



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.179 OF 2013**

**GREEN POWER GENERATION COMPANY.....PLAINTIFF**

**VERSUS**

**KENYA POWER AND LIGHTING COMPANY**

**HON. ATTORNEY GENERAL.....DEFENDANTS**

**JUDGMENT**

**BACKGROUND**

1. By a Plaint dated 4<sup>th</sup> September 2013 as filed herein on 10<sup>th</sup> October 2013, Green Power Generation Company Ltd (the Plaintiff) prays for Judgment against the two Defendants for:-

- a. A declaration that the continued occupation and use of Lamu/Lake Kenyatta 1/3690 (the suit property) by the Defendants from 2<sup>nd</sup> July 2010 is wrongful and actionable trespass, for which the Defendants are liable to pay exemplary damages;**
- b. A declaration that the continued occupation and use of the suit property by the Defendants from 2<sup>nd</sup> July 2010 occasioned environmental degradation and diminution in value of the suit property and the Defendants ought to atone for the mischief by damages, and purchase the suit property from the Plaintiff at its price;**
- c. Exemplary and primitive damages to be ordered in favour of the Plaintiffs to be assessed and measured by the Court as a proportion of the profits made by the Defendants on use of the land for generation of electric power for profit;**
- d. The Defendants be ordered to purchase the suit property at current market value to be determined by the Plaintiff or assessed by Court.**

2. The Plaintiff's prayers arise from its contention that in July 2010, it did purchase the suit property measuring approximately 1.94 Ha from the erstwhile owners. Thereafter the Plaintiff informed the Kenya Power and Lighting Company Ltd (the Defendant) of this new development and required it to remove from the land any electric power generating plant or machinery they may have put on the land with the leave of the previous owners and to vacate the land forthwith.

3. The 1<sup>st</sup> Defendant did not however vacate or remove its machinery from the suit property and it is the Plaintiff's case that their continued occupation and use of the property is wrongful and amounts to trespass and hence the orders sought herein.

4. But in their Statement of Defence dated and filed herein on 13<sup>th</sup> November 2013, the Kenya Power & Lighting Company Ltd (the 1<sup>st</sup> Defendant) denies that the Plaintiff purchased the suit property as alleged or at all. The 1<sup>st</sup> Defendant further denies that the Plaintiff has suffered any loss and/or that it is entitled to any exemplary damage as alleged or at all.

5. It is the 1<sup>st</sup> Defendant's case that the process of acquisition, retention and the continued use of the suit property by the Plaintiff including the institution of this suit are all fraudulent, illegal and unconstitutional. The 1<sup>st</sup> Defendant asserts that the suit property was clandestinely sub-divided from the original Plot No. Lamu/Lake Kenyatta 1/2834 which original plot was wholly owned by the Government of Kenya.

6. The 1<sup>st</sup> Defendant asserts that prior to the sub-division, and in conjunction with a community based project known as Mpeketoni Electricity Project (MEP), the Government agreed to provide an extension of the national electricity grid to the nearby Mpeketoni Settlement

Scheme. The Government through the 1<sup>st</sup> Defendant would own and manage the proposed mini grid whose construction and implementation was started and based on the said Plot No. Lamu/Lake Kenyatta 1/2834.

7. As a result of those arrangements, the 1<sup>st</sup> Defendant asserts that the suit property currently houses the Mpeketoni Diesel Power Station which supplies electric energy to Mpeketoni and the adjacent areas including Witu. The suit property currently houses the 1<sup>st</sup> Defendant's generators, an office, a workshop, a store, a Substation and fuel tanks.

8. It is the 1<sup>st</sup> Defendant's case that the existence of its assets on the land as aforesaid creates an overriding interest which have not been defeated by the subsequent acquisition of the land by Mpeketoni Electricity Project and/or the transfer to the Plaintiff. It is further its case that the suit property could not be sold off or acquired by the Plaintiff or any other party without its knowledge or consent.

9. The Honourable the Attorney General (the 2<sup>nd</sup> Defendant) is equally opposed to the Plaintiff's claim. In its Statement of Defence dated 25<sup>th</sup> February 2014, the 2<sup>nd</sup> Defendant denies that the Plaintiff is the proprietor of the suit property. The 2<sup>nd</sup> Defendant further denies that the Plaintiff has suffered any loss as alleged and asserts that the suit as filed offends Section 13(A) (1) of the Government Proceedings Act (Cap 40) and Section 3 (1) of the Public Authorities Limitation Act (Cap 39).

### **THE PLAINTIFF'S CASE**

10. At the trial herein, the Plaintiff called a total of four (4) witnesses in support of their case.

11. PW1-Robert Kariuki Wang'ombe was a National Environmental Management Authority (NEMA) expert. He told the Court that he was engaged by the Plaintiff company to assess the environmental impact of the activities being carried out by the 1<sup>st</sup> Defendant on the suit property. He visited the site and prepared a Report dated 6<sup>th</sup> February 2018 (Pexh 1).

12. PW1 testified that when he and his team visited the site, it was being used as a warehouse as power generation activities were no longer taking place. They made enquiries and asked for an Environmental Impact Assessment (EIA) Report but none was availed to them.

13. On cross-examination, PW1 testified that the Project was established in 1993 and that at the time there was no requirement for Environmental Impact Assessment (EIA) Report as the Rules requiring the same were promulgated in the year 2000. He further told the Court that the basis of his Report was to find out the suitability of the land for growing crops and not its suitability for power generation. It was further his testimony that they had no access into the suit property and did not therefore test the soil inside the Plant.

14. PW2-Dr. Peter Njiru Muratia is a Director of the Plaintiff Company. He testified that the Plaintiff was incorporated in April 2010 as per Certificate of Incorporation No. CPR/2010/21091 (Pexh 2). Thereafter the Plaintiff acquired the suit property having learnt about its sale in the press. They did a Search at the Land Registry on 21<sup>st</sup> May 2010 from where they learnt that it was registered in the name of Mpeketoni Electricity Project (MEP).

15. PW2 told the Court that they agreed to purchase the property at Kshs 2.4 Million. At the time of the auction on 22<sup>nd</sup> June 2010 the company paid a deposit of Kshs 240,000/- through a Bank transfer. They settled the balance through payments made on 30<sup>th</sup> June 2010 (Kshs 1,160,400/-); on 6<sup>th</sup> July 2010 (Kshs 400,000/-) and on 23<sup>rd</sup> June 2010 (Kshs 900,000/). Subsequently the land was transferred and registered in the Plaintiff's name.

16. PW2 further told the Court that after the purchase, they visited the suit property and found the 1<sup>st</sup> Defendant thereon. Thereafter, they wrote several demand letters asking them to vacate but they refused to yield the property. On 11<sup>th</sup> January 2012, the Plaintiff wrote another demand letter through its Advocates threatening to sue. There was still no response and they therefore instituted this suit.

17. PW2 testified that the 1<sup>st</sup> Defendant continues to occupy the land to-date and that as a result the Plaintiff has suffered loss and damage. He told the Court that there is a lot of spillage and wastage on the land and that the Defendants have placed heavy logs all over the place. He told the Court that the Defendants continue generating power on the land and selling it to the national grid.

18. PW2 further testified that they had carried out a Valuation of the Property on 7<sup>th</sup> October 2016 and also instructed an environmental specialist who prepared and filed a Report on the same.

19. During cross-examination, PW2 testified that they visited the suit property before they agreed on the purchase price. When they visited, they found Kenya Power & Lighting Company (1<sup>st</sup> Defendant) on the land. They also saw their power generators thereon. They did not however know in what capacity the 1<sup>st</sup> Defendant was on the land.

20. PW2 told the Court that when they acquired the land, they planned to establish a wind power generating plant and to do wheat production thereon. They had been made to understand that the 1<sup>st</sup> Defendant was leaving the land.

21. PW3-Danson Mwangi Kinyanjui was the Chairman Mpeketoni Electricity Project (MEP). He testified that Mpeketoni Electricity Project (MEP) was a community based organization and that they are the ones who sold the suit property to the Plaintiff. PW3 told the Court that the property was a sub-division of Plot No. Lamu/Lake Kenyatta1/2834.

22. PW3 testified that prior to the mutation, Mpeketoni Electricity Project (MEP) approached the area Sub-District Development Committee (DDC) and applied for land to put some power generators. Initially, the NGO GTZ was assisting them to develop electricity. Mpeketoni

Electricity Project (MEP) raised Kshs 500,000/- in 1994 while GTZ gave them Kshs 1,000,000/-. Their project then started generating power and selling to the area residents.

23. PW3 told the Court that when GTZ pulled out of the Project, they approached the Government which agreed through the Permanent Secretary Ministry of Energy to supply the Project with two generators. They were then advised to get their own land to install the generators. That was when they approached the District Development Committee (DDC) and their request was approved.

24. PW3 told the Court that the District Development Committee (DDC) sat and agreed to allocate them the suit property at a meeting attended by representatives of the 1<sup>st</sup> Defendant. Mpeketoni Electricity Project (MEP) paid Kshs 40,000/- for the discharge of the land and it was then registered in their names.

25. PW3 testified that when the 1<sup>st</sup> Defendant arrived in Mpeketoni, they gave them the land to put up the generators. They were to be paying Mpeketoni Electricity Project (MEP) Kshs 8,000/- per month for the use of the land but they did not pay. PW3 further testified that at some point in time, the Ministry of Energy allowed them to sell all their assets. This was after their Project stopped following the coming of the 1<sup>st</sup> Defendant to the ground.

26. PW3 told the Court that they initially offered the land to Kenya Power & Lighting Company but they declined to purchase. After waiting for two years, they floated a tender and three people came up to buy. The Plaintiff was the highest bidder at Kshs 2,400,000/-. Mpeketoni Electricity Project (MEP) then transferred the suit property to the Plaintiff after obtaining consent from the Land Control Board. PW3 denied that there was anything secret or clandestine about the sale.

27. During cross-examination, PW3 told the Court that the parcel of land allocated to them initially belonged to the Government. He agreed that they did not buy the land but only paid what was due to the Settlement Fund Trustees. PW3 told the Court that they distributed the money generated from the sale to their members.

28. PW4- Maina Chege is a Valuer practicing as Maina Chege & Company Valuers. He testified that he received instructions from the Plaintiff to carry out a Valuation of the suit property. He visited the site and prepared a Report dated 7<sup>th</sup> October 2016 (Pexh 9).

29. PW4 told the Court that he valued the land at Kshs 8 Million. He did not however enter the land as there were guards at the gate who did not allow entry. He was therefore unable to estimate the value of the development on the land.

#### **THE DEFENCE CASE.**

30. The Defence called two (2) witnesses at the trial in support of their case.

31. DW1-Ahmed Hassan Mohammed was an Assistant Director of Lamu Adjudication and Settlement, Lamu. He testified that the suit property was initially reserved for the Ministry of Environment. At that time it was Plot No. 2834. The Plot then went through a sub-division following a request made by Mpeketoni Electricity Project (MEP) to the Lamu District Development Committee (DDC). DW1 told the Court that Lamu District Development Committee (DDC) approved the allocation to Mpeketoni Electricity Project (MEP) on the understanding that the land was for community purpose.

32. During cross-examination, DW1 conceded that their office was represented at the District Development Committee (DDC) meeting that approved the allocation to Mpeketoni Electricity Project (MEP). There was no objection to the allocation.

33. DW2-Owiti Awour was the Manager Legal Services of the 1<sup>st</sup> Defendant. He testified that as far as the 1<sup>st</sup> Defendant was concerned, the suit property is owned by the Government of Kenya. The 1<sup>st</sup> Defendant was contracted by the Government to construct a diesel-powered electricity generating sub-station or Plant on the property. They therefore entered the land as agent of the Government at the behest of the Ministry of Energy in the year 2006.

34. At that time DW2 told the Court that the property was known as Plot No. 2834 comprising 4 Ha and was registered under the Ministry of Environment. Later on in 2010, the land appears to have been sub-divided and the Plaintiff was issued with a title for the Plot No. 3690 measuring 1.94 Ha. The 1<sup>st</sup> Defendant was however unaware of the sub-division.

35. DW2 told the Court that when they realised what was happening, the 1<sup>st</sup> Defendant wrote several letters raising serious concerns in regard to the "mysterious" transfer. He told the Court that the Plaintiff is not entitled to the orders sought herein and urged the Court to declare that the suit property belongs to the Government.

