



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
CIVIL APPEAL NO. 64 OF 2019

KENYA POWER & LIGHTING CO LTD.....APPELLANT

VERSUS

JULIUS MUTHURI CYPRIAN.....1st RESPONDENTS

BATHLOMEW KABURU CYPRIAN.....2nd RESPONDENTS

CONSOLATA MWITIABI GITUMA.....3rd RESPONDENTS

(Being an appeal from the Judgment and Orders of Senior Resident Magistrate J.M Irura dated 7th November 2018 in Nkubu CMCC No. 8 of 2013)

JUDGMENT

1. The appellant was the 1st defendant in the trial court. It was sued with another by the respondents vide a plaint dated 23/1/2013, where the following orders were sought;

a) General damages for interference and nuisance for installation of High Voltage power line over the plaintiffs' said parcels of land No. ABOTHUGUCHI/IGANE/1661, 1666, 1667.

b) An order that the defendants do remove the high voltage power line from the plaintiffs' said parcels of land

c) Costs and interest at Court rates.

2. It was the respondents' case that they are the registered owners of the parcels of land which they had extensively developed. The appellant without any authority or consent or right of way from them installed high voltage power line over the said parcels of land which actions were malicious, wrongful, illegal and unconstitutional, hence the respondents suffered loss and damage.

3. The Appellant filed its statement of defence dated 04/02/2013 denying all allegations and averring that if any high voltage power line was installed, then the relevant consent of the land owners was duly obtained.

4. The matter proceeded for hearing where the respondents gave their evidence, but the appellant did not. The appellant did file an application for reopening of the defence case which application was dismissed.

5. On 07/11/2018 the trial court entered judgment in favor of the respondents as follows:

a) "That the plaintiffs claim for general damages for trespass is hereby allowed at the costs of Kshs. 250,000 for each of the plaintiffs.

b) That the defendants do within 60 days of this judgment re-route the power lines running through the plaintiffs' respective parcels of land from their current position so that the same runs as close as possible to the boundaries and/or hedges of the plaintiffs' respective parcels of land.

c) That the costs of re-routing and realigning the power lines shall be borne by the defendants.

d) Costs of this suit are awarded to the plaintiffs".

6. The appellant being aggrieved by the decision of the trial court filed their memorandum of appeal dated 26/4/2019 raising 8 grounds. In summary, the appellant contends that the trial Magistrate erred in law and fact in:-

(i) Not finding and holding that the judgment is a nullity for the Resident Magistrate N.M.Idagwa had no jurisdiction to hear the matter.

(ii) Holding that the plaintiffs had proven their case when they did not prove that they were the owners of the parcels of land.

(iii) In condemning the appellants unheard.

(iv) In awarding excessive damages of Kshs. 250,000 to each of the plaintiffs when the same were undeserved or proved.

7. The appeal was canvassed by way of written submissions. The appellants submitted that pursuant to section 26 (3) of the Environment and Land Court Act, the Hon N.M Idagwa lacked the requisite mandate and authority to take evidence of witnesses and generally preside over the original suit. That the said magistrate was only appointed on 28.2.2019 to hear land matters. Thus the eventual judgment is a legal nullity having been arrived at in consequence proceedings taken by a magistrate who clearly lacked jurisdiction.

8. The appellant further submitted that the respondents failed to demonstrate the existence of the ingredients of trespass. The ownership of the respondents in respect of the suit parcels is not disputed however the appellant had earlier procured the consent of the original proprietor pursuant to statutory provisions. The respondents did not adduce evidence of when the supply lines were installed and it was presumptuous of the trial court to conclude that installation happened post sub division.

9. The resultant award of general damages is equally flawed having been premised on a wrong pronouncement and is unreasonably high given that the court in its judgment admitted that there was no proof of actual damage on the suit properties. That nominal damages of Kshs. 50,000 would have sufficed.

10. The appellants relied on the following authorities; Kenya Ports Authority V Modern Holdings [E.A] Limited [2017]eKLR, Jane Wanjiku Wambu V Anthony Kigamba Hato & 3 others [2018]eKLR, Mutegi Mugwetwa V County Ministry of Lands, Physical Planning Energy & Ict County Government of Tharaka Nithi & 4 others [2017]eKLR, Paul Audi Ochuodho V Joshia Ombura Orwa [2014]eKLR, Margaret Iminza Luyayi V Moses Opudo Mudaka [2019]eKLR, Hillary Rotich V Wilson Kipkore [2018]eKLR, Ephantus Gtahu Muiyuro V Kenya power & Lighting Company Limited [2016]eKLR, Obadiah K. Macharia V Kenya power & Lighting Company Limited [2016]eKLR,

11. The respondents submitted that at the time of taking evidence, the Hon N.M Idagwa had jurisdiction based on Malindi law Society & 6 Others V Law Society of Kenya Nairobi Branch [2017]eKLR. After this decision, the matter was transferred to Hon. J. Irura and thus the trial court at no time did it lack jurisdiction to hear and determine the suit. Further the respondents submitted that they had proved the claim of trespass and that they were the registered owners of the suit parcels, hence the award of Kshs. 250,000 per respondent was not excessive.

12. They also submitted that the appellant's application to reopen the defence case was dismissed for lack of merits 4 years ago and the appellant challenging the said ruling now is an afterthought and an attempt to prevent the respondents from enjoying the fruits of their judgment. The respondents urge the court to dismiss the appeal.

