Njenga v Kenya Electricity Transmission Company (Environment and Land Appeal 23 of 2023) [2023] KEELC 22537 (KLR) (9 November 2023) (Judgment)

Neutral citation: [2023] KEELC 22537 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL 23 OF 2023

YM ANGIMA, J

NOVEMBER 9, 2023

BETWEEN

ROBERT KARANJA NJENGA ..... APPELLANT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY ..... RESPONDENT

(An appeal against the judgment and decree of Hon. Charles Obulutsa (CM) dated 03.11.2022 in Nyahururu CM ELC No. 43 of 2019)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. C.O. Obulutsa (CM) dated 03.11.2022 in Nyahururu CM ELC No. 43 of 2019 – Robert Karanja Njenga v Kenya Electricity Transmission Co. Ltd. By the said judgment, the trial court entered judgment for the Appellant against the Respondent in the um of Kshs 956,130/= together with costs and interest as opposed to the sum of Kshs 18,237,000/= the Appellant had sought in the plaint.

B. Background

2. The record shows that vide a plaint dated 23.04.2019 the Appellant sought the following reliefs against the Respondent:

    a. An order directing the Defendant to compensate the Plaintiff for loss of use of his parcel of land, loss of trees and income at a sum of Kshs 18,237,000/= or any other adequate amount.

    b. Costs of the suit plus interest.

    c. Any other or further relief this honourable court may deem fit and just to grant.

3. The Appellant pleaded that at all material times he was the registered proprietor of Title No. Nyandarua/Malewa/2009 (the suit property). It was pleaded that the Respondent had constructed a power transmission line whose corridor traversed the suit property in consequence whereof he had suffered loss of use of his land, destruction of trees, and loss of income. The Appellant contended that he was entitled to 50% compensation for loss of use of the suit property at the prevailing market price.

4. It was the Appellant's case that in spite of issuance of several demand letters and service of a notice of intention to sue the Respondent had failed to make good his claim hence the suit.

5. The record shows that the Respondent filed a defence dated 19.10.2020 in which it admitted that it was undertaking a project for the construction of the Ethiopia – Kenya Transmission Line which traversed the suit property owned by the Appellant. It was pleaded on or about 30.07.2018 the parties mutually agreed on compensation at Kshs 309,600/= and that the Appellant executed a wayleave acquisition negotiation form for that purpose.

6. The Respondent further pleaded that prior to the filing of the suit the parties had agreed to conduct a joint valuation of the trees and beehives affected by the project which valuation was in fact undertaken. It was contended that the only reason why compensation had not been paid was because the Appellant had wilfully failed to submit the requisite documents to the Respondent for processing of his compensation.

7. The Respondent further pleaded that acquisition of a wayleave was the duty of the National Land Commission and that any compensation for loss of user of land should be based on the value at the cut-off date and not what may be the current market value at the time of filing suit. As a consequence, the Respondent prayed for dismissal of the Appellant's suit with costs.

C. Trial Court's Decision

8. The record shows that upon a full hearing of the suit, the trial court entered judgment for the Appellant and awarded him Kshs 956,130/= made up as follows:

    a. Limited loss of use of land @ 30% - Kshs309,600/=

    b. Compensation for trees - Kshs444,550/=

    c. Compensation for beehives - Kshs202,000/=

    Total - Kshs956,130/=

9. In its judgment, the trial court relied upon, *inter alia*, the report of the joint valuation presented by the Respondent. The trial court was of the opinion that the Appellant was entitled to compensation for limited loss of user since the Respondent was not permanently acquiring the suit property. The court further held that compensation at the rate of 30% of the value of the land was appropriate and not at 50% as claimed by the Appellant. Moreover, the trial court held that there was no evidence to support the Appellant's claimed valuation of the affected portion of the suit property in the sum of Kshs 1.5 million.

D. Grounds of Appeal

10. Being aggrieved by the said judgment, the Appellant filed a memorandum of appeal dated 16.11.2022 raising the following eight (8) grounds of appeal:

a. The learned magistrate erred in law by failing to have due regard, take into account and appreciate the substantive legal issues of law and fact raised by the Appellant during the hearing of the Appellant's suit.

b. The learned magistrate erred in law and fact in undervaluing the Appellant's claim.

c. The learned magistrate erred in law by not taking into account issues of valuation raised and proved during the hearing of the suit.

d. The learned magistrate erred in law by failing to reach a just determination on all the issues placed before the court.

e. The learned magistrate erred in law and fact by failing to appreciate the settlements in all other matter of the same nature previously before him.

f. The learned magistrate erred in law and fact by failing to appreciate and distinguish the substantive issues of cost of private plantation and public forest in the submissions, authorities and other documents on record.

g. The learned magistrate erred in law and fact by failing to appreciate the valuation figures in the parties pleadings.

h. That in all the circumstances of this case, the learned judge failed to render justice to the Appellant.

11. As a result, the Appellant sought the following reliefs in the appeal:

a. That this appeal is allowed.

b. That the judgment delivered on the 3rd November, 202 be set aside.

c. That the court be pleased to enter judgment in favour of the Plaintiff as sought in the plaint.

d. That costs of the appeal be borne by the Respondent.

E. Directions on Submissions

12. When the appeal was listed for directions, it was directed that the appeal shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 18.09.2023 whereas the Respondent's submissions were filed on 10.09.2023.

F. Issues for Determination

13. Although the Appellant raised 8 grounds in his memorandum of appeal, the court is of the opinion that the appeal may be effectively resolved by determination of the following issues:

a. Whether the trial court erred in law and fact by undervaluing the Appellant's claim.

b. Whether the Appellant is entitled to the reliefs sought in the appeal.

c. Who shall bear costs of the appeal.

G. Applicable legal principles

14. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court.

The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

> "... Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> "...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

16. In the same case, Sir Kenneth O'Connor quoted *Viscount Simon, L.C in Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

17. In the case of *Kapsiran Clan v Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

Whether the trial court erred in law and fact by undervaluing the Appellant's claim

18. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court for failing to properly appreciate the valuation figures and failing to take into account the Appellant's valuation reports proved at the trial in consequence whereof the court ended undervaluing his claim for compensation. It is evident from the material on record that the Appellant was mainly aggrieved by the decision of the trial court to rely upon the valuation reports presented by the Respondent rather than his own reports.

19. The Appellant was aggrieved by the trial court's reliance on a value of Kshs 600,000/= per acre as opposed to his stated value of Kshs 1,500,000/=. He was also aggrieved by the court's adoption of 30% of the value of the land as compensation for limited loss of use as opposed to 100% of the value of the land. The Appellant submitted that the trial court ought to have applied the rate of 100% as was applied in the case of *Tennyson Nyinge Chilyalya & 60 Others v Kenya Electricity Transmission Co. Ltd* [2020] eKLR and not the 30% applied in the earlier case of *Kenya Electricity Transmission Company Ltd v James Kinoti M'twerandu* [2018] eKLR.

20. The Respondent, on the other hand, fully supported the decision of the trial court. It was submitted that the value of the trees and the beehives was determined by the designated officers pursuant to a joint valuation conducted by consent of the parties. It was submitted that the parties were legally bound by the terms of the consent. The Respondent further submitted that the value of the affected land was freely negotiated by the parties and agreed upon at Kshs 600,000/= per acre in consequence whereof the Appellant signed the wayleave forms. It was further submitted that the amount of Kshs 309,600/= indicated in the wayleave form was calculated at the rate of 30% of the value of the 1.72 acres of the suit property which was affected by the project. It was disputed that the trial court erred either in law or in fact in making the award in the judgment.

21. In adopting what it considered to be the report of a joint valuation, the trial court held as follows:

> " The court has considered the valuation reports presented. The ones used by the Plaintiff were prepared even before the suit was filed. Mr. Ngunyi admitted that at the time the Plaintiff told him it was for his personal use and was not related to the case. Once the parties entered into a consent to conduct a joint valuation for the trees and beehives for purposes of the case, and the reports be submitted in court, in effect it meant that the earlier reports relied on by the Plaintiff became superfluous. As was stated in the case of NKM –vs- SMM cited by the Defendant, the consent was binding and had not been set aside."