36. On cross-examination, DW2 testified that the two initial generators on the land were not their own but that the same were supplied by the Ministry of Energy. He told the Court that he did not have any record of any amounts of money the 1<sup>st</sup> Defendant may have expended in the Project. He further told the Court that their letters to the Ministry of Lands in regard to the unclear nature of alienation of the suit property did not elicit any response from the Ministry.

37. DW2 further told the Court that the 1<sup>st</sup> Defendant had not been granted a lease or any other interest in the suit property and that they were occupying the same as agents of the Government. DW2 further testified that he was aware that at some point in time, Mpeketoni Electricity Project (MEP) offered the land to the 1<sup>st</sup> Defendant. They did not accept the offer.

#### **ANALYSIS AND DETERMINATION**

38. I have perused and considered the pleadings filed herein by the parties, the oral testimonies of their witnesses and the evidence adduced at the trial. I have similarly considered the written submissions and Lists of Authorities placed before me by Mr. Kimani, Learned Counsel for the Plaintiff, Mr. Makori, Learned Counsel for the 1<sup>st</sup> Defendant and Ms Lutta, Learned State Counsel for the 2<sup>nd</sup> Defendant.

39. The Plaintiff, a limited liability company incorporated on 9<sup>th</sup> April 2010 prays for a declaration that the continued occupation of the suit property by the 1<sup>st</sup> Defendant is wrongful and actionable trespass; that the occupation has occasioned environmental degradation and diminution in value of the property and that as a result, it is entitled to be paid exemplary and punitive damages to be assessed by the Court as a proportion of the profits made by the Defendants on use of the land for generation of electric power. In addition, the Plaintiff urges this Court to order the Defendants to purchase the suit property at the current Market Value.

40. It is the Plaintiff's case that in July 2010, it did purchase the suit property measuring approximately 1.94 Ha from the then registered owners, a community based organization known as Mpeketoni Electricity Project (MEP). As at the time of the said purchase, the 1<sup>st</sup> Defendant was in occupation of the premises. Thereafter, the Plaintiff informed the 1<sup>st</sup> Defendant of the change in ownership and required them to vacate and remove from the land any electric power generating Plant or machinery they may have put on the land.

41. The 1<sup>st</sup> Defendant did not however vacate or remove their machinery. As far as the 1<sup>st</sup> Defendant was concerned, the suit property is owned by the Government of Kenya. It is their case that they entered the suit property as agents of the Government upon being contracted in the year 2006 to construct a diesel-powered electricity substation or Plant on the property.

42. As a result of the contract with the Government, the 1<sup>st</sup> Defendant told this Court that the suit property currently houses the Mpeketoni Diesel Power Station which supplies electric energy to Mpeketoni and the adjacent areas including Witu. In that respect, the property houses the 1<sup>st</sup> Defendant's generators, an office, a workshop, a store, a substation as well as fuel tanks.

43. It is the Defendants' case therefore that the suit property could not be sold to or acquired by the Plaintiff without the 1<sup>st</sup> Defendant's knowledge or consent and that the purported acquisition by and transfer to the Plaintiff was clandestine, fraudulent, illegal and unconstitutional.

44. From the material placed before me, Mpeketoni Electricity Project (MEP) was established sometime in 1992 with the efforts of the Mpeketoni Jua Kali Association. Members of the Association and the surrounding community were in need of electric power to carry out their businesses and the Project came into operation to assist them in that regard. Correspondence availed to Court indicate that the Jua Kali artisans mobilized the public and about 128 members initially came together and contributed some Kshs 7,005,000/- for the purpose.

45. Danson Mwangi Kinyanjui (PW3) was a founder member in 1992 and the Chairman of Mpeketoni Electricity Project (MEP) as from 1998 until the time it wound up its operations. According to PW3, the Project to supply electric power to homes and small scale industries in Mpeketoni Township and its neighbourhood took off in earnest in 1994 when the membership raised an initial capital of Kshs 500,000/- and the German Development Organisation GTZ supported them with a grant of Kshs 1,000,000/-. That initial sum was to cater for acquisition of generators, cables and poles for the establishment of the Project.

