provide 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.

39. Section 55 of the Act further provides as follows:

(1) Where any tree or hedge obstructs or interferes with the construction by a licensee of any electric supply line, or interferes or is likely to interfere with the maintenance or working of any electric supply line, owned by any licensee, such licensee shall give a seven days notice to the owner or occupier of the land on which the tree or hedge is growing, requiring the person to lop or cut it so as to prevent the obstruction or interference of the electric supply line, subject to the payment by such licensee of the expenses reasonably incurred by the owner or occupier of the land in complying with the notice:

Provided that in any case where such a notice is served upon an occupier who is not the owner of the land on which the tree or hedge is growing, a copy of the notice shall also be served upon the owner thereof, if his address is known.

(2) If within twenty-one days from the date of giving such notice the owner or occupier of the land on which the tree or hedge is growing gives a counter-notice to the licensee objecting to the requirements of the notice, the matter shall, unless the counter-notice is withdrawn following consultations between the licensee and the owner or occupier, be referred to the Commission for determination and the Commission may, after giving the parties an opportunity to be heard, make such orders as it thinks just, and any such order may empower the licensee, after giving a seven day prior notice to any such person by whom the counter-notice was given of the commencement of the work as the order may direct, to cause the tree or hedge to be lopped or cut, and may determine any question as to what compensation, if any, and expenses are to be paid:

Provided that any party aggrieved by any decision of the Commission with regard to compensation may within thirty days after being notified of such decision appeal to the Tribunal.

(3) The licensee shall issue instructions to his servants and agents with a view to ensuring that trees and hedges shall be lopped or cut in a way that little damage as possible is done to trees, fences, hedges and growing crops, and shall cause the boughs lopped to

be removed in accordance with the directions of the owner or occupier, and shall make good any damage done to land.

(4) Any compensation or expenses payable to the owner or occupier by the licensee under this section shall be a civil debt recoverable summarily.

(5) Where it is necessary to fell any trees, this section shall apply to the felling of trees *mutatis mutandis* as it applies to the lopping of trees.

(6) This section shall apply to electric supply lines owned or to be constructed by any licensee regardless of the type of licence he holds.

40. From the above provisions of the law, it is clear that a person ought not to enter into another's land in order to lay electric supply lines unless with the permission of the land owner. Such person needs to give notice accompanied by a statement giving the particulars of entry. Under Section 55, where trees interfere with an electric supply line, a 7 day notice is required to be given to the land owner requiring such owner to lop or cut down the trees affecting the power line.

41. I therefore find that the Defendant's action of entering into the Plaintiff's land without first notifying him and without his permission was indeed tantamount to trespass. Its further action of cutting down the Plaintiff's trees, without first giving him notice and giving him opportunity to do so, was also clearly in contravention of the provisions of Section 55.

42. Section 3 (1) of the Trespass Act, Cap 294 provides 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."

43. Having found that the Defendant herein trespassed on the Plaintiff's land and keeping in mind the that once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary. See **Park Towers Ltd V John Mithamo Njika & 7 Others (supra)**. I find that the Defendant needs to compensate the Plaintiff in general damages for trespass and since general damages are in the discretion of the court. The court having regard to the value of the trees to the environment which far surpasses the narrow view of trees as being purely commercial in nature, and keeping in mind that there was no material evidence adduced to show when the trees were planted, their optimum harvest period, and when they were to be harvested, I assess general damages for trespass in this case in the sum of Kshs. 250,000/=.

44. As earlier alluded, although the Plaintiff's case was supported by evidence, the Defendant on the other hand **apart from filing its amended defence did not adduce any evidence in support of assertions made therein**. The consequences of a party failing to adduce evidence in support of its case, which was the fourth matter for determination, is that **the Plaintiff's evidence remained unchallenged and uncontroverted**.

45. In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit**, citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998** stated:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail".

46. **When all is said and done I find in favour of the Plaintiff and enter judgment against the Defendant in the following terms:**

- a. Special damages assessed at Ksh 214,179/=
- b. General damages- at Ksh 250,000/=
- c. Cost of the suit
- d. Interest on (a) and (b) above at Court rates from the date of filing suit till payment in full.

Dated and delivered at Kericho this 25th day of February 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE