



M'Tuamwari v Kenya Power and Lighting Company (Environment & Land Case E023 of 2021) [2023] KEELC 21498 (KLR) (8 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E023 OF 2021
CK NZILI, J
NOVEMBER 8, 2023**

BETWEEN

PETER KAIMATHIRI M'TUAMWARI PLAINTIFF

AND

KENYA POWER AND LIGHTING COMPANY DEFENDANT

JUDGMENT

1. The plaintiff approached this court through a plaint dated 9.6.2021. As the registered owner of LR No. Nyambene/Uringu/1/1023 he sued the defendant for entering into, digging into, and erecting electricity posts on two sides of his land by occupying approximately 627 square meters without authority, permission, or consent. He termed the occupation unlawful and illegal and amounting to forceful acquisition or annexation of his land contrary to *the Constitution*. The plaintiff averred that out of the illegal occupation, he had been deprived of use and utilization of his land presently and in the future, which damage or loss he assessed at Kshs.35,000,000/=.
2. Over and above the foregoing, the plaintiff averred that on or about 29.5.2020, the defendant's agents, servants, and or employees once again trespassed into his land, cut down and felled his artificial forest, alleging that they were planted on the wayleave of the power line which was not true estimated loss being Kshs.876,200/=.
3. Therefore, the plaintiff prayed for;
 - a. permanent injunction restraining the defendant, its servants, agents, or employees from entering into, occupying, working on, or in any way whatsoever interfering with this proprietorship rights over his land or felling or destroying trees.
 - b. Special damages of Kshs.875,200/=.



- c. Mandatory order directing the defendant to remove and uproot the electricity posts from his land.
 - d. Restraining order against any entry or trespass into his land.
 - e. Damages for trespass, conversion, annexation, illegal occupation, and denial of loss or user.
 - f. General damages for the illegal occupation, annexation, conversion, and loss of user.
4. The plaint was accompanied by a list of witness statements and documents dated 9.6.2021.
 5. The defendant opposed the claim through a preliminary objection dated 5.8.2021 and a statement of defense dated 17.8.2021. The defendant averred that the suit was premature since the plaintiff had not exhausted the statutory laid-down procedures for addressing and ventilating such disputes and that the claim should have been filed at the Energy and Petroleum tribunal, the Energy and Petroleum Regulatory Authority, or the Small Claims Court.
 6. On trespass, the defendant denied that the plaintiff was the registered owner of the suit land or that it had illegally entered and erected electricity posts on the two sides of the land as alleged or at all without permission, consent, or approval and or that it had forcefully acquired, occupied or denied the plaintiff use of and or occasioned his loss of use or damages to is trees. Further, the defendant denied the alleged entry, damage, and loss by his agents, servants, or employees on 29.5.2020 or receipt of any demand or notice of intention to sue from the plaintiff. Additionally, and in the alternative, the defendant pleaded that in line with Section 28 (i) of the [Land Registration Act](#) 2012, the electricity posts were properly and lawfully installed in the alleged area. On the contrary, it was averred that the plaintiff was the one who illegally encroached and trespassed onto its wayleaves corridor with impunity and continues to do so.
 7. The defendant, in the alternative and without prejudice to the foregoing, averred that the plaintiff was underserving of the orders sought, for he has come with unclean hands for he has committed offenses under Section 169 (1) (a) of the [Energy Act](#) hence prejudicing it and further engaging the court in an academic exercise.
 8. The defendant averred that the plaintiff's claim was not only fraudulent but a ploy, devised or conjured up to facilitate unjust enrichment based on pretenses, forged documents, and over-encroachment of its wayleave. Moreover, the defendant averred that the suit was res judicata, ambiguous, unclear, wanting in particulars, incompetent, incongruous, misconceived, an abuse of the court process, inept in both legal substance and form, filed by a party with no locus standi, improperly before the court, lacking merits, fatally defective, lacking a reasonable cause of action and an affront to mandatory legal provisions on pleadings. The defence was not accompanied by any list of witnesses, witness statements, or documents.
 9. By a reply to the defense dated 23.9.2021, the plaintiff denied the contents of the defense and termed his suit properly and competently before the court, terming the defence as a sham, flawed and a misrepresentation of the facts before the court. As to the jurisdiction, the plaintiff challenged the defendant to produce such contracts and or documentary evidence to prove any contractual relationship between the parties. The plaintiff denied that his parcel of land had encumbrances of any nature or kind to anybody, including the defendant; otherwise, the allegations were misconceived and a figment of its imagination. The plaintiff averred that the defendant's existence and continued to stay on his land were illegal, anarchical, arbitrary, trespassing, and contrary to [the Constitution](#).



10. Following a ruling on 26.10.2022, parties were directed to comply with Order 11 of the Civil Procedure Rules. In particular, the defendant was granted leave to file a list of documents and witness statements by 27.3.2023. As of 27.3.2023, the defendant had not complied and was given more time to do so by 10.5.2023. Instead of filing the documents, the defendant filed an application dated 22.5.2023 on the eve of the hearing seeking to amend the defense, which the court declined to entertain and ordered the hearing to proceed as scheduled.
11. At the trial, Peter Kaimathiri M'Tuamwari testified as PW 1 and adopted his witness statement dated 9.6.2021 as his evidence in chief. He testified that he was the owner of LR No. Nyambene/Uringu/1/1023, Tigania West sub-county, which is approximately 1.6 acres. He said that about ten years ago, the defendant entered his land and erected posts on two sides, taking approximately 6297 square meters of his land. The plaintiff told the court that he was notified of the same by his caretaker since he lives in the United States of America and occasionally visits Kenya. PW 1 told the court that he sent the caretaker to request the defendant to remove some of the electricity posts from his land for him to use his land, which they refused. He testified that the defendant's entry and occupation were not only forceful and illegal but also deprived him of the use of his land, which he had intended to develop. He estimated the loss estimated at Kshs. 35,000,000.
12. Further, PW 1 told the court that on 29.5.2020, the defendant's agents, servants, or employees entered his land and without notice or justification, maliciously, indiscriminately, unlawfully cut and destroyed his artificial forest of 77 mature eucalyptus trees, valued at Kshs.876,000/=. He said the entry, occupation, and trespass to his land denied him the right to quiet enjoyment and ownership since he never allowed, consented to, or permitted the defendant to enter his land and erect electricity posts. He prayed for compensation for the loss and damage. The plaintiff produced a copy of his title deed issued on 12.1.2014 as P. Exh No. (1), copy of an official search dated 5.9.2016 as P. Exh No. (2), a complaint letter written by the sub-county forester of Tigania as P. Exh No. (3) occurrence book report No. 16/29/05/2020 as P. Exh No. (4), a bundle of photographs showing the destruction as P. Exh No. 5 (a) – (g), a demand letter dated 6.8.2020 and received by the defendant on 7.8.2020 as P. Exh No. (6), valuation report for the loss and damage as P. Exh No. (7).
13. In cross-examination, PW 1 told the court that some of the defendant's power lines were running along. In contrast, other posts ran across his land, denying him an opportunity to fully utilize or invest in his land since 2016, where he had intended to put a shopping mall in the locality of Nchiru market housing the Meru University community. Since he does not live in Kenya, the plaintiff denied meeting or seeing the person who entered and erected electricity posts on his land or whoever cut down the trees. He termed the valuation report as substantive and depicted the position of the electricity posts on his land, the estimated loss and damage. PW 1 told the court that there was no doubt that the electricity posts belonged to the defendant, who had continued to enter his land even during the pendency of the suit. He denied that the electricity posts were erected on a road reserve. Further, PW 1 told the court that there was no notification or permit from him to authorize the entry and installation of the posts. PW 1 said that he had visited the defendant's offices several times since 2016, seeking to relocate the electricity posts, but instead, they have been cutting the trees he had planted before the eight posts were erected.
14. Enock Mwebia testified as PW 2 and adopted his witness statement dated 9.6.2021 as his evidence in chief. He told the court that as a caretaker employed by PW1, he witnessed the plaintiff planting over 5,000 trees on the Suitland and on the two occasions when the defendant, through its employees or agents, entered the land and erected the electricity posts inside it. He told the court that efforts to stop the defendant's acts were in vain. PW 2 said the plaintiff had no option but to report the matter to the sub-county forest office and the police. He said two posts were on one side while six others were on the other side of his land. He said a land valuer came, drew a sketch, and prepared a valuation report for