46. PW3 told the Court that after a long and fruitful relationship, GTZ which used to offer them financial support for fuel and other outgoings requested to pull out of the Project in the year 2006. As the Project faced imminent collapse, the Mpeketoni Electricity Project (MEP) Management approached the Ministry of Energy and explained their plight. Immediately, the then Permanent Secretary (PS) in the Ministry Patrick Nyoike instructed the Mpeketoni Electricity Project (MEP) Management to source for alternative land wherein the Government could assist them with their intended green power Project.

47. Subsequently according to PW3 Mpeketoni Electricity Project (MEP) applied for land through the then District Development Committee (DDC). Their request was approved and the suit property which was then part of Plot No. Lamu/Lake Kenyatta 1/2834 was allocated to the Project. Mpeketoni Electricity Project (MEP) then paid Kshs 40,000/- for the sub-division and discharge of the property upon which they were registered as the owners of the suit property culminating in their being issued with a title deed therefor on 29<sup>th</sup> April 2009.

48. From the pleadings filed herein by the 1<sup>st</sup> Defendant, there was no dispute that Mpeketoni Electricity Project (MEP) got into negotiation with the Government to provide cheap and reliable electricity to the Mpeketoni area before they were invited into the scene. This can be discerned from the detailed averments made at Paragraphs 6, 7 8 and 9 of the 1<sup>st</sup> Defendants Amended Statement of Defence in which they posit as follows:-

**“6. Prior to the year 2010 there existed a Community based project known as Mpeketoni Electricity Project (MEP). This was for the benefit of the residents of Mpeketoni and the same was established with the sole objective of facilitating cheap available and constituent power supply to speed up development and industrialization for the people (of) Mpeketoni and Mpeketoni region.**

**7. In 2005, as an effort to make their vision and mission a reality, officials of Mpeketoni Electricity Project(MEP) travelled to Nairobi and met the Permanent Secretary Ministry of Energy and floated (a) proposal for assistance namely:-**

**a. Either supply Mpeketoni Electricity Project(MEP) with power from the national grid from Garsen which is 80kms away at a cost of Kshs 80,000,000/-, or**

**b. Offer Mpeketoni Electricity Project(MEP) with duty free fuel and/or alternative**

**c. The Government of Kenya to take up the existing system and run it so that consumers of Mpeketoni Electricity**

**Project (MEP) may enjoy the then prevailing national tariff.**

**For purposes of this suit three proposals are referred to as the “MEP Proposals.”**

**8. It is on record that after the Government of Kenya looked at the Mpeketoni Electricity Project(MEP) Proposals, it was agreed between Mpeketoni Electricity Project(MEP) and the Government of Kenya through the Ministry of Energy that:-**

- a. The Government would provide reliable and affordable power supply in line with the existing national grid tariff.**
- b. The Government would assist and create an atmosphere for rapid growth and industrialization.**
- c. The Government would engage in grid extension to the Mpeketoni Settlement Scheme.**

**9. Arising out of the agreement between Mpeketoni Electricity Project (MEP) officials and the Government, the Government through the 1<sup>st</sup> Defendant agreed to manage the proposed mini grid at Mpeketoni.**

49. From the foregoing details, it was evident that the Government had turned down the offer to supply Mpeketoni Electricity Project (MEP) with power from the national grid at Garsen and had instead opted for a phased assistance to the area residents through what had already been placed on the ground by Mpeketoni Electricity Project (MEP). While the 1<sup>st</sup> Defendant does not disclose why this option was taken in its aforesaid detailed pleadings, PW3 testified that the Permanent Secretary advised them to look for alternative land since the Government could not support the MEP community Project directly as it was not a Government Project. The arrangement then was that the Government would indirectly get involved through the 1<sup>st</sup> Defendant electricity company.

50. Indeed while the 1<sup>st</sup> Defendant’s Manager Legal Services Owiti Awuor (DW2) testified that they were unaware of the process that led to the sub-division of land and acquisition of the suit land by Mpeketoni Electricity Project (MEP), it is apparent from a letter written by DW2 himself on 2<sup>nd</sup> August 2005 (Pexh 11) that the Power Company was kept abreast of the “action-points” on the agreement between the Government and Mpeketoni Electricity Project(MEP). In the said letter, DW2, signing off as the Chief Engineer Rural Electrification wrote