13. The respondents relied on the cited cases of; Duncan Nderitu Ndegwa V Kenya power & Lighting Company Limited & Another [2013]eKLR, Eunice Nkirote Ringera V Kenya power & Lighting Company Limited [2020]eKLR, Obadiah K. Macharia V Kenya power & Lighting Company Limited [2016]eKLR, Law Society of Kenya Nairobi Branch V Malindi Law Society & 6 others [2017]eKLR, Malindi Law Society V Attorney General & 4 others [2016]eKLR, Ochako Obinchi vs Zachary Oyoti Nyamongo (2018) eKLR.

Analysis and determination

14. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and make its own determination having in mind that it did not have the advantage of hearing witnesses. See: Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123, Kenya Ports Authority vs. Modern Holdings (E.A.) Limited (2017) eKLR.

15. **Pw1** Julius Muthuri Cyprian testified and also adopted his statement dated 23/01/2013 as his evidence. He averred that he inherited the land parcel no. 1661 from his father. That the appellant without consent erected posts and a high voltage line through his land destroying his crops. He had asked them to remove the line which they never did. He availed documents in his list dated 23.1.2014 as well as a search as his exhibits.

16. **Pw2** Batholomew Kaburu Cyprian also wished to rely on his statement dated 23/01/2013 as his evidence. A portion of his evidence is missing in the record of appeal (see page 74 of the record of appeal). For **pw3**, the evidence has been omitted altogether in the record of appeal.

17. From the memorandum of appeal, the record of appeal and the submissions made in respect thereof, I find the issues for the court's determination to be;

(i) Did the trial Court have Jurisdiction to determine the suit?

(ii) Whether the magistrate erred in condemning the appellants unheard.

(iii) Whether the respondents proved their case on trespass and if the general damages awarded are excessive?

18. On jurisdiction, I make reference to Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage of Nyarangi, JA;:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.....”

A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.....”

19. I have looked at paragraph 7 of the defence of the appellant where it is stated that; “Jurisdiction of the court is admitted”. The appellant however avers that going by the decision in Malindi Law Society V Attorney General & 4 others [2016]eKLR, Hon Idagwa had no jurisdiction to hear the matter. The question begging for an answer is; *did the appellant raise the issue of jurisdiction when they realized that the Hon Magistrate Idagwa no longer had jurisdiction to hear the matter!*

20. In the case of Abraham Yattani Guyo v Qunche Woge [2020] eKLR, I cited the case of Kiplagat Korir v. Dennis Kipngeno Mutai (2006) eKLR, where it was held as follows;

“In this case, the appellant has raised the issue of jurisdiction so much later in the day. Substantial justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it has been called upon to decide on an issue which is raised for the first time on appeal (Emphasize added). If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal, but be acting as a court of first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate’s court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction”.

Also see; Sebastian Kaweto Kalovwe & another v Patrick Mulevu Kaweto [2019] eKLR.

21. The appellant has not pointed out to this court the point at which it raised the issue of jurisdiction before the trial courts. It follows that at the time judgment was being delivered before Hon Irura SRM, the issue of jurisdiction was not a subject of contest and was therefore not a point for determination before that trial court.

22. In the case of Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2015], the Supreme Court had this to say regarding an issue which had not been subjected through the judicial hierarchy;

“It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this Court, ever considered, or determined by the superior Courts. The issues now being associated with “matters of general public importance”, have clearly not evolved through the judicial hierarchy, in the mode contemplated by this Court in the Peter Oduor Ngoe case. Suffice it to say that if this Court were to admit and determine such issues, the Court would be determining them in the first instance which would be contrary to established principle, and to the design of the judicial system”.

23. I wholly associate myself with the above cited cases. Thus the appellant is estopped from raising this issue of jurisdiction in an appellate forum. The appeal cannot therefore succeed on the ground of want of jurisdiction.

24. On the claim that the appellants were condemned unheard, that consent had been obtained hence there was no trespass and that damages were excessive, I find that the appellants are attempting to adduce evidence at the appellate stage. The history of how the proceedings were conducted is crystal clear, that the appellants were aware of the matter. The suit had marked time for years in the corridors of justice. At some point, the appellant had offered to have an out of court settlement. Eventually when plaintiff’s case was heard in their absence, the appellants filed an application dated 18.11.2015 seeking to reopen the case of which a ruling was delivered on 12.5.2016 where the application was dismissed.

25. The appellants cannot revisit the issue of reopening the case through this appeal. It was incumbent upon them to either lodge an appeal or seek a review of the said ruling. What is clear is that the judgment delivered on 7.11.2018 was based on the evidence tendered by the plaintiffs only.

26. Section 107 of the Evidence Act provides that

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

27. Section 109 of the aforementioned act further provides:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is

provided by any law that the proof of that fact shall lie on any particular person”.

28. Thus he who alleges bears the burden of proving, see -*Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR*. In the case at hand, the question to ask is whether the appellant complied with the above cited provisions of law during the trial of the case.

29. In *Autar Singh Bahra and Another Vs Raju Govindji HCCC No. 548 of 1998(Ur)*, Cited in *Trust Bank Limited V Paramount Universal Bank Limited & 2 others [2009] eKLR* Mbaluto J. held that:

“Although the Defendant has denied liability in an amended Defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the 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.”

30. Similarly, the evidence of the respondents remained unchallenged before the trial court. The appellants cannot purport to advance their defence through this appeal. I therefore find no basis to disturb the award made by the trial court.

31. In the circumstances, I find that this appeal is not merited. The same is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF APRIL, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 27.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE