



Mbithi v Kenya Power & Lighting Company Ltd (Environment & Land Case 42 of 2019) [2024] KEELC 5277 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 42 OF 2019**

**A NYUKURI, J
JULY 10, 2024**

BETWEEN

PENINAH MBITHE MBITHI PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LTD DEFENDANT

JUDGMENT

1. Vide a plaint dated 4th June 2015, the plaintiff sought against the defendant the following orders;
 - a. General damages.
 - b. A perpetual order of injunction restraining the defendant by itself, its agents, servants and/or employees from installing and/or continuing to provide electricity within the suit premises known as Mavoko Town Block 3/6091 and a mandatory order of injunction directing the defendant to remove its electricity posts, wires and other installations and equipment from the suit premises forthwith.
 - c. Costs of this suit and interest thereon at court rates.
 - d. Any other relief that this Honourable Court may deem fit and just to grant.
2. The plaintiff averred that she was the absolute registered Proprietor of the parcel of land known as Mavoko Town Block 3/6091 (hereinafter referred to as the suit property). Further that in December 2014, the defendant through its agents, servants and/or employees trespassed on the suit property and installed electric poles and cables purportedly for purposes of supplying electricity within the suit premises. She denied applying for supply of electricity in the suit premises.
3. She also stated that by her letters dated 8th January, 2015 and 27th February 2015, she protested the defendant's actions, believing that the same had happened through an honest mistake but the defendant persisted in their actions. She stated that the installation of the electric cables on her property



was because of the corruption of the defendant's officers. She further stated that the defendant had wantonly damaged, destroyed and environmentally degraded the suit property reducing its market value thereby subjecting the plaintiff to financial loss, mental agony, loss and suffering.

4. The suit was opposed. The defendant entered appearance and filed defence dated 16th July, 2015 and amended on 4th May, 2022. It denied the plaintiff's claim and stated that it only entered the suit property upon the plaintiff's request to remove illegal electricity lines. It stated further that having received a request to remove illegal electricity lines, it was under statutory duty to enter the suit property and remove the said electricity lines to ensure safety of the plaintiff and the public.
5. In a rejoinder, the plaintiff filed reply to amended plaint dated 16th September, 2022 wherein she reiterated the averments in the plaint and denied allegations contained in the amended defence.
6. On close of pleadings, the suit was heard by viva voce evidence. The plaintiff testified in support of her case while the defendant also presented one witness.

Plaintiff's evidence

7. Pw1 was Peninah Mbithe Mbithi. She adopted her witness statement dated 4th June 2015 as her evidence in chief. It was her testimony that she was the registered proprietor of the suit property. She stated that in December 2014, she noticed that the defendant's agents and or employees had trespassed on the suit property and were erecting electric poles and cables which act surprised her as she had not applied for electricity.
8. She stated that by letters dated 8th January, 2015 and 27th February, 2015 she wrote through her advocates to the defendant asking them to stop the works on the suit property, but the latter ignored her and continued with the work. She stated that she visited the defendant's offices and talked to a Mr. Mureithi, working in the way leave section, who conceded that their presence in the suit property was a mistake as there was no consent from the owner of the suit premises. She alleged that on 13th February 2015, Mr. Mureithi, the area chief and herself visited the suit property whereof Mr. Mureithi promised to stop the works in one week.
9. She claimed that the defendant's officers were working corruptly with land grabbers to enable the latter lay claim on the suit property, and so they did not stop the works. She further allege that the defendant's actions were unlawful and had subjected the suit property to wastage, destruction, damage, reduced market value and environmental degradation. She contended that she suffered an estimated loss of Kshs. 20,000,000/- which continue to escalate. She stated that the defendant only removed their posts and cables after being served with this court's order.
10. She produced documents attached to her list of documents dated 4th June, 2015 and supplementary list dated 16th September, 2022. The exhibits she produced are a copy of Title of the suit property, letters dated 8th January, 2015 and 27th February, 2015 and ruling of the court dated 29th September, 2015.
11. In cross-examination, she stated that she complained to the defendant that there were illegal power lines on the property and that at the time of giving her testimony, the same had been removed. She admitted having sub-divided the suit property and stated that the same now had a different title. She stated that the property in the plaint was for permanent injunction regarding the old title, but that she had also sought general damages. That marked the close of the plaintiff's case.

Defendant's evidence

12. DW1 was Charles Wagana the way leaves officer of the defendant. He adopted the contents of his witness statement dated 11th March 2022 as his evidence in chief. It was his evidence that he was aware



that before the defendant installs electric posts and cables in any one's land, an application must be made by the proprietor thereof and if an application is made by a person who is not a proprietor, way leave consent must be obtained from the proprietor. He stated that the plaintiff never applied for electricity from the defendant and therefore the defendant has never been on the suit property for purposes of installing electric posts and wires.

