



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Makori v Kenya Electricity Transmission Company Ltd; Makori (Third party) (Environment and Land Appeal 16 of 2019) [2021] KEELC 5 (KLR) (31 May 2021) (Judgment)**

Neutral citation: [2021] KEELC 5 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL 16 OF 2019**

**JM ONYANGO, J**

**MAY 31, 2021**

**BETWEEN**

**JEREMIAH ONDIGI MAKORI ..... APPELLANT**

**AND**

**KENYA ELECTRICITY TRANSMISSION COMPANY LTD ..... RESPONDENT**

**AND**

**WILFRED ONTUBE MAKORI ..... THIRD PARTY**

*(Being an Appeal from the Judgment Hon. S. K. Onjoro (SRM) delivered on 3rd May, 2018 in Kisii CMCC No. 67 of 2018 formerly Kisii ELC NO. 92 OF 201)*

**JUDGMENT**

**Introduction**

1. This appeal arises from the judgment of Hon. S. K. Onjoro (SRM) delivered on 3<sup>rd</sup> May, 2018 in Kisii CMCC No. 67 of 2018 formerly Kisii ELC Case No. 92 of 2017.
2. As per Memorandum of Appeal dated 23<sup>rd</sup> May 2019, the Appeal is premised on the following grounds:
  - a) The learned trial Magistrate erred in law and in fact by misapprehending that the Appellant's permanent house was part and parcel of the 3<sup>rd</sup> Party's houses required to be demolished in favor of the Respondent's way leaves project along Kisii - Awendo.
  - b) The learned trial Magistrate erred in law and in fact by not recognizing that the Respondent herein encroached, wasted and created nuisance on the Appellants land known as Bassi/Bogetaorio/11/4495 on or about 12<sup>th</sup> day April, 2017 without any right color (sic) or just cause.



- c) The learned trial Magistrate erred in law and in fact by not recognizing the evidence that the Respondent carried her electrical/survey on or about 12<sup>th</sup> day of April, 2017 without issuing any prior notice to him as the proprietary (sic) of the suit parcel known as Bassi/Bogetaorio/11/4495 as required by Section 46 of the Energy Act 2006.
- d) The learned trial Magistrate erred in law and in fact by underestimating the Appellant's permanent residential house which expensed (sic) the Appellant much more money than what the court offered as compensation in the said suit.
- e) The learned trial Magistrate erred in law and in fact by not considering the expenses he has incurred since the Respondent laid her wayleaves or electricity wires over and above his residential house which is no longer habitable to any human being.
- f) The learned trial Magistrate erred in law and in fact by not recognizing that the Appellant was disturbed by the Respondent when she abruptly laid her electricity wire/way leaves over and above his residential houses without any notice at all.
- g) The learned trial Magistrate erred in law and in fact by not apprehending (sic) why the High Court ordered the suit thereof to be tried on the issue of compensation only.
- h) The learned trial Magistrate erred in law and in fact by misapprehending or not noting that once electricity way leaves or wires have been laid over and above any residential houses as in this suit the same has to be demolished upon compensation.
- i) The learned trial Magistrate erred in law and in fact by misleading himself and ordered that the 3<sup>rd</sup> party to pay the costs of the suit before Kisii Chief Magistrate 's court ELC Case No. 67 of 2018 and yet the Appellant did not sue him in the whole matter.
- j) The learned trial Magistrate erred in law and in fact by misapprehending the evidence adduced and the submissions thereof and as such arrived at a wrong conclusion and decision.

Based on the above grounds the Appellant prayed that;

- a) The Appeal be allowed and compensation be awarded to the Appellant in respect of his permanent residential houses to the current value as per the report.
- b) The Respondent be compelled to pay the costs of the suit before Kisii Chief Magistrate 's court ELC No. 67 of 2018 (formerly Kisii High Court ELC 92 of 2017)
- c) The Respondent be ordered to compensate the Appellant the entire costs he has incurred since she laid electrical wires over and above his permanent houses
- d) Costs of the Appeal.

### **Brief background of the case**

3. Before delving into the merits of this appeal, it is important to give a brief background of the case.
4. By a Plaint dated 18<sup>th</sup> April, 2017 the Appellant filed suit against the Respondent alleging that the Respondent had trespassed into his land parcel known as Bassi/Bogetaorio/11/4495 without his consent, and placed construction materials thereon with the intention of connecting electricity to her customers.
5. He averred that the Respondent had threatened to demolish his house as the proposed electricity lines would pass over the Appellant's house hence endangering his life and that of his family members.



6. It was the Appellant's case that the Respondent had not negotiated any payment nor compensated the Appellant before laying the electricity lines on his land and above his house. He therefore prayed for a permanent injunction restraining the Respondent from interfering with his land as well as general damages for trespass together with costs.
7. Upon being served with the Plaint and Summons to enter appearance, the Respondent entered appearance and filed a Defence dated 8<sup>th</sup> June 2018.
8. In her Defence, the Respondent averred that she adequately compensated the Appellant's father, who by then was among the owners of the piece of land in question and that the Appellant's title to the suit property (BASSI/BOGETAORIO/11/4495) was non-existent at the time.
9. The Respondent further averred that she conducted a valuation of all the crops, structures and land along the wayleave trace and reached a compensation figure of the same with the Appellant's father who was one of the registered owners of the said piece of land.
10. The Respondent stated that her policy was that compensation was first made by paying for the crops and structures before compensation for the land. She stated that the Appellant's father was paid 70% of the agreed compensation figure for the structures on the land.
11. It was the Respondent's contention that the compensation was discussed and there was no objection raised by any person including the Appellant and that his father signed an acknowledgement as proof that the inventory was confirmed, compensation accepted and that the wayleave was granted.
12. The Respondent further contended that the Appellant did not own any property in the land that had been reviewed, surveyed and valued at the time of such valuation and any claim he had over such property ought to have been directed at his father.
13. By an application dated 12<sup>th</sup> September 2017, the Respondents applied for the Appellant's father to be joined to the suit as the 2<sup>nd</sup> Defendant as she stated that she had paid him the sum of Kshs. 3, 866,576 being 70% of the compensation amount of the Kshs. 5,523,680 which included the Appellant's claim. The said application was allowed and the Appellant's father was added to the suit as the 2<sup>nd</sup> Defendant/3<sup>rd</sup> Party.
14. The 3<sup>rd</sup> Party filed a response dated 22<sup>nd</sup> February, 2018 wherein he denied the Respondent's claim against him. He stated that the compensation amount of Kshs. 5,523,680 only covered his own structures and did not include the Appellant's permanent structures on land parcel No. BASSI/BOGETARIO 11/945 as it had not been anticipated that the wayleave would affect them hence they were not valued. He stated that the 30% compensation balance that was yet to be paid was solely payable to him.
15. In her reply to the 3<sup>rd</sup> Party's response the Respondent reiterated her averments in the Defence. She stated that the Appellant's claim was a family dispute disguised as a legitimate civil suit and was therefore an abuse of the court process.
16. On 15<sup>th</sup> March 2018, the matter was referred from this Court to the Senior Principle Magistrate's Court which had the requisite jurisdiction.
17. The case was subsequently fixed for hearing on diverse dates between 21<sup>st</sup> June 2018 and 10<sup>th</sup> December 2018 when the parties testified and closed their cases. Thereafter the parties filed their submissions with the exception of the 3<sup>rd</sup> Party who elected not to file any submissions.



18. The learned trial Magistrate rendered his judgment on the 3<sup>rd</sup> May of 2019 and held inter alia as follows:

“Having heard the opportunity to hear the parties herein and established that indeed it is the third party who was dishonest in his dealings, if any compensation is to be made then the remaining 30% compensation ought to be paid to the plaintiff since it is the 3<sup>rd</sup> Party was dishonestly received proceeds of the structures belonging to the plaintiff. Should the plaintiff have any her claim for compensation then the same ought to be recovered from the third party and not the defendant.”

As regards the other prayers sought by the plaintiff in his submissions such payment for demolition of a residential house (Kshs. 4,475,000) and rent Kshs. 55,000). be the same were not pleaded and as such cannot be awarded. A party is bound by his pleadings and this court cannot award what has not been pleaded. Further the same are in the nature of special damages which it is trite law that they must also be specifically pleaded and strictly pleaded which is not the case herein.

As regards costs, in view of the fact that the 3<sup>rd</sup> party was dishonest in his dealings thus necessitating this suit, he shall bear costs of the suit”.

19. It is against the said judgment that the Appellant has lodged this Appeal based on the grounds highlighted earlier in this judgment.

20. With the concurrence of the parties, the Court directed that the Appeal be disposed of by way of written submissions. The Respondent filed her submissions dated 7.12.2021 and the 3<sup>rd</sup> Party filed his submissions dated 15.2.2022. Thereafter the Respondent filed brief submissions in response to the 3<sup>rd</sup> Party’s submissions. The Appellant did not file any submissions.

#### **Issues for determination**

21. Having considered the proceedings in the lower court, the judgment of the trial court, the Memorandum of Appeal and the submissions of the parties with respect to this Appeal, the following issues fall for determination:

- i. Whether the Respondent trespassed into the Appellant’s land parcel No. BASSI/BOGETAORIO 11/4495.
- ii. Whether the Appellant’s permanent structures were considered at the time compensation was calculated by the Respondent.
- iii. Whether the Appellant is entitled to special damages
- iv. Whether the trial Magistrate erred by ordering that the 3<sup>rd</sup> Party bear the cost of the suit against the Respondent.

#### **Analysis and determination**

Whether the Respondent trespassed into the Appellant’s land parcel No. BASSI/BOGETAORIO 11/4495

22. It is not in dispute that sometime in 2017, the Respondent created a wayleave on land parcel number BASSI/BOGETAORIO 11/945. What is in dispute is whether the Appellant’s claim of trespass in respect of parcel No. BASSI/BOGETAORIO/11/4495 which is a sub-division of parcel No. 945 is valid.



23. The 3<sup>rd</sup> Party testified that in 2012 when the Respondent sought a wayleave through land parcel No. BASSI/BOGETAORIO 11/945, the said parcel was registered in the name his late father, Ontumbe Ondari and that the same was being occupied by the 3<sup>rd</sup> Party and his two brothers; Enock Otumbe and Samuel Otumbe. By then no succession had been carried out in respect of his later father's estate.
24. The 3<sup>rd</sup> Party in his testimony revealed that there were negotiations between him, his two brothers and the Respondent after which they allowed the Respondent to create a wayleave on their late father's land at a negotiated compensation value. He affirmed that the compensation comprised of the value of the structures and crops that were to be demolished as well as the value of the portion of the land where the wayleave was going to pass through.
25. The 3<sup>rd</sup> Party admitted that he signed an inventory that contained structures that were to be demolished which included the Appellant's permanent house. He conceded that in as much the Appellant was not involved in the negotiations, he later informed him that his house was part of the structures that were to be demolished. Having signed the said inventory, he accepted 70% payment of the agreed compensation sum and accepted that 30% was payable after the houses were demolished. The inventory which was produced by the Appellant as part of his evidence clearly showed that the 3<sup>rd</sup> Party had given the Respondent a go ahead to enter into parcel of land which included the Appellant's land parcel as parcel No. BASSI/BOGETAORIO 11/4495 was non-existent at the time of negotiations.
26. However, in his submissions, the Appellant wants this court to turn a blind eye to the negotiations that his father, the 3<sup>rd</sup> Party herein had with the Respondent prior to the Appellant acquiring parcel BASSI/BOGETAORIO 11/4495 which was hived from parcel BASSI/BOGETAORIO 11/945 in 2015. He would only like the Court to consider the actions of the Respondents that took place on 12<sup>th</sup> April, 2017 and assume that there were no negotiations between his father and the Respondent in 2012 that gave the Respondent the mandate to enter into a portion of parcel No. 945. This would be erroneous as it is clear that the Appellant's parcel no. BASSI/BOGETAORIO 11/4495 did not exist as a separate and distinct parcel.
27. From the foregoing therefore, it is my finding that the trial court did not err by holding that there was no evidence of trespass on the part of the Respondent but rather that there was dishonesty on the part of the 3<sup>rd</sup> Party who duped the Respondent that all structures on the land belonged to him. The 3<sup>rd</sup> Party further failed to disclose to the Appellant that he had been compensated for the structures that belonged to the Appellant and was to receive a further compensation for the land.

**Whether the Appellant's permanent structures were considered at the time compensation was calculated by the Respondent.**

28. From his own exhibits PEX-1 and PEX-3 which are similar to the Respondent's exhibits DEX-1 and DEX-2, it is clear that the Appellant's structures were considered in the compensation sum that was to be paid to the 3<sup>rd</sup> Party. The Appellant has not adduced any evidence to the contrary. In fact, in his own testimony, his father admitted that amongst the structures that he had consented to be demolished by the Respondent was the Appellant's house and he informed the Appellant about the same. It is therefore my finding that the 3<sup>rd</sup> Party signed an inventory of all the structures that were to be demolished which included the Appellant's house.
29. In view of the evidence on record, I cannot fault the learned trial Magistrate for holding that if any compensation was to be made, then the remaining 30% compensation ought to be paid to the Appellant since the 3<sup>rd</sup> Party had dishonestly received proceeds of the structures belonging to the Appellant. With respect, I do not agree with learned counsel for the 3<sup>rd</sup> Party that the Respondent



should compensate the Appellant for the structures on parcel No. BASSI/BOGETAORIO 11/4495 without taking into account the amount paid to the 3<sup>rd</sup> Party.

### **Whether the Appellant is entitled to special damages**

30. It is trite law that special damages must be specifically pleaded and strictly proved. This has been held in a plethora of decisions including the case of *Equity Bank Ltd V Gerald Wang'ombe Thuni* (2015) eKLR, *Okulu Gondi v South Nyanza Sugar Co. Ltd* (2018) eKLR and in the case of *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* {2013} eKLR the Court of Appeal observed that:

“...a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of... the degree of certainty and particularity depends on the nature of the acts complained of... “It is now trite law that special damages must first be pleaded and then strictly proved.....”

31. In the case of *Charles Sande V Kenya Cooperative Creameries*, Civil Appeal No. 154 of 1993 Shah J.A held that in the absence of specific pleadings on special damages, such a claim cannot be allowed even if there is no objection by the other side.

32. I have had the opportunity to look at the Plaintiff filed by the Appellant and no special damages were pleaded. Special damages cannot be introduced in submissions. Korir, J in the case of *Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another* [2014] eKLR held that:

“The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”

33. What the Appellant ought to have done was to amend his Plaintiff and specifically plead his claim for special damages. Since he failed to do so, the trial Magistrate could not award special damages as they were not pleaded.

### **Whether the 3<sup>rd</sup> Party should have been ordered to bear the cost of the suit against the Respondent.**

34. According to the Appellant, since he never made any claim against the 3<sup>rd</sup> Party, the 3<sup>rd</sup> Party ought not to have been compelled to pay the costs of the suit. However, from the background of this case, it is clear that the 3<sup>rd</sup> Party was added to the suit as the 2<sup>nd</sup> Defendant by the Respondent and thus there is nothing that barred the trial Magistrate from finding that the 3<sup>rd</sup> Party was liable to pay costs of the suit after the Respondent successfully proved that he was the person who cunningly received the compensation sum that the Appellant was claiming from it.

35. In view of the foregoing, the appeal lacks merit and it is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT KISII THIS 31<sup>ST</sup> DAY OF MAY, 2022.**

.....  
**J.M ONYANGO**  
**JUDGE**