22. There is no doubt from the material on record that prior to the hearing of the suit, the parties had recorded a consent on 21.08.2019 which stipulated, among other things, that:

> " 3. A joint valuation for the parties hearing be carried out within seven days to determine the costs associated with damage to trees and the location of

beehives occasioned by the Defendant's construction activities on the suit land.

4. The joint valuation for the location of the beehives and trees shall be done by the Nyandarua County Agricultural and Livestock Officer and District Forest Officer respectively.

5. The parties to file a joint valuation report for adoption and for further directions in court."

23. The court finds absolutely no fault on the part of the trial court in its finding and holding on which valuation reports were to be relied upon with respect to the claim for compensation for trees and beehives. The trial court properly relied upon the reports prepared by the designated government officers. In fact, the minutes of the tallying exercise for the trees indicated that the Appellant was present. The court is unable to agree with the Appellant's contention that a joint valuation was never undertaken at all.

24. On the issue of land valuation and the percentage of compensation for loss of user, the trial court held as follows:

> " For loss of land, the Plaintiff claimed Kshs 1.5 million. This was an erroneous position since the Defendant was not permanently acquiring his land for him to claim at the rate of the market value. However as admitted by himself, he had no valuation report to support this. In any event he conceded that only 1.72 acres of his land was to be affected and not the entire parcel. He declined the valuation done for the limited loss of use offered for the same at the rate of 30% as was held in the case of Kenya Transmission Company v James Kinoti."

25. The court finds no fault at all with the reasoning and finding of the trial court on the value of the land and the percentage of compensation. There was no valuation report which was presented by the Appellant at the trial on the value of the land. There was credible evidence on record to show that the parties had negotiated and agreed upon a value of Kshs600,000/= per acre as a result of which the Appellant signed the Wayleave Acquisition Negotiation form at page 188 of the record of appeal. The said form indicates that both the initial offer and negotiated offer on the rate of compensation was 30%. The court is satisfied that if the Appellant considered a valuation of Kshs600,000/= per acre to be reasonable on 30.07.2018 he could not validly turn around and unilaterally enhance it to Kshs 1.5 million without involving the Respondent. The trial court was thus entitled to apply the rate of Kshs 600,000/= per acre.

26. The mere fact that the judge in the Tennyson Nyinge Chilyachilya Case applied the rate of 100% for compensation does not necessarily mean that the judge in the James Kinoti M'twerandu Case was wrong in applying the rate of 30%. Both cases were decided by courts of the same status. The trial court was thus entitled to rely on either of them and could not be faulted for relying on one and leaving out the other. It is a matter of common knowledge that it would be impossible to apply both authorities to the same case.

b. Whether the Appellant is entitled to the reliefs sought in the appeal

27. The court has already found that there is no evidence on record to demonstrate that the trial court failed to properly appreciate the valuation figures and reports before it and as a result arrived at an undervaluation of the Appellant's claim. The court has found that the trial court did not err in law and fact in awarding the Appellant the sum of Kshs 956,130/= instead of the sum of Kshs 18,237,000/=

claimed in the plaint. It would, therefore, follow that the Appellant is not entitled to the reliefs sought in the appeal, or any one of them.

c. Who shall bear costs of the appeal

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should be deprived of costs of the appeal. Consequently, the Respondent shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

29. The upshot of the foregoing is that the court finds merit in the appeal. As a result, the court makes the following orders for disposal thereof:

a. The appeal be and is hereby dismissed.

b. The judgment and decree of the trial court in Nyahururu CM ELC No. 43 of 2019 is hereby affirmed.

c. The Respondent is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 9TH DAY OF NOVEMBER, 2023.

Y. M. ANGIMA

.....

JUDGE

I certify that this is a true copy of the originally

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Kinyanjui for the Appellant

Mr. Lutta for the Respondent

C/A - Nyaga