13. It was also his testimony that the defendant only went to the suit property to disconnect and recover illegal lines which the plaintiff reported to have been erected on the suit property, by a person unknown to the defendant. He maintained that the defendant in going to the suit property was responding to the plaintiff's request and acted in public interest and safety. According to the witness, the illegal lines were of no benefit to the defendant and that they actually caused loss of revenue to the defendant. He stated that since it is the plaintiff who requested for disconnection and removal of the posts and cables erected on the suit property, which request was complied with, the plaintiff's prayers for perpetual and mandatory injunction is now spent and that no damages should be awarded because the same are in respect of illegal connections.
14. In cross examination, he stated that he joined the defendant in 1990 and that the actions complained of happened before he began working in Machakos. He stated that upon investigation, they realized that the electric posts were not installed by the defendant's employees and were not their lines. He stated that the same were illegally installed. He maintained that the posts and cables belong to the defendant and that the people who connected the power in the suit property were not the defendant's agents or employees. He confirmed that the defendant has the monopoly of supply of electricity in Kenya and that he was not aware of any complaint of illegal installation. He stated that he was not aware that the plaintiff obtained an order compelling the defendant to remove the posts from her land.
15. He confirmed to have seen the letter by the plaintiff asking the defendant to remove their posts and also the order compelling the defendant to remove their posts from the plaintiff's land, and that the letters came before the order.
16. He conceded that the supply of power and placing posts in the plaintiff's land was unlawful and that he was not aware if the plaintiff had been compensated. That marked the close of their defence case.
17. The parties filed their submissions in support of their respective cases. On record are submissions filed by the plaintiff on 21st September, 2023 and those filed by the defendant on 7th September, 2023.

Plaintiff's submissions

18. Counsel for the plaintiff submitted that it was ironical that after the court issued the mandatory injunction compelling the defendant to remove their posts from the suit property, that the defendant changed its version in the amended defence because they had earlier admitted having installed the electric posts in the plaintiff's land. Counsel submitted that although the defendant stated in defence that they removed the posts on the plaintiff's request, no such request was produced.
19. Regarding the defence, counsel submitted that the same was a mere denial since it was inconsistent with earlier pleadings. Counsel argued that as the defendant is charged with the monopoly of supplying electricity to Kenyans, they failed to demonstrate that there was another body/person who installed the electricity line in the plaintiff's land. Counsel contended that if they did not install the line, then they had no obligation to remove it. It was further submitted that the plaintiff had proved her case on the required standard as the defendant benefited from the illegal electricity installation and that upon removal, the plaintiff land was left in a damaged state. Counsel urged the court to grant damages of Kshs. 1,500,000/-.



Defendant's submissions

20. Counsel for the defendant submitted that the plaintiff had failed to prove her case on a balance of probability as she failed to prove trespass against the defendant. Reliance was placed on the provisions of Section 3(1) of the [Trespass Act](#) and the case of John Kiragu Kimani v Rural Electrification Authority [2018] eKLR for the proposition that the plaintiff failed to show that the defendant intruded on her land.
21. It was further contended for the defendant that the plaintiff failed to prove that the electric poles and cables were installed by the defendant. Counsel submitted that it is in the public domain that there exist illegal electricity connections, that is why the same are offences under Sections 118, 152 and 168 of the [Energy Act](#) 2019. Counsel submitted that failure to avail Mr. Mureithi and the area chief as witnesses meant that the plaintiff did not prove her case.
22. Counsel submitted further that the defendant's version that it did not install the electric lines on the plaintiff's property is believable on account of "empty chain doctrine" as upheld in the case of Ahmed Abdullahi Mohamed & Another v Mohamed Abdi Mohamed & 2 Others [2018] eKLR. Counsel argued that the court may draw adverse inferences where there is absence of a witness who might have presented crucial evidence.
23. Counsel argued that the defendant's entry on the plaintiff's property was sanctioned by the plaintiff, and that therefore the defendant cannot be faulted.
24. On general damages, counsel submitted that there was no proof of the value of the land before and after the trespass and relied on the case of Philip Ayaya Aluchio v Chrispinus Ngayo [2014] eKLR. Regarding costs, counsel relied on Section 27 of the [Civil Procedure Act](#) and submitted that costs follow the event.

Analysis and determination

25. The court has carefully considered the pleadings, evidence and submissions presented. The fact that the plaintiff is the registered proprietor of the suit property is not in dispute. Therefore the only issues that arise for determination are;
 - a. Whether the plaintiff has proved trespass against the defendant.
 - b. Whether the plaintiff deserves the orders sought.
26. The Black's Law Dictionary defines trespass as wrongful entry on another's real property. Section 3(1) of the [Trespass Act](#) states as follows:

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.
27. Therefore unauthorized entry on another's land amounts to trespass. In the instance suit, the defendant does not deny entering the plaintiff's property. It contends that entry thereto was sanctioned by the plaintiff who sought removal of the illegal electrical installations on the suit property.
28. Section 107 of the [Evidence Act](#) places the burden of proof on the plaintiff, in any case. It is therefore upon the plaintiff to demonstrate that the defendant's entry on the suit property was unauthorized. The plaintiff testified that the defendant's officers entered the suit property in December, 2014 and that through her advocates she sent the defendant letters dated 8th January, 2015 and 27th February, 2015.



The defendant's witness confirmed in evidence that the two letters were received by the defendant. The plaintiff stated that she visited the defendant's offices and one of the defendant's employee in the way leave Section a Mr. Mureithi accompanied the plaintiff to the suit property promising to stop the installation and remove the same but which was not done. The defence witness confirmed that one of their way leaves officer was called Mureithi and that he was the one who investigated the matter.

29. According to the Defendant, they entered the suit property for purposes of removing illegal installation which they did not install. On this position, the plaintiff pointed out that the defendant had initially conceded to have been the ones who erected electric poles and cables on the plaintiff's property and that the change of the narrative demonstrated their untruthfulness. I have considered the pleadings and the record, and it is true that when the defendant filed their defence dated 16th July 2015, in paragraph 4 thereof, they admitted to have installed electricity poles pursuant to an application by the proprietor of the suit property and stated that there existed a contract between them and the proprietor of the suit property. The record shows that this remained the position for 6 years and ten months until 4th May, 2022 when the defendant amended their defence deleting paragraph 4 of the original defence and adding two other paragraphs, wherein they denied trespassing on the suit property and alleged to have entered the property for purposes only of removing the illegal electricity poles.
30. While a party is entirely entitled to amend their pleadings as they deem fit, aprobatng and reprobating within one pleading without providing any basis, justification or reasonable explanation points to a party who is keen to mislead the court. In this case, from the onset, the defendant did not just admit having been the one who installed the electric poles and cables on the plaintiff's property, its officers swore on oath as much. For instance, Jude Ochieng, the Chief Legal Officer – litigation of the defendant, swore a replying affidavit dated 4th July 2017, which was a response to the plaintiff's application dated 25th May, 2017 seeking striking out of the defence and listing the suit for hearing for assessment of damages. In paragraph 4 of that replying affidavit he stated as follows:-

"That the Respondents position has always been that it installed electricity posts and wires to supply electricity to the suit premises pursuant to an application by the rightful proprietor of the premise."

The above position is reiterated in another affidavit of the aforesaid legal officer sworn on 18th August, 2017.
31. Besides, the defendant's witness herein confirmed in cross-examination that the poles and electric cables erected on the plaintiff's premises belonged to the defendant. However, no explanation was given how the defendant's property found itself on the plaintiff's property.
32. For the above reasons, I am clear in my mind that the defendant's officers are the ones that unlawfully erected the electric poles and cables on the plaintiff's land. Therefore I am satisfied that the defendant unlawfully entered on the plaintiff's property and unlawfully installed electric poles and cables thereon. In the premises, I find and hold that the defendant trespassed on the plaintiff's property.
33. The next issue that ought to be addressed is whether the plaintiff is entitled to the orders sought. Although the plaintiff sought a perpetual injunction to restrain the defendant from installing electricity on parcel Mavoko Town Block 3/6091 and a mandatory injunction to compel the removal of the electrical installations thereon, the plaintiff conceded that the title of the suit property has now been subdivided and therefore the original number is no longer in existence. No new numbers were provided neither was the plaint amended to demonstrate the new numbers. Court orders are not issued in vain and this court will not grant orders to restrain the defendant on a non-existent title. Therefore the prayer for perpetual injunction fails.



34. Regarding the prayer for mandatory injunction, the record shows that on 29th September, 2015 this court, differently constituted, granted orders of mandatory injunction for removal of electrical poles and cables. As that prayer was granted at the interlocutory stage, and both parties are on record that upon service of the order, the defendant removed the poles and cables installed on the suit property, it is clear that nothing remains to be granted on that prayer, which I hold as spent.
35. The last prayer is for general damages. The plaintiff sought general damages in view of the trespass on her suit property. The plaintiff did not demonstrate by way of evidence the extent of the trespass. It is settled that a claim for damages for trespass is actionable per se and the plaintiff need not demonstrate proof of actual loss.
36. In the case of *Duncan Nderitu Ndegwa v KPLC Limited & another* [2013] eKLR, the court held as follows;
- Once a trespass to land is established it is actionable per se, and indeed proof of damage is necessary for the court to award general damages.
37. In the instant case, it is not disputed that several posts and cables were in the plaintiff's property. The same were on the property between December 2014 and 29th September 2015 when the court issued mandatory orders for the removal of the same. The plaintiff submitted that she was entitled to Kshs. 1,500,000/-. The defendant did not give any figure. Having considered the above circumstances, I award general damages in the sum of Kshs. 500,000/-.
38. In the premises, I am satisfied that the plaintiff has proved her claim on the required standard and I enter judgment for the plaintiff against the defendant for payment of general damages for trespass in the sum of Kshs. 500,000/-.
39. It is trite that costs follow the event as stipulated in Section 27 of the *Civil Procedure Act*. The plaintiff having shown that there was no justification or excuse whatsoever for the defendant's actions, and the defendant having failed to remove their electric posts and cable when they were asked to do so in January and February 2015, until the plaintiff filed suit and obtained mandatory injunction 9 months later, it is only fair and just that the defendant bears the costs of the suit. I therefore order that the costs of this suit shall be borne by the defendant.
40. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Kisui for defendant

Mr. Mutemi for plaintiff

Court assistant – Josephine

