



Ramji & 2 others v Kenya Power and Lighting Company (Environment and Land Case 109 of 2015) [2023] KEELC 407 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEELC 407 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 109 OF 2015
CA OCHIENG, J
FEBRUARY 1, 2023**

BETWEEN

HARISH RAMJI 1ST PLAINTIFF

BHARAT RAMJI 2ND PLAINTIFF

ASHVI RAMJI 3RD PLAINTIFF

AND

KENYA POWER AND LIGHTING COMPANY DEFENDANT

JUDGMENT

1. By a Plaint dated the April 7, 2015, the plaintiffs pray for judgement against the defendant for:
 - a. A declaration that the actions of the defendant are unlawful and that the defendant is a trespasser
 - b. An order for forthwith eviction of the defendant
 - c. An order of injunction restraining the defendant whether by itself, agents, servants, contractors or employees from entering into and remaining, entering into or remaining, erecting electricity lines on and over the plaintiff's property known as L.R No.11895/50 (original number 11895/24/17) or any other way dealing with Plaintiffs property known as L.R No.11895/50 (Original Number 11895/17)
 - d. General damages for trespass assessed as Ksh.500,000/= per day
 - e. Interest at court rates from date of filing suit until payment in full
 - f. Costs of this suit
 - g. Any other relief that the court may deem fit in the circumstances



2. The defendant filed a Defence dated the May 11, 2015 where it acknowledged that the plaintiffs were as at June 16, 2010 the registered proprietors of L.R No.11895/50 (original number 11895/24/17) hereinafter referred to as the 'suit land', and not as original owners but as transferors. They averred that the defendant occupied the suit land from 1956 by way of its power line that runs from the Juja Road Control sub-station to the Athi River sub-station since the said year. Further, it stated that the Plaintiffs acquired the suit land in 2010, subject to all the pre-existing encumbrances and any other inhibitions affecting not only the said parcel but also, I.R No.95708/1 to which the suit land is registered in part substitution. It alleged that by the time it erected the power lines, they had obtained all the relevant consents and authority to do so from the then registered owner. Further, that it is the Plaintiffs who had applied for re-routing of the existing power line in 2010 but they did not comply with the conditions as issued by the defendant.
3. In response to the Defence, the plaintiffs filed a reply on May 18, 2015 where they stated that there was no encumbrance, way leave or restriction registered against the suit land. They further stated that they were the ones who requested the defendant to move its power lines from the property as they wanted to develop it but the defendant responded by requesting for the site plan for purposes of informing it where the development would be and facilitate rerouting of the said power line.

Evidence by the Plaintiffs

4. PW1, Harish Ramji Patel (1st plaintiff), testified that he was one of the registered owner of the suit land. He stated that the defendant never sought their consent before constructing the power lines over the suit land. He clarified that the injunctive orders as obtained in Nairobi ELC No.615 of 2011 touched on land parcel numbers 3205 and 7548 but not the suit land.
5. On cross-examination he stated that at the time they purchased the suit land in 2010 from the National Social Security Fund (NSSF) trustees, there were no encumbrances thereon. He admitted that the title he held over the suit land was a subdivision. Further, that they bought a whole plot but some subdivisions were allocated to Mombasa Cement and other Interested Parties prior to their purchase in 2010. He further admitted that the developed properties next to the suit land were serviced with water and electricity. He explained that on 23 December, 2010, they wrote to the Defendant to relocate the power line passing on the fence of Mombasa Cement and the suit land. He confirmed that when they purchased the suit land, there was a power line on the fence. Further, that the Defendant later constructed a much bigger power line in the centre of the suit land. He further confirmed that the Defendant served them with a Court Order restraining them from interfering with their construction of the aforementioned power line. He reiterated that he was in court for a subsequent trespass. Further, that the estimated earnings they stood to gain from their project would be Ksh.500, 000 per day but they had lost the same as a result of the Defendant's acts of trespass.

Evidence by the Defendant

6. DW1, James Kibet Sacho, the Defendant's Wayleave Officer testified that the Powerline that is the subject of this suit was approved by the crown land on 30th November 1956. He explained that the suit land was part of the crown's land formerly Land Reference numbers 3205 and 7548. He averred that the wayleave to construct the power line was recorded on the relevant land records registry as MK/1 on 3rd December 1956 and that the same was constructed and even reflected on the map of Nairobi. He reiterated that the Plaintiffs obtained the title subject to the Defendant's rights. In cross examination, he denied that the defendant had trespassed on suit land but he did not have a copy of the subdivisions as they were dealing with a wayleave.



Submissions

Submissions by the Plaintiffs

7. The Plaintiffs submitted that the Defendant has been trespassing over the suit land. They further submitted that the suit land belonged to them and that the Defendant had not obtained any consent from them to construct the said power line. As to the Defendant's assertion that there existed a wayleave over the suit land, the Plaintiffs submitted that the suit land is different from parcel numbers LR 3205 and 7548 and that the Plaintiffs have not tendered any evidence to prove that the suit land was a sub-division of LRs 3205 and 7548. They reiterated that the Defendant did not produce the Grant no.95708/1 to prove that there was a wayleave over the suit land registered on the special conditions section. Consequently, they urged the court to find that the Defendant had been continuously trespassing on the suit land since they have been thereon since November 2011. They reiterated that the Defendants had unlawfully trespassed on the suit land and the court ought to order for their eviction as well as payment of general damages assessed at Ksh.500,000/= per day as supported by the valuation report. To buttress their averments, they relied on section 3 of the *Trespass Act* and Section 46 of the *Energy Act* as well as the following decisions: *John Kiragu Kimani v Rural Electrification Authority* (2018) eKLR; *Fleetwood Enterprises Limited v Kenya Power & Lighting Limited* (2014) eKLR; *Bhogal v Kenya Power and Lighting Co. Ltd* (2020) eKLR; *George Joseph Kangethe & Another v Kenya Power & Lighting Company Ltd* (2020) eKLR; and *Kenya Power & Lighting Company Limited v Eunice Ringera & 2 Others* (Civil Appeal E 247 & E 248 of 2020 (consolidated) (2022) KECA 104 (KLR) (4 February 2022) (Judgement).

Submissions by the Defendant

8. The Defendant in its submissions insisted that the Plaintiffs had not proved their cases as pleaded. They argued that the claim for general damages assessed at Ksh.500,000 per day could not be ascertainable as general damages are determined by the court. They contended that the Plaintiffs did not produce any approved building plans of the alleged intended godowns or an expert valuation of the alleged projected loss of income. Further, they submitted that no demand notice was served upon the Defendant before institution of the suit to warrant payment of any costs. They reiterated that the suit that has been alluded to by the Plaintiffs, being Nairobi ELC No.615 of 2011 declared that the Defendant herein was not a trespasser to the suit land. To buttress its averments, it relied on the following decisions: *Municipal Council of Eldoret v Titus Gatitu Njau* (2020) eKLR and *Justin Gatumuta v Kenya Power & Lighting Co. Ltd* (2018) eKLR.

Analysis and determination

9. I have considered the pleadings, the evidence adduced and the rivalling submissions by the parties herein and decipher that the following are the issues for determination:
- Whether the Defendant has trespassed on the Plaintiffs' land.
 - What damages, if any, are payable to the Plaintiff?
 - Who should bear the costs of the suit?
- As to whether the Defendant has trespassed on the Plaintiffs' land.
10. It is not in dispute that the Plaintiffs are the registered proprietors of the suit land. It is further not in dispute that there exists a power line over the suit land. The Plaintiffs claim the Defendant has trespassed on their land, constructed a power line thereon culminating in their failure to utilize the



said land. The Defendant on the other hand insists that they were granted a wayleave to construct the power line.

11. *Clerk & Lindsell on Torts* 18th Edition at paragraph 18-01 defines trespass as follows:

“ Any unjustifiable intrusion by one person upon land in possession of another.” ...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession”
12. PW1 in his evidence admitted that at the time of purchase of the land in 2010, there existed a power line between the suit land and Mombasa Cement. PW1 further admitted that on 23rd December, 2010, they wrote to the Defendant to relocate the power line passing on the fence of Mombasa Cement and the suit land but the Defendant failed to do so. He insisted that the Defendant constructed a much bigger power line in the centre of the suit land after they had purchased it, and this forms the fulcrum of the dispute herein. He further confirmed that the Defendant served them with a Court Order restraining them from interfering with their construction of the said power line. DW1 in his evidence contended that the Defendant had been granted a wayleave in 1956 for a power line running from Juja Substation to Athi River Substation and produced a letter confirming this position including two maps. He insisted that the Defendant had not trespassed on the suit land as claimed.
13. On perusal of the evidence on record, it indicates that the Defendant obtained the relevant wayleave in 1956. It can be presumed that the original owners of the suit land consented to the same since there has not been a dispute over it for decades. I note the Plaintiffs only got registered as proprietors of the suit land in June, 2010. Further, prior to that period, there was no evidence presented of any party having challenged the wayleave or powerline. I note the Plaintiffs sought for rerouting of the powerline immediately they purchased the suit land in 2010 and this is evident that they acquired the suit land when there was already an existing power line. Further, the Plaintiffs failed to provide proof that they adhered to the requirements set by the Defendant before rerouting of the power line could take place. There are various legal provisions governing setting up of a wayleave/electric supply line on private land which I wish to highlight hereunder:
14. Section 46 of the *Energy Act*, 2006 provides as follows, “ 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 purpose of paragraph (a) except with the prior permission of the owner of such land.”(2) Permission sought in subsection 1 above shall be done by way of notice which shall be accompanied by statement of particulars of entry.
15. Further, sections 171 of the *Energy Act* stipulates thus; “171 (1)A person who wishes to enter upon any land, other than his own to—(a)undertake exploratory activities relating to exploitation of energy resources and development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, or drilling exploratory wells;(b)carry out a survey of the land for the purposes of paragraph (a);shall seek the prior consent of the owner of such land, which consent shall not be unreasonably withheld: Provided that where the owner cannot be traced, the applicant shall give fifteen days' notice, through appropriate mechanisms including public advertisement in at least two newspapers of nationwide circulation and an announcement in a radio station of local coverage for a period of two weeks.”
16. While Section 173 of the *Energy Act* states thus; (1)An owner, after receipt of a request for consent under section 171 may consent in writing to the development of energy infrastructure, upon agreement being reached with the applicant as to the amount of compensation payable, if any, and any consent so given shall be binding on all parties having an interest in the land, subject to the following



provisions—(a)that any compensation to be paid by the licensee giving notice to the owner, in cases where the owner is under incapacity or has no power to consent to the application except under this Act, shall be paid to the legal representative of the owner; and(b)that an occupier or person other than the owner interested in the land shall be entitled to compensation for any loss or damage he may sustain by the development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, drilling geothermal wells or coal long as the claim is made within three months after the development.”

17. Section 3 of the *Trespass Act* further provides that, “(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. (2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
18. The Defendant insisted that the Plaintiffs obtained a Transfer subject to pre-existing encumbrances and any other inhibitions affecting not only the suit land but also IR No. 95708/1 to which the suit land is registered in part substitution. The Plaintiffs in rejoinder in their submissions contend that the Defendant did not produce the Grant no.95708/1 to prove that there was a wayleave over the suit land registered on the special conditions section. I have had a chance to peruse the Certificate of Title which was produced by the Plaintiffs and I note at the Memorandum (clause 2) it states that: ‘The Special Conditions contained in a Grant registered as IR 95708/1.’ Further at the bottom of page one in the Certificate of Title, it indicates as follows:’ The Certificate of title is issued under section 70 of the Registration of Titles Act Cap 281 and is in part substitution of a Grant registered as IR 95708/1.’ From this piece of uncontroverted evidence a lone, it is my finding that indeed the Plaintiffs’ obtained a Transfer subject to pre-existing encumbrances and any other inhibitions affecting not only the suit land but also IR No. 95708/1 to which the suit land is registered in part substitution. In the Nairobi ELC 615 of 2011 The *Kenya Power Lighting & Co. Limited v Kings Collection Limited*, which the parties have quoted relates to this suit, I note on 30th March, 2012, the Court granted orders of injunction restraining the Defendant therein including its agents from accessing and or carrying out works on the then Plaintiff’s Embakasi – Athi River 66KV electric supply line on over or through LR No. 11895/50 or any subdivision therefrom. I note the said parcel of land is the suit land herein. Further, that PW1 is indeed one of the directors of the Defendant named therein. It is interesting to note that once the orders of injunction had been issued on 30th March 2012 in the Nairobi suit enabling the Plaintiff therein who is the Defendant herein to undertake System Reinforcement Programme on the impugned power line, the Plaintiffs proceeded to file the instant suit in April, 2015 claiming the Defendant had trespassed on the suit land in November, 2011 and are now seeking damages.
19. Based on the evidence before Court while relying on the legal provisions cited above, I opine that the power line was already an encumbrance on the large parcel of land before subdivision and its registration on the Plaintiffs’ title did not matter. Further, since there was already an existing powerline as per the letter dated 30th November 1956 and the two maps which were produced as an exhibit, I opine that there was no need for the Defendant to seek consent of the subsequent owners as a wayleave attaches to the land. On the decision of *Kenya Power & Lighting Company Ltd v Ringera & 2 others* (Civil Appeal E247 & E248 of 2020 (Consolidated)) [2022] KECA 104 (KLR) (4 February 2022) (Judgment) which the Plaintiffs heavily relied upon, I wish to distinguish it from the circumstances at hand, as in the said decision, KETRACO has constructed high voltage power lines, without the owners’ permission, when the Plaintiff in the said suit had already constructed houses thereon, which is not the case in the instant suit.



20. Based on the evidence before me while relying on the legal provisions cited above, I find that the Plaintiffs have failed to discharge their burden of proof as required under section 107 of the [Evidence Act](#), to confirm that the Defendant indeed trespassed on their land and constructed fresh power lines thereon. On the issue of damages, the PW1 admitted that they had not yet constructed the go downs on the suit land but projected to get Kshs. 500,000 per day as revenue therefrom. He however never produced any building plans or expert evidence on the proposed go down. It is trite that for damages to be awarded, the same has to be proved, which is not the position in this instance. In the circumstances, I find that the Plaintiffs are not entitled to damages as sought from the Defendant.
21. It is against the foregoing that I find that the Plaintiffs have failed to prove their case on a balance of probability and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 1ST DAY OF FEBRUARY, 2023.

CHRISTINE OCHIENG

JUDGE

