



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya Power & Lighting Company v Chonge (Environment and Land  
Appeal 2 of 2023) [2024] KEELC 418 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 418 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 2 OF 2023  
FO NYAGAKA, J  
FEBRUARY 1, 2024**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY ..... APPELLANT**

**AND**

**JUSTUS CHONGE MUKANDA ALIAS JUSTUS CHONGE  
KORAH ..... RESPONDENT**

*(Being an appeal from the Judgment delivered by Hon. C.M. Kesse  
(PM) on 19th January 2023 in Kitale CMC ELC No. 38 of 2021)*

**JUDGMENT**

**Background**

1. Through a Plaintiff dated 22/04/2021, Justus Chonge Mukanda, 'the Respondent herein, sued Kenya Power & Lighting Company, the Appellant herein for trespassing onto his land, being Kiminini/Matunda Block 2(Mitoto)/104 (hereinafter 'the suit land'), and cutting down trees, erecting electricity poles and installing power transmission line without his consent. In the trial Court he sought the following reliefs:-
  - a. General damages for trespass.
  - b. Special damages of Kshs. 51,250/-.
  - c. An order that the defendant do forthwith remove the electric pole(s) and power transmission line on the suit land.
  - d. Costs of the suit.
  - e. Any other orders/reliefs the Court may consider just and expedient to grant.



2. The Appellant opposed the suit through the defence dated 21/05/2021. Apart from stating that the Respondent had not exhausted the statutory mechanisms for addressing the dispute, it denied the Plaintiff's case including proprietorship the suit land by the Respondent as well as the act of trespass damage to property.
3. Upon considering the issues, the Trial Court delivered a judgment by which it allowed the Plaintiff's case. It awarded his Kshs. 400,000/- in general damages for trespass and loss of user and Kshs. 51,120/- in special damages.

### **The Appeal**

4. Dissatisfied with the judgment, the Appellant instituted the instant Appeal. In the Memorandum of Appeal dated 02/02/2023, it cited the following grounds of appeal;
  - a. That the learned trial magistrate erred in law in failing to appreciate the facts and overwhelming laws and statutory provisions tendered to prove that the Trial Court had no jurisdiction.
  - b. That the trial Court completely erred in law and facts by completely disregarding the testimonies of the Appellant's witnesses.
  - c. That the learned trial magistrate erred in law and in facts by failing to appreciate the overwhelming laws and statutory provisions tendered by the appellant against the claim for special damages.
  - d. That the learned trial magistrate erred in law and in facts by ignoring the submissions tendered by the appellant but irregularly relied on the learned trial magistrate's own direction by arbitrarily awarding the respondent damages for Kshs. 400,000/- without any supporting authorities.
  - e. That the learned trial magistrate erred in law and facts by ignoring binding authorities of the superior courts adduced in the appellant's submissions.
  - f. That the learned trial magistrate erred in law by ignoring the evidence and submissions tendered by the Appellant.
  - g. That the learned trial magistrate erred in law and in fact by taking into account irrelevant considerations.

### **The Submissions**

5. The Appellant urged its case through written submissions dated 04/09/2023.
6. In its contention that the Trial Court did not have jurisdiction, the Appellant submitted that the trial court dismissed its Preliminary Objection, based on repealed Energy Act 2006 and by citing the decision in Civil Appeal No. 80 of 2016, Kenya Power & Lighting Company Ltd. -vs- Fleetwood Enterprise Ltd. [2017] eKLR where the Court held that failure to seek consent was a violation of mandatory provision Section 46 and 47 of the energy Act.
7. It argued further that the trial court relied on Section 171 and 172 of the Energy Act in total disregard and ignorance of Section 3 and 36 of the said Act that give supremacy to the Energy Act and confers jurisdiction to the Energy and Petroleum Tribunal Respectively.
8. To bolster its case, the Appellant relied on the decision in Abidha Nicholus -vs- Attorney General & 7 Others, National Environmental Complaints Committee (NECC) and 5 Others (Interested Parties)



- unreported where it was observed that on disputes related to the Appellant, a complaint must first be raised with Energy and Petroleum Regulatory Authority. The second tier is the Energy and Petroleum Tribunal (EPT) and the third tier is the Court upon exhaustion of the appellate process.
9. On the foregoing, the Appellant urged the Court to allow the appeal based on the operation of the doctrine of exhaustion pursuant to Section 1, 10, 11(e), (f), (I), (k) & (l) of the *Energy Act*, Regulation 2, 4, 7 and 9 of the Energy (complaints and Disputes Resolution Regulations, The Energy Tribunal Rules 2008, Article 159(2)(c) and 169(1)(d) and 2 of *the Constitution* and Sections 9(2) and (3) of the Fair Administrative Actions Act.
  10. On the second issue regarding the Trial Court's failure to take into consideration inconsistent evidence of the witnesses, the Appellant submitted that the court in its judgment made the finding that the Respondent produced photos showing a pole, power line and cut trees whereas in fact the Respondent testified that there were no trees in the photos that they had produced as evidence.
  11. It urged further that the Respondent confirmed in court that he did not see the appellant cutting trees, that he only relied on people who did not testify in court. It submitted that the Respondent failed to prove that the allegedly cut trees were 41 since he only produced photos showing one electricity pole.
  12. As regards the claim that the eucalyptus trees were aged 7 years, it was the Appellants position that there was uncertainty on the year since in the plaint it was averred that it was planted in the year 2021 while in PW1's report, it indicated that the trees were planted in the year 2015. It argued that the Respondent did not discharge its legal burden of proof.
  13. As regards special damages, the Appellant submitted that the Respondent's evidence was in general terms without any specificity on losses. To that end, the decision it referred to the case of Capital Fish Limited -vs- Kenya Power and Lighting Company where it was observed that special damages must not only be specifically pleaded but also specifically proved.
  14. On the aspect of general damages, the Appellant submitted that the trial court failed to cite any authorities that led to the award of Kshs. 400,000/-. It was its case that it investigated irrelevant issues which had not been pleaded including the finding that the Respondent had lost use of the suit land.
  15. The Appellant stated that the Trial Court misapprehended evidence and arrived at an inordinately high figure. While relying on the decision in Butt -vs- Khann (1981) KLR, and the Court of appeal decision in Cecilia mwangi & Another -vs- Ruth W. Mwangi [1977] eKLR, it was urged that this Court makes its own assessment on the quantum using comparable cases and keeping in mind the correct level of similar cases. In conclusion, the Appellant urged the Court to allow the appeal and set aside the entire judgment of the lower court.

### **The Respondent's Case**

16. Justus Chonge Mukanda challenged the Appeal through written submissions dated 10/07/2023 and filed in court on a similar date. In response to the claim that the trial court did not have jurisdiction, the Respondent submitted that the Appellant raised a preliminary objection before the Trial Court but was dismissed. It was its case that the Appellant did not appeal against the Preliminary Objection and as such did not suffer any prejudice when it was dismissed. The Respondent therefore submitted that the issue of jurisdiction is now res-judicata.
17. The Respondent rebutted the Appellant's claim that the Trial Court misdirected on the issue of the applicable law by stating that the Court's finding of failing to seek his consent before using his land was in line with Section 171 of the *Energy Act*. As pertains award of general damages, it was the



Respondent's case that there is no wrong principle that the trial magistrate considered. He argued that there was evidence that he lost a potential purchaser of the suit land as a sum of Kshs. 1,600,000/- due to the erection of electricity poles and wires by the Appellant.

### **Issues for determination**

18. From the foregoing arguments and counter arguments, the issues that arise for determination are as follows;
  - i. Whether the trial Court had jurisdiction to deal with the dispute.
  - ii. Depending on (i) above, whether the trial court's assessment of evidence and resultant award of damages was proper.
  - iii. Costs of the suit.

### **Analysis and Determination**

19. This being a first appeal, this Court's role, as observed in the case of *Selle & Ano -vs- Associated Motor Boat Co. Ltd* [1968] EA 123 is to revisit the evidence on record, evaluate it and reach its own conclusions.
20. Also, it is trite law that this Court ought not to interfere with the findings of the trial Court except a case of clear misunderstanding of both the law and evidence. In *Mwanasokoni -vs- Kenya Bus Service Ltd*. 1982-88 1 KAR and *Kiruga -vs- Kiruga & Another* [1988] KLR 348 caution ought be taken not to interfere with the findings of fact by the trial Court unless they are based on no evidence at all, or on a misapprehension of it or if it is demonstrated that the Court acted on wrong principles.
21. I will hence consider the issue sequentially.

#### **(i) Whether the Trial Court had jurisdiction to deal with the dispute**

22. Jurisdiction is so central to validity of any court proceeding that the lack of it renders any adjudicatory proceeding invalid ab initio. The concept was discussed in a detailed fashion by the Court in *David Ndii & 4 others -vs- Attorney General & 3 others; Kenya Human Rights Commission & 2 others (Intended Amicus Curiae) (Petition E282 of 2020) [2020] KEHC 738 (KLR) (Constitutional and Human Rights) (30 November 2020) (Ruling)*. Although the excerpt is long, I will reproduce it as it is for clarity purposes. The Court observed:

24. Jurisdiction is defined in *Halsbury's Laws of England (4<sup>th</sup> Ed.) Vol. 9* as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision." *Black's Law Dictionary, 9<sup>th</sup> Edition*, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.

25. In *Words and Phrases Legally Defined Vol. 3*, John Beecroft Saunders defines jurisdiction as follows:

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a



Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

23. In the seminal case of *MOTOR VESSEL M.V. LILLIANS VS. CALTEX OIL (KENYA) LIMITED* 1989 KLR 1 wherein Nyarangi, J.A, as he then was stated:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean... If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing...”

24. In the case of *Jamal Salim v Yusuf Abdulahi Abdi & Another Civil Appeal No.103 of 2016 [2018] EKLK* the Court of Appeal held;

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577*, as follows;

- “1) ...
  - 2) The jurisdiction either exists or does not ab initio ...
  - 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
  - 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
18. It follows that even where a party initially admits to jurisdiction, as in this case, the same does not clothe a court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity.”

25. Why is the jurisdiction of a Court or body everything? It is because that is where parties' rights are settled in. Put differently, the jurisdiction of a Court or body to handle a dispute is a fundamental firmament upon which parties' rights such as the ones *the Constitution* designates as those which cannot be derogated from and even those that derogation may be made hang from. Thus, the Court of Appeal has held, and it is true, that jurisdiction is determinatively central to any proceedings. It has done so in *Court's Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] EKLK* where it stated that:-

“So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for



economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain”.

26. Having elaborated the meaning, the source and significance of the jurisdiction of a court, I now turn to the question whether the Court was clothed with the requisite jurisdiction. As I do so I bear in mind that from the record, the issue of the jurisdiction of the Court was raised before the Court vide a preliminary objection dated 09/09/2021. It was argued and the trial Court rendered itself on it on 08/02/2022 dismissing the same with costs.
27. After the Court delivered the ruling, the Appellant did not appeal against the decision. But it now raises the same issue before me. The appellants do not dispute that the issue was determined by the Court and the ruling on it was made considering the merits thereof. Therefore, when that juxtaposed with the provisions of res judicata, absent of the argument that jurisdiction can be raised at any stage of a matter and also, as the Court of Appeal held, that where a court does not have jurisdiction but it proceeds to determine a dispute its work and decision is a nullity, the ground of appeal herein regarding jurisdiction against the decision of the trial magistrate would have been simply res judicata. Therefore, I have the duty to determine whether the exception I have alluded to would fit the instant argument.
28. First, it is understandable for the Respondents to argue that the ground on jurisdiction is res judicata. But it is puzzling why, if the Appellant was of the view that the Court did not have jurisdiction, it submitted itself to the trial of the matter and not appeal immediately or within the period permitted from when the decision was rendered. Since the decision was made, the Appellant had up to 08/03/2022 to appeal or to seek leave to appeal soon after the expiry of the period. The Appellant having failed to do so, it appears to me that, the ground it raises that the court did not have jurisdiction to entertain the suit whose judgment they could have appealed from is an afterthought and an act of having a second bite at the cherry, through the back door, that is an ‘appeal’ (ground) brought out of time and without leave of the Court. It is unprocedural, unheard of and not permissible in law.
29. Be that as it may, the fact that courts of equal status and those of higher level in hierarchy than this one have held that the issue of jurisdiction can be raised at any stage of the proceedings, including on appeal if need be (Refer, for instance, to the holding of the Court of Appeal in *Kenya Ports Authority v Modern Holdings [e.a] Limited*[2017] eKLR), it does not mean that a party re-litigates such an issue irregularly or illegally as sought to be done herein regarding the first ground of appeal. It must and only can be that the objection to the jurisdiction of the Court is raised for the first time at that stage. So much so that where it is raised prior to the (second) time it is being raised, the latter time can only be on appeal strictly arising from the earlier decision on the same but not through a fresh ground of appeal after the opportunity to appeal the earlier decision has gone stale or passed. This court abhors the practice the Appellant wants to introduce by raising the issue through a ground of appeal herein.
30. The Court of Appeal has had the occasion to address the foregoing issue. In Civil Appeal E247 & E248 of 2020 (Consolidated) *Kenya Power & Lighting Company Ltd v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment) the learned Judges observed as follows:

“Turning to the 2nd issue, we have revisited the subject sections of the *Energy Act* 2006, forming the appellant’s complaint on this issue and construed them on our own. Our take thereon is that these relate to the out of court procedures the respondents were at liberty to invoke and seek compensation for the appellant’s conduct of trespassing on the suit properties by laying electricity supply posts and cables without their consent, authority or knowledge through the dispute resolution compensatory mechanism inbuilt in those provisions which the respondents elected not to avail themselves of. We find nothing therein



to bar a party aggrieved by the appellant's trespass conduct to seek redress from court as the respondents did instead of resorting to the inbuilt out of court dispute resolution, compensatory mechanism inbuilt in the said provision. Secondly, we also find these formed the basis of two preliminary objections the appellant filed separately in each cause."

53. The one in ELC No. 869 of 2017 was dated 27th February, 2018 while that in ELC No. 797 of 2017 was dated 5th March, 2018, both similar in all material particulars basically touching on the issue of want of jurisdiction in the court to entertain and determine both causes allegedly in view of the provisions of the *Energy Act*, 2006 as read together with the Energy (Complaints and Disputes Resolution) Regulations, 2012. Both were heard jointly on their merits and dismissed in a ruling delivered by the learned Judge on 2nd May, 2019. This issue is therefore an attempt to argue the appeal against the trial court's rejection of the preliminary objections through the back door as no appeal against it was filed. It is accordingly rejected".
31. That said, in the wider interest of justice and as an exception to what this Court has held above, it will now proceed to consider whether indeed the Court erred in holding that it had jurisdiction. I have stated much above about what amounts jurisdiction. Therefore, I delve into the issue straight away.
32. Thus, first ground in the Memorandum of Appeal is the contention that the Trial Court did not have jurisdiction in view of the requirement by the *Energy Act* that disputes in the nature of the one in the instant Appeal ought to first to be placed before the Energy and Petroleum Regulatory Authority and if on appeal therefore, the Tribunal. The Respondent challenged the Appellant's position by simply stating that the issue was now res-judicata since it was already disposed of at the Trial Court when it dismissed the Appellant's Preliminary Objection on jurisdiction.
33. The Respondent's argument is an invitation to interrogate whether the bar of res-judicata is applicable on jurisdiction. My attention is drawn to the Court of Appeal decision in Civil Appeal No. 621 of 2019 (Consolidated with Civil Appeal 74 of 2020, Attorney General & 2 others v Okiya Omtata Okoiti & 14 Others [2020] eKLR. In the case, the Court rendered themselves itself follows:
- “There are many decisions of our courts that emphasise that due to its importance, an issue of jurisdiction may be taken at any time and stage of proceedings...”
34. Further in the case, the Court referred to the decision in *Lemita Ole Lemein v. Attorney General & 2 Others* [2020] eKLR, where Karanja, J.A. spoke of jurisdiction in the following terms:
- “In my view, jurisdiction is primordial and must exist right from the filing of a case to determination...The Court can suo motu determine the issue even without being prompted by a party. Just like you cannot confer jurisdiction even by consent of the parties, you cannot confer jurisdiction by ignoring the issue or sidestepping it. It is omnipresent and cannot be wished away. Moreover, it being a point of law, the issue of jurisdiction can also be raised at any stage; in the trial court, first appeal or even on second or third appeal”. [Emphasis added].
35. The Court cited with approval the decision in *Nyangau v Nyakwara* [1986] KLR 712 where it was observed:
- “though the new point had not been taken up earlier and was raised for the first time in the Court of Appeal, the Court would allow it because it was an issue going to the issue of jurisdiction.”



36. The learned Judges concluded the need to ascertain a trial court’s jurisdiction even on appeal by referring to the decision in *Kenya Commercial Bank v. Osebe* [1982] KLR 296, where the following remarks were made:

“...in *Kenya Commercial Bank -vs- Osebe* [1982] KLR 296, it was held that although an appeal must be confined to the points of law raised and determined by the trial court, there were two exceptions to that rule, namely, where the trial court commits an illegality or acts without jurisdiction. In our view, the basis of all these decisions is that jurisdiction flows from the often stated truth that jurisdiction is everything and without jurisdiction, a court must down its tools”.

37. The foregoing had made me to consider, though late as an appeal, whether the trial Court had jurisdiction over this matter. On that account, I will dismiss the Respondents’ submission that the ground is *res judicata*.

38. I now turn to the merits of the contest that the jurisdiction of the Trial Court was ousted by that of bodies stated above. The Respondent sued the Appellant for acts allegedly committed in or about January, 2021, by employees or agents of the latter over his parcel of land, namely, Kiminini/ Matunda Block 2 (Mitoto)/104 measuring about 0.4452 acres. He urged the Court to deem them as trespass and grant him the relief of General Damages for that trespass and special damages, an order for the Appellant to remove the electric poles and power transmission lines so erected and costs of the suit. The Appellant denied the claim and raised the defence that the Respondent had not, among others, exhausted the laid down statutory procedures laid down for addressing the issue and ventilating such disputes.

39. I will therefore look at the source of the jurisdiction of the Energy and Petroleum Regulatory Authority and its appellate body the Energy and Petroleum Tribunal’s authority.

40. In the first instance Section 170 of the *Energy Act* allows anyone to develop energy infrastructure including electric supply lines over any public or private land in the following terms:

“A person may develop energy infrastructure, including but not limited to electric supply lines, petroleum or gas pipelines, geothermal or coal infrastructure, on, through, over or under any public, community or private land subject to the provisions of this Act and relevant written law.”

41. In regard to the Energy and Petroleum Regulatory Authority, it is established under Section 9 of the Act, its functions enumerated under Section 10 and its powers Section 11. Appeals from the Authority lie to the Tribunal in terms of Section 36 of the Act.

42. As regards the establishment of the Energy and Petroleum Tribunal, Section 25 of the *Energy Act* is relevant. It provides as follows:

“25. There is established the Energy and Petroleum Tribunal, hereinafter referred to as the Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law.”

43. The jurisdiction of the Energy and Petroleum Tribunal is established by Section 36 of the *Energy Act* 2019 in the following manner:

“36.



- (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
- (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
- (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
- (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
- (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
- (6) The Tribunal shall hear and determine matters referred to it expeditiously.”

44. The foregoing provision is comprehensive on powers of the Regulatory Authority and the Energy Tribunal. Regarding disputes resolutions, the Energy (Complaints and Disputes Resolution) Regulations 2012 provide that a complaint is a dissatisfaction with the service rendered by, a practice of, any person carrying out any undertaking pursuant to a licence, permit or registration issued or granted by the Commission (now Authority) under the Act [emphasis mine].

45. The claim in the lower Court was that the Respondent, through its servants and or agents trespassed onto his land. The question is: is trespass an activity, practice or service regulated under the Act? Not so. These are acts that are illegal and actually border on criminal liability. When a party does an act outside of the ones permitted by the Act, or indeed any other law, it is an illegality, Period! Can a party negotiate an illegality or move the Authority over an illegality? In my view that would not accord the Authority jurisdiction to handle. He can only move the proper forum that deals with determinations on illegalities, and that is the Court, except if the Authority had been specifically granted by the statute that created it that power to deal with it. This is a nuanced jurisprudential approach which a mind not keen may not discern. Therefore, the Respondents was right in moving the Court as he did and the Court had jurisdiction to deal with the matter.

46. In any event the Respondents had a right to access to justice when the illegal activities of the Appellant took place. They cannot be denied that right by the argument that the doctrine of exhaustion caught up with them. I find that the first ground is to be laid to rest as was found by the trial Court.

47. Having so found, I now turn to the succeeding issue:

**(ii) Whether the trial court’s assessment of evidence and resultant award of damages was proper**

48. The Appellant’s second and sixth and seventh ground of appeal revolve around the contention that in its decision, the Trial Court disregarded the testimony/evidence of its witnesses.

49. I have carefully read through the record of appeal as well as the impugned Judgment. The Appellant called one witness by the name Luka Kibet Kigen. For the reason of the claim that the Trial Court



disregarded the said witnesses' evidence, it is crucial that I reproduce his evidence verbatim. He stated as follows:

“I don't have any authority to enter the Plaintiff's land. I do not know whether the Plaintiff is a beneficiary. We did not ask for consent to put a pole on the land”.

50. The Court, upon considering the foregoing alongside Section 171 of the *Energy Act*, the relevant provision that requires consent of the land owner made the following remarks:

“The defendant did not seek the consent of the Plaintiff to erect a power line or a post on the Plaintiff's land.

The fact that the Defendant went ahead to erect a pole with powerline affected the Plaintiff. The Defendant trespassed on the Plaintiff's land for over a year now thereby interfering with the govet (sic) possession and enjoyment of the Plaintiff.”

51. The foregoing puts to rest the Appellant's contention about the evidence. It is clear that indeed in her decision, the learned trial magistrate took into account the evidence of the Appellant's witness. The witness expressly admitted that he did not ask for consent to put a pole on the land. It was a correct finding of fact. The Appellant's ground of appeal is therefore without basis.

52. Having found so, I will condense and consider the grounds of appeal in paragraphs c, d, e, in view of the fact that it faults the Trial Court in its award for special and general damages. The fair determination of the issue of special damages calls upon this Court to in the first place appreciate the tort of trespass. The first port of call is the *Trespass Act*. Section 3 defines trespass upon private land as follows:

3. Trespass upon private land

- (1) 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.

53. From the foregoing definition, an essential ingredient for one to succeed in a claim of trespass is proof of exclusive occupation of private land. In the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR the Court of Appeal cited with approval its earlier decision in *M'Mukanya vs. M'Mbijiwe* [1984] KLR 761, where trespass was spoken of in the following terms;

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership.”

54. In this case, the Title to the land was produced by the Respondent as P.Exhibit 2. He further produced a bundle of photographs marked as P.Exhibit 7(a)-(f) showing the pole, powerline and the trees that were cut down as a result. In absence of any rebuttal by the Appellant as to the ownership and possession of the suit land, it is without doubt that the Respondent is the owner and was in occupation.

55. Taking cue from the foregoing, I am reminded, as was held by the Court of Appeal in *United India Insurance Company Limited vs. East African Underwriters Kenya Ltd* [1985] KLR 898 and cited with approval in *Civil Appeal E247 & E248 of 2020 (Consolidated)*, *Kenya Power & Lighting Company Ltd v Ringera & 2 Others (Civil Appeal E247 & E248 of 2020 (Consolidated))* [2022] KECA



104 (KLR) (4 February 2022), that judicial discretion is only interfered in instances where there is misdirection in law and facts. In the case it was observed:

“Interference with exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, taking into consideration factors the trial court ought not to have taken into consideration or failure to take into consideration factors that ought to have been taken into consideration or looking at the decision generally, the only plausible conclusion reached is that the decision albeit a discretionary one, is plainly wrong”.

56. The Appellant’s contention is that the Trial Court’s assessment of special and general damages was against the law and statutory provisions and was arbitrary respectively. The factors to consider while awarding damages with particular respect to trespass were crystallized by the Court of Appeal in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022). It was observed:
- i. Harlsburys Laws of England 4th Edition Vol. 45 at para 26 pg 1503, namely, the owner of the land is entitled to nominal damages where there is no actual damage occasioned to the owner by the trespass, such amounts as will compensate the owner for loss of use resulting from the damage caused by the trespass, reasonable damages are payable where the trespasser has made use of the owner’s land, exemplary damages are payable where the trespassers conduct towards the owner is not only oppressive but also cynical and carried out in deliberate disregard of the right of the owner of the land with the object of making a gain by his/her unlawful conduct, general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land.
  - ii. Duncan Nderitu Ndegwa vs. Kenya Pipeline Company limited & Another [2013] eKLR - damages payable for trespass are the amount of diminution in value or the loss of reinstatement of the land with the overriding principle being to put the claimant in the position he was in prior to the infliction of harm.
  - iii. Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR, - the measure of damages for trespass is the difference in the value of the plaintiffs’ property immediately before and immediately after the trespass or the cost of restoration whichever is less.
  - iv. Ephantus Mwangi & Another v Duncan Mwangi [1981 - 1988] I KAR 278, - an appellate court is not bound to accept and act on the trial court’s findings of fact if it appears clearly that the trial court failed to take account of particular circumstances or probabilities material to an estimate of evidence. A Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.
  - v. Kiambu Dairy, Farmers Co-operative Society Limited v Rhoda Njeri & 30 Others [2018] eKLR, - the extend of an award of compensatory damages lies in the discretion of the trial court and interference therewith on appeal must be approached with a measure of circumspection and well settled principles.
  - vi. Kemfro Africa Limited v Lubia & Another [No. 2] [1987] KLR 30 as approved in Peter M. Kariuki v Attorney General [2014] eKLR, - before interference with the quantum of damages awarded by a trial court the appellate court must be satisfied that either the judge in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or



short of the above, the award is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages payable.

- vii. Johnson Evans Gicheru vs. Andrew Martin & Another [2005] eKLR, - this Court on appeal will be disinclined to disturb the finding of the trial Judge as to the amount of damages awarded by the trial court merely because if it had tried the case itself in the first instance, it would have awarded either a higher or lesser sum) justification for reversing a trial Judge on an award of damages only applies where the court is convinced either that the Judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it an entirely erroneous estimate of the damage to which the aggrieved party is entitled.
  - viii. Sumaria & Another vs. Allied Industries Limited [2007] 2 KLR I, - an appellate court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or that the Judge had been seen demonstrably to have acted on a wrong principle in reaching the finding he/she did.ix)
  - ix. Butt v Khan [1981] KLR 349, - an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate
  - x. it must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.
  - xi. Total (Kenya) Limited formerly Caltex Oil (Kenya) Limited v Janevans Limited [2015] eKLR, - whether the claim is in contract or tort, the only damages to which an aggrieved party is entitled to is the pecuniary loss;(b) the accruing awardable damages is aimed at putting the aggrieved party into as good a position as if there had been no such breach or interference. In other words, in the position it/he/she was in with regard to the object trespassed upon before the onset of such a trespass;(c) it is meant to cushion the aggrieved party against the expenses caused as a result of the trespass and loss of benefit over the period of the duration of the trespass.
57. Coming back to the issue at hand and deriving from the foregoing, the record bears itself out that indeed there was trespass, damage to property and loss of use resulting from the damage caused by the trespass. This Courts further notes that as a matter of fact, the trespass is still continuing.
58. Whereas this Court is in agreement with the Appellant that there were no supporting authorities relied upon the trial court in arriving at damages of Kshs. 400,000/- there was no demonstration of misdirection in law, misapprehension of the facts presented by the Appellant categorically pointing out the factors the trial court ought not to have taken into consideration or failed to take into consideration.
59. Guided by the decision in Kiambu Dairy, Farmers Co-operative Society Limited vs. Rhoda Njeri & 30 Others [2018] eKLR, referred to by the Court of Appeal in Kenya Power & Lighting Company Ltd v Ringera & 2 others [Civil Appeal E247 & E248 of 2020 (Consolidated)] [2022] KECA 104 it is my finding that whereas there were no authorities, I would find no fault to the extent that the damages of Kshs.400,000/- was for both trespass and loss of user.
60. Despite the Appellant's contention, I find that the Trial Court's inclusion of 'loss of user' in its assessment of damages was correct to the extent that the Repsondent pleaded that he was unable to sell the suit land neither could he do any useful developments thereon after erection of power lines.
61. As regard special damages, save from stating that the Trial Court erred in law and fact in awarding Kshs. 51,250/-, the Appellant did not challenge the assessment and valuation report from Kenya Forest



Service on the amount of loss suffered by the Respondent. The Respondent pleaded and specifically proved his case.

62. The totality of the foregoing is ample demonstration that the Trial Court did not err in its appreciation of facts and assessment of the law and evidence. This Court was availed no material to deviate from its finding.
63. In the premises, I find and do hereby hold that the Appeal is unsuccessful and I hereby dismiss it in entirety with costs to the Respondent.
64. It is so Ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 1ST DAY OF FEBRUARY, 2024.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE.**