- the loss and damage. PW 2 clarified that the defendant's agents or employees trespassed onto the land on several occasions, donning their official uniforms ferried to the land by an official vehicle belonging to the defendant.
15. Mark Lamuor, a senior conservator of forests in Nyambene Zone, testified as PW 3. He produced P. Exh No. 3, showing that his colleague had written a report to the notice. Further, he told the court that he visited the suit land and observed that it had aged eucalyptus trees planted systematically along the road but inside the land with regenerated 35 stumps and another 112 cut trees. PW 3 said he had estimated the destroyed trees' age, value, and cost at Kshs150,000/= per post, over and above the tendering and labor cost, totaling Kshs. 50,040,000/=. He believed the defendant should have requested permission as per the forest regulation to cut down such trees. He said P. Exh No. (4) captured the elements of trespass and destruction. In cross-examination, PW 3 said his predecessor made an official technical report and was competent to stand in for him under Section 43 of the Forest Act. PW 3 said that using a hypsometer Machine, he could calculate the tree stumps' age, height, and diameter.
 16. Cypriano Kirera Riungu, a registered and gazette land valuer with over 40 years of post-graduate experience, testified as PW 4. He testified that the plaintiff contracted him to visit the site and assess the loss and damage caused by the offending electricity posts. He said that he established the ownership of the land by conducting an official search at the land office and by visiting the defendant's offices to establish if there was a wayleave certificate. Similarly, PW 4 also said that they visited the police station and confirmed that an OB report had been made on 20.8.2020 by PW 2. PW 4 told the court that he later visited the suit land, prepared a sketch map on the side, and took photographs showing the nature of the loss and damage as contained in his witness statement dated 14.6.2021, which he adopted as his evidence in chief.
 17. In cross-examination, PW 4 told the court that he was one of the directors of Boma Valuers, a registered company, and his credentials were all contained in the valuation report. He said the land was agricultural, with two electricity poles on the western side where trees had been cut but had regrown. In his view, the presence of the electricity poles, as shown in the sketch map, had seriously affected the value of the land, as per his assessment on page 6 of the report. PW4 said he assessed the value at Kshs.25,000,000/= comprising the value of the land, trees, loss of users, and carbon sinks as per the Kyoto Protocol. Further, PW 4 told the court that from his inquiries from neighbors and visit to the defendant's offices, he did not doubt that the electricity poles belonged to the defendant who erected them without a wayleave certificate from the plaintiff.
 18. Following the close of the plaintiff's evidence, the defendant opted to close its case without calling any witnesses in support of their defense. Parties were, therefore, directed to file written submissions by 21.10.2023.
 19. By written submissions dated 29.9.2023, the plaintiff isolated two issues for determination. On whether he was entitled to the reliefs sought, the plaintiff conceded that the legal burden rested on him as per Gateway Insurance Co. Ltd vs. Jamilla Suleiman & another (2018) eKLR and Sections 107 – 112 of *Evidence Act* to affirm the issue of trespass, loss and damage to his land on a balance of probability as held in Ahmed Mohamed Noor vs Abdi Aziz Osman (2019) eKLR.
 20. On trespass, the plaintiff submitted that trespass was an injury to a possessory right, which ownership has to be proved by way of a title deed as held in Charles Ojego Ochieng vs Geoffrey Okumu (1995) eKLR and Kenya Power Lighting Company vs Ringera & others (2022) KECA 104 (KLR) 4th February 2023 (Judgement) that erection of power lines for the supply of electricity was a continuous trespass



and that to determine the quantum of damages the court has to look at the evidence in rebuttal, case law, principles, assessment, reasons and conclusion in trial and the evidence by way of valuation reports.

21. Relying on *Alex Waigera Mwaura vs Chania Power Co. Ltd and another* (2020) eKLR, the plaintiff submitted that in the absence of a valid explanation or permission to enter, the same would amount to trespass to the land of another. The plaintiff submitted it was only fair there be the restoration of the land to its status before the erection of the electricity poles, for he was entitled to all the rights and privileges appertaining to his title, including the quiet use of his land under Sections 24 and 25 of the [Land Registration Act](#). To this end, the plaintiff submitted that as the proprietor of the suit land, he gave no consent, permission, or authority to the defendant to enter into the said property for any purpose whatsoever, including erecting of electricity poles and the continued annexation or occupation of the said land, which was contrary to Sections 170 – 180 of the [Energy Act](#) 2019. Further, the plaintiff submitted that PW 4 confirmed that the destroyed trees were not in a wayleave, no wayleave exists, the electricity posts were not on a road reserve or an easement granted to the defendant, and no encumbrance existed as per paragraph 12 C & D of the amended defense.
22. On the allegations of locus standi and res-judicata, the plaintiff submitted that the same was misplaced, which defense, in any event, remained mere allegations unsupported by evidence. Reliance was placed on *Neteah Njoki Kamau & another vs Eliud Mburu Mwaniki* (2021) eKLR, *Edward Mariga through Stanley Mobija Mariga vs Nathaniel David & another* (1997) eKLR, *Everlyn College of Design Ltd vs Director of Children Department & another* (2013) eKLR.
23. As to the dating of the expert report by PW 4, the plaintiff submitted that such conceded minor misgiving occasioned no prejudice since the defendant was able to cross-examine the witness and have the figure of Kshs.1,680,000/= for the felled trees was accurate.
24. On general damages, the plaintiff submitted that figure of Kshs. 16,000,000/= would be reasonable compensation for trespass annexation and occupation of his land, which was continuing, and another Kshs.9,000,000/= for loss of business opportunity of the felled trees that would have been used for future carbon emissions trading under the Climate Change Amendment Act 2023. It was submitted that this amounted to environmental damage such as loss of beauty and aesthetic effect of the destroyed trees, his attachment to the felled trees, damage to his environment, and climate change action initiatives.
25. The plaintiff relied on *Gateway Insurance Co. supra Ahmed Mohamed Noor (supra)*, *Charles Ogejo Ochieng (supra)*, *KPLC (supra)*, *Alex Waigera Mwaura (supra)*, *Netah Njoki Kamau (supra)*, *Edward Mariga (supra)* and *Evenlyn College of Design Ltd (supra)*.
26. The court has carefully perused the pleadings, evidence tendered, written submissions, and the law. The issues calling for the court's determination are:
 - a. If the plaintiff has proved ownership of the suit land.
 - b. If the defendant trespassed into the plaintiffs land.
 - c. If the defendant sought and obtained consent from the plaintiff to enter into and erect electricity poles and maintain them.
 - d. If the defendant was justified in law or otherwise to enter, cut down trees erect and sustain electricity poses and power lines onto the suit land.
 - e. If the plaintiff has pleaded and proved special and general damages against the defendant.



f. If the plaintiff is entitled to the reliefs sought.

27. The plaintiff claims that he is the registered owner of LR No. Nyambene/Uringu 1/1023 since 1996 measuring approximately 0.24 ha as per a title deed issued on 12.4.2014 produced as P. Exh No. (1) and an official search produced as P. Exh No. (2).
28. In paragraph 4 of the plaint, it is averred that the defendant illegally and unlawfully entered into the suit land and erected or dug electricity posts on two sides of the land covering approximately 627 square meters of the land without the plaintiff's permission and or consent. Thus, the plaintiff averred his land was unlawfully and forcefully acquired or annexed, depriving him of the use and utilization of the land currently and in the future. He pleaded for damages estimated at Kshs.35,000,000/=. Further, the plaintiff averred that on 29.5.2020, the defendant, without any color of a right, entered into his land and, without justifiable cause, indiscriminately cut down or fell 77 trees alleging that they were on the way leave of the power lines, hence occasioning him loss and damage. He termed the trespass and the defendant's action as a breach of peaceful and quiet enjoyment of his constitutional rights and a threat to his livelihood from trees, causing irreparable loss and damage to himself and his tenants. He, therefore, prayed for a permanent injunction and special damages of Kshs. 875,200/- removal of the electricity posts, damages for trespass and conversion, denial of user rights, and general damages for illegal occupation or annexation
29. Trespass is defined in Section 3 (1) of the *Trespass Act* (Cap 294) as an entry into the land of another without his consent, approval, or lawful justification. It may be continuing, innocent or permanent, or ab initio. In the case of *John Eutick vs Nathan Carrington & others* (1965), EWHC KBJ 98 Lord Camden 55 had this to say;
- “Our law holds the property of every man so sacred that no man can set his foot upon his neighbors close without his leave.”
- The court said:
- “The great reason for which men entered into society was to secure their property. The right is preserved, sacred, and incommunicable in all instances where it has not been taken away or abridged by some public law for good of the whole..... If he admits the fact, he is bound to show by way of justification that some positive law has empowered or excused him:” If no excuse can be found or produced, the silence on the books is an authority against the defendant, and the defendant must have judgment.”
30. In *John Kiragu Kimani vs Rural Electrification Authority* (2018) eKLR, the court cited with approval Clerk & Lindsell on Torts 18th Edition on page 923, which defines trespass as an unjustifiable intrusion by one person upon the land of another. The court observed that the onus was on the plaintiff to prove that the defendant invaded his land without justifiable reason. The court cited Clerk & Lindsell on Torts 16th Edition paragraphs 23-01 that every continuance of a trespass was a fresh trespass for which a new cause of action arose from day to day as long as the trespass continued. The *Energy Act* No. 25 of 2022 defines a permit as an authorization granted to a person to carry out any energy business or activity. A license is a document or instrument granted in writing.
31. In *KPLC vs Fleet Wood Enterprises Ltd* (2017) eKLR at issue was whether the appellant had breached Section 46 of the *Energy Act* in digging and erecting electricity poles together with power lines on the respondent's land without permission and related request to bring the trespass to an end. The appellant, in his defense, had denied the trespass. The respondent had tendered documentary evidence



on land ownership, including demand letters for action and sketch maps. The appellant had called a wayleaves officer saying they had applied for a wayleave license from the municipality and was unaware that the wayleave was on private land, though they had not consulted the survey department before laying the power lines. The appellant's witness had also conceded that he was aware of the provisions of the [Energy Act](#), requiring the consent of the owner of a private land before laying electric lines on a portion of his land. The appellant had maintained that they had erected the transmission lines on a road and not private land. The appellate court agreed with the trial court that the evidence on record showed that the poles were not even erected on the road reserve but in the middle of the 16 plots. The court found that the poles breached the mandatory provision of Sections 46 and 47 of the [Energy Act](#) 2006. The court reiterated that trespass was an actionable tort per se and proof of damage was a necessary or requirement.

32. The upshot averred and testified that no consent, approval, or permission was sought from him before the power lines were erected. He produced a demand letter dated as P. Exh No. (6), which the defendant received on 7.8.2020. On the other hand, the defendant, in its defense, denied the claim in its entirety. It denied ownership of the land or lack of locus standi and insisted the installation was lawful by dint of Section 28 (1) of the [Land Registration Act](#). It averred that the plaintiff had encroached and trespassed onto its lawful wayleaves corridor; it averred the plaintiff was guilty of offenses under Section 169 (1) (a) of the [Energy Act](#) 2019; It termed the claim as fraudulent and aimed at unjust enrichment; It termed the suit as disclosing no cause of action and relied on a preliminary objection under Sections 3, 10, 11, 23, 24, 36, 40, 42 & 224 (2) of the [Energy Act](#) 2019 and its regulations and lastly Articles 159 2 (c) and 169 (1) (d) and (2) of [the Constitution](#) and Section's 9 (2) & (3) of the Fair Administration Action Act.
33. A title deed is to be taken as prima facie evidence of ownership by a court. The plaintiff has produced evidence of ownership of his land. The defendant has not challenged this exhibit under the exceptions provided by the law. In the absence of such impeachment, the court finds that the plaintiff has proved ownership of the land, which does not contain encumbrances or easements in favor of the defendant.
34. On the issue of whether the defendant's entry into the plaintiff's land was justified on account of any public law, the onus in law is on the one who alleges to prove such a fact. See *Charter House Bank Ltd vs Frank N. Kamau* (2016) eKLR. Section 28 of the [Land Registration Act](#) provides that all registered land shall be subject to overriding interests such as electricity power lines, telephone lines or pipelines, aqueducts, canals, weirs, and dams. Section 173 (1) of the [Land Act](#) provides the creation of public rights of way, while Section 143 (2) provides that any right of way is created for the benefit of the National or County Governments or communal rights of way. Based on this section, the rights of the plaintiff to land can be limited by the operation of the law.
35. The question is how can the limitation be implemented. Does the plaintiff have the right to be notified? In *KPLC vs. Kipeon Inland Container Export Processing Zone Ltd* (2018) eKLR, a wayleave, was interfered with by a landowner, posing a danger to the pylons holding the power lines. The plaintiff was alleging illegality, recklessness, and interference of its lawful and statutory rights which it termed as an affront to the rights of its users or customers entitled to enjoy power, should the pylons collapse. Yano J held that the rights of a registered owner under Section 25 (1) of the [Land Registration Act](#) were subject to such liabilities, rights, and interests declared in Section 28 of the [Land Registration Act](#). The court further held that since the plaintiff had applied for a public way leave and the same was granted and had a wayleave trace for the power lines to run across the defendant's land, the defendant had encroached on it, which was a breach of the easement. The court upheld that the defendant's possession and use of the said property was subject to the public right of way or way leave with a duty imposed on the latter to safeguard such way leave.



36. How, then, is a wayleave obtained, and did the defendant herein prove the facts that it has a valid wayleave? In *Kenya Power Lighting Company vs Joseph P. King'ara* (2013) eKLR, the court said the statutory authority to enter the land was found in sections 45 of the Electric Power Act, Sections 4 & 5 of the Way Leave Act (repealed) Sections 46 (1-3) of the Electric Power Act that the owner was deemed to assent to a proposal to lay a power line on his land unless he has notified the person laying the lines within 60 days after service on him. Under Section 6 (1) of the Wayleave Act, the government was to make good all damages done, including for crops and trees felled, in executing any power under the Act.
37. Section 148 (1-5) of the *Land Act* provides that compensation shall be payable to any person in lawful or actual occupation as a communal right of way and concerning a way leave in addition to any compensation for the use of land for any damage suffered in respect of trees, crops and buildings as shall in case of private land, be based on the value of the land as determined by a qualified surveyor. Sub-rule (3) says that any damage caused as a result of the creation of a wayleave shall include any preliminary work undertaken in connection with the survey or determine the route of that wayleave, and the duty shall be on the corporate body or authority that applied for the public right of way to be done, promptly and if unable to agree on compensation, appeal to the court to determine the amount, method or payment including additional costs and inconvenience incurred by the person entitled to the compensation.
38. The defendant's entry date into the suit land was not pleaded in paragraphs 4 and 5 of the plaint. In paragraph 5 of the plaintiff's witness statement, he says the entry was about ten years ago. He says he was notified by PW 2 about it and directed to ask the defendant if they could at least remove the posts on the side of his land, which they refused to do. The plaintiff did not produce any written objection to the entry during the erection of the electric poles. Between 2011 and 2020, it is unclear if the plaintiff sought to stop further occupation of his land or demanded the re-location of the poles out of his land. PW 1, in his witness statement and evidence, did not state if and when he objected to the entry or demanded compensation for the 627 square meters taken up by the defendant. P. Exh No. (2) was issued on 12.1.2014. No evidence is available that, as of 2011 or when the electric poles were erected, the plaintiff was the registered owner of the suit land. Other than the title deed, no records were availed to show that the plaintiff was the demarcated owner of the suit land. Similarly, no copy of records was availed to show when the register for the suit land was opened and, if so, whether it was in favor of the plaintiff.
39. The onus was on the plaintiff to prove that when the defendant moved into the land, he was the one owning the land as per land registration documents at the time and that he ought to have been notified or consent sought from him in line with Section 143 of the *Land Registration Act*. The date on which the electric power posts and lines were erected and whether the defendant ought to have sought wayleaves from the plaintiff needed to be proved through documentary evidence. If the plaintiff was the one on the ground at the time, the easiest thing would have been to provide the court with the exact year, date, and the entity that erected the power lines, given that it is not only the defendant who has the exclusive mandate to erect electric power lines in Kenya. To blame the defendant as a trespasser to the plaintiff's land under Sections 46 and 55 of the *Energy Act*, 2006 at the time, which required permission by the entity to survey and use the land to lay electric power lines from the land owner, had to be proved through cogent evidence. Even though the defendant has not pleaded if it gave notice of entry and particulars of it in line with Sections 46 of the *Energy Act* 2006, the onus was on the plaintiff to prove when the trespass initially occurred and whether it was the defendant who laid the power lines since it is not the only entity in Kenya, with the mandate of laying of electricity lines.
40. In my view, the date of entry and erection of the power lines was a critical issue that the plaintiff had to prove to establish which entity did it after which the court would be able to attribute liability.



- The notice requires a personal service except the owner. In the event is not traced, other appropriate mechanisms must be employed to notify him. Section 173 of the *Energy Act* 2019, requires the owner to consent in writing and agree on compensation.
41. In *John Kiragu Kimani vs Rural Electrification Authority* (2018) eKLR, the court held there was trespass for non-compliance with Sections 46 of the *Energy Act*. In *Ahmed Sheikh Amin Msellen vs KPLC* (2020) eKLR, there was nothing before the court on who had constructed the power line. However, the defendant admitted that it had taken over and was running the power lines built on the plaintiff's land without permission or compensation. The court found the defendant liable since there was an admission and evidence through a demand letter for the stoppage of the power line construction and compensation for the trees destroyed.
 42. In this suit, the plaintiff did not plead the status and value of his land before the electricity poles and power lines were erected. He did not plead when he planted the trees and whether the defendants found them there. In *KPLC vs Mburu C.A 130 of (2019) (2022) KECA 512 (KLR) (6th May 2022) (Judgment)*, the court observed that determination on whether the power line was within the boundaries of Plot No 50 was necessary before the trial court could conclude that the power lines were within the respondent's property.
 43. In this suit, the plaintiff failed to call or file a notice to produce, the way leaves certificate or evidence that the defendant was justified in laying electric poles on his land. The defendant had, in his defense, denied that the plaintiff was the owner of the land. The plaintiff should, therefore, have proved his ownership of the land before the electric poles were erected; unfortunately, this was not done.
 44. The defendant has pleaded that the plaintiff's claim was time-barred under Sections 4 (2) of the *Limitation of Actions Act* and 3 (1) of the Public Authorities Act. In *KPLC vs. Ringera* (supra), the court observed that trespass be continued. In this suit, the defendant admits that the power lines are still on the plaintiff's land. The defendant failed to plead the date the suit land became subject to a public right of way through a way leave obtained from the County Government of Meru or any other entity. No evidence was produced to show that the plaintiff was notified that the land was subject to an easement and that his use of the wayleave trace was limited. Without that, the defendant has not discharged the burden to prove the claim as time-barred or subject to dully obtained wayleave rights. See *Edward Mariga vs Schuller* (supra)
 45. In the events on 29.5.2020, the plaintiff pleaded that the defendant unlawfully and without any color of right or permission entered on the land negligently and without justifiable reason, indiscriminately cut down and fell his artificial forest, hence occasioning loss and damage. In reply, the defendant averred that the acts were justified in law since the plaintiff had encroached on its wayleave and was guilty of offenses under Section 169 (1) (a) of the *Energy Act* 2019. As of 29.5.2020, the plaintiff was the owner of the suit land, going by his title deed issue effect from 2014. The plaintiff was aware of the power lines on his land. As indicated above, there is no indication that before this date, the plaintiff had raised any formal objection, demanded a relocation, or has sought a clarification on the nature of limitations to use his land falling under the power lines.
 46. Even assuming that permission had been granted to lay the power lines, the power bestowed to the defendant under Section 46 of the *Energy Act* 2006 to trim trees and hedges interfering with the maintenance or working of any electric supply lines required a licensee to be given a seven days' notice to the owner or occupier of the land on which the trees or hedges was growing to top or cut it to prevent the obstruction or interference with the electric supply line, subject to the payment by such licensee of the expenses reasonably incurred by the owner or occupier of the land in complying with the notice. The section provides that if within 21 days from the date of giving notice, a counternotice of objection



is received from the owner, the commission would hear the matter and order he works to proceed after giving a seven days' notice to the owner and or any aggrieved party by the decision who can within 30 days appeal to the Energy Tribunal.

47. As to the cutting or lopping of trees or hedges, Section 55 of the *Energy Act* 2006, provides that the licensee shall issue instructions to ensure as minimal damage as possible is done to the trees, fences, hedges, and growing crops and that any compensation would be a civil debt, recoverable summarily.
48. In this suit, other than pleading the relevant laws as the justification, the defendant, despite leave granted by the court to file supporting documents and witness statements to justify its actions, failed to do so or call evidence to sustain its defense. It is trite law that failure to call evidence to support a defense makes its contents mere statements with no probative value. See Edward Mariga (supra). In Joseph Abraham Kafwa vs KPLC (2014) eKLR, the court, in the circumstances similar to the instant case, held the action of the defense of cutting down the plaintiffs' trees without first giving him notice or an opportunity to fell the trees himself was an apparent contravention of Section 55. The court termed the entry as illegal, and the defendant was liable to payment of damages for the inconvenience caused.
49. In Samuel Motari Nyambati vs KPLC (2018) eKLR, the issue was whether the court could order the re-routing or realignment of the power supply line. Land valuers had prepared a report showing that the power line ran through the middle of the land and not along the boundary as is the norm. The report showed that the power line Could run along the boundary of the plaintiff's land instead of restricting the user of the land. In the first instance, the defendant had not explained why the power line had been placed so that it impeded and or limited the user right of the plaintiff's land. The court observed that the defendant had a duty and obligation to lay and erect the power line so that the plaintiff's use of land was least compromised and or affected. The court observed further that the defendant had chosen the easier option of running the power line through the middle of the plaintiff's land. The court said that the increasing pressure on land availability and how every usable portion of it was treasured meant that the defendant acted without due care and diligence when they erected the power line and should bear the cost of rerouting it to run along the boundary.
50. The plaintiff pleaded and testified that he expressed dissatisfaction with the entry on 29.5.2020, made a report to the defendant, area Officer Commanding Station (OCS), and forest office, and immediately wrote a demand letter to the defendant, which was received on 7.8.2020. The letter sought for damages for trespass. It did not claim that there was no wayleave. It did not raise issues on the illegality of the power poles and the electricity lines on the land. It did not raise the issue of loss of user, deprivation of the right to peaceful and quiet enjoyment of the property, illegal erection of electric poles, or power lines on the two sides of the land. It did not raise the issue of an illegal, unlawful, and forceful acquisition of land without compensation or raise particulars of special damages for past, current, and future use. In his demand letter, the plaintiff did not ascertain the nature, size, and value of the land taken up by the power lines out of his entire land.
51. The plaintiff did not state that he had never been consulted in the first place when the power lines were erected to give his consent or permission. Lastly, the plaintiff never demanded removing, relocating, or rerouting of the power lines away from his land and state if laying them was malicious, reckless, or negligent since there was already enough road reserve to place them. The plaintiff called PW 1, 2, 3, 4 to sustain his claim. PW 3 testified and produced P. Exh No. (3) & (4) the forest produces assessment report dated 6.6.2020, and the OB report made on 29.5.2020 at Kianjai police station by the plaintiff. PW 3 told the court that the defendant should have sought and obtained permission from their offices before taking the law into their actions and felling down trees. He told the court that the defendant's actions were unlawful and malicious.



52. On his part, PW 4 told the court that he visited the suit land on 23.6.2020 and 28.1.2021 as the police and the defendant's offices but could not get any way leaves to support the defendant's entry into the plaintiff's land. He produced his report as P. Exh No. (7). He attached a registry index map sheet number 108/3/15/16, the location sketch of the land measuring 0.59304 acres whose land use he described as agriculture/artificial forest land user, a rectangular plot. The report attached photographs showing the cut tree stumps. In the sketch map, the report shows an access road that is not named and or depicts its measurements. The reports did not show the beacons for LR No. 1023. The attached Sheet Map No. 108/3/15/16 is not certified at all.
53. As to the value of the land assessed at Kshs.21,675,200/=, the land was under agricultural use/artificial forest land user; One would have expected the scientific formulae used to arrive at the figure and evidence of land similar in character to have been provided. See *Collector vs Heptulla (1968) E.A 555* based on the principle of substitution. The wayleave trace was in dispute in *Dobin Mutiso Ndolo vs Ketraco Ltd (2020) eKLR*. Guided by *Ketracco vs James Kinoti M'Twerandu (2018) eKLR*, the court took a 30% compensation policy, and the forest produced an assessment report on rates contained in the Forest Service General Order (FS90) of 2016/2017.
54. In *Ravaspaul Kyalo Mutisya vs National Land Commission (2022) eKLR*, the court cited the Land Value Amendment, Act 2019 and Section 133 (6) of the [Land Act](#) where in any matter relating to wayleaves, easement and or public rights of way such matter has been referred to the land acquisition tribunal.
55. As at the time this suit was filed, the Land Acquisition Tribunal was not operational, and therefore, the objection by the defendant is rejected for under Section 128 of the [Land Act](#), this court had jurisdiction to determine the dispute. The defendant has invoked public interest in its entry on 29.5.2020. It is only under section 120 (2) of the [Land Act](#) that where there is an absolute necessity, land can be acquired in public interest without prior compensation but only after the expiration of 15 days of the notice publication. See *African Gas & Oil Co. Ltd vs. Attorney General & another (2016) eKLR*.
56. The defendant has not pleaded that there was an urgent necessity to enter the land and commit acts of wastage. The defendant failed to substantiate its defense that the law was complied with, and the plaintiff was given an option of lopping the trees. The defendant did not challenge the assessment of the trees by the forest department by way of a rival report. The evidence of PW 1, 2, 3, and 4 on the tree damage appeared credible and reliable. I find the claim of Kshs.875, 200/= as specifically pleaded and proved.
57. It is trite law that special damages must be pleaded and proved. Damages for trespass, annexation, loss of user, mesne profits, conversion, and general damages had to be pleaded and substantiated by the plaintiff. The Land Value Amendment Act 2019 established the criteria for assessing land. A land value index has to be developed by the Cabinet Secretary as provided under Section 107 of the Act and the Land Assessment of Just Compensation Rules. Factors to consider include the market value, damage sustained, and the diminution of profits.
58. PW 4 did not specify if he was guided and followed the cited law above in arriving at Kshs.21,800,2000. The plaint in paragraph 6 a figure of Kshs.35,000,000/=. In *Peter Musimba vs National Land Commission and others (2016) eKLR*, the court observed that Article 40 (3) of [the Constitution](#) intended a person to be entitled to compensation or loss fairly attributed to the taking his land but not to any greater amount. The court said it must be equitable and lawful.
59. The plaintiff has not endeavored to tell this court if he sought the approval of his intended investments and whether the same was declined or objected to by the defendant on account of the alleged wayleave



or public right of way. There is evidence that the plaintiff had planted trees on his land. It is unclear whether the plaintiff sought consent to plant the trees in the first instance and whether he was denied permission. Again, it is unclear if the plaintiff has been stopped from utilizing his land for the intended purpose. The plaintiff has not pleaded that due to the voltage of the power line, he cannot put up any permanent buildings on the disputed portion. P. Exh No. (7) was silent on the issues, yet they could have guided this court on the plaintiff's loss, nature, extent, and value. Evidence by PW 4 and his report was silent on what percentage of the total value of the land the plaintiff has lost or is likely to lose unless compensated by the defendant. Similarly, the plaintiff did not put any figure in the demand letter to the defendant. In my view, special damages were not particularized, pleaded, or proved to the required standards, prayer number (vi) of the plaints is hereby rejected.

60. Regarding prayers numbers (1) & (vi) of the plaint, the court has already observed that the date of entry and nature of entry was not pleaded. There is, however, general admission that the defendant's power lines have been on the suit land since the plaintiff obtained a title deed in 2015. It is unclear if the plaintiff brought it to the defendant's attention that he was opposed to the powerline occupying his land in the manner they had been affected. Between 2015 and 2020, there is no evidence that the plaintiff formally sought the re-routing, relocation, or realignment of the power lines with the boundaries to his land. There is also no evidence that the plaintiff objected to the continued occupation of 627 square meters of his land without a wayleave or compensation for the loss of the user. A mandatory and permanent injunction is granted in clear cases, as held in *Locabal International Furniture Ltd vs. Agro Exports and others* (1986) 1 ALL ER 901, *Kamau Mucuha vs Ripples Ltd* (2001) eKLR.
61. In *KPLC vs Sheriff Molana Habib* (2018) eKLR, the court said a perpetual injunction is granted upon hearing the suit and fully determines the party's rights based on evidence and merits of the case to perpetually restrain the commission of an act by the defendant in order or the rights of the plaintiff to be protected. In *Lucy Wangui Gachara vs Minudi Okemba Lore* (2015) eKLR, the court said it would not grant a mandatory injunction if the damage fared by the plaintiff was trivial or where the detriment that the injunction would inflict was disproportionate to the benefit it would confer. The court had to consider the facts and circumstances of each case. The court also cited with approval *Philip Aluchio vs Chrispin Ngayo* (2014) eKLR that damages for trespass are the difference in the value of the plaintiff's property immediately after the trespass or restoration costs, whichever was less.
62. In this suit, the date of entry, value, and status of the property, and the plaintiff's reaction at the entry was not pleaded and proved. The valuation report is not at the time of the entry and at the present. Mesne profits were not specifically pleaded and proved. In *Evelyn College of Design Ltd* (supra) evidence was established that under Section 28 (1) of the *Land Registration Act*, the title deed held by the plaintiff was subject to overriding interests of way leaves held by the defendant. In this suit, even if there were no formal wayleaves consent to or permission by the plaintiff, the law still allows the plaintiff and the defendant to regularize the status.
63. As to general damages cited in *Park Towers Ltd vs John Mithamo Njika* (2014) eKLR the court cited with approval *Alex Mwaura* (supra), the court said the court assesses general damages awardable depending on the unique circumstances, including lack of due process in acquiring the land in total breach of the petitioner's rights. In this suit, the plaintiff has failed to substantiate his claim for general damages regarding when the trespass occurred, why he did not complain until 2020, and the value of his land before the entry and the present. Given the circumstances of this suit, I order that the defendant shall, within three months from the date hereof, re-align or re-route its power lines with the plaintiff's boundaries to his land, taking into consideration the rights of use by the plaintiff. Costs of the re-routing are to be met by the defendant.



64. The upshot is that the suit succeeds only in terms of prayers (ii), (iii), and (iv) to the extent of rerouting or realigning the power lines. Costs to the plaintiff.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 8TH DAY OF NOVEMBER 2023

In presence of

C.A Kananu/Mukami

Muriuki for plaintiff

HON. CK NZILI

ELC JUDGE

ELC E023 OF 2021 - JUDGMENT	0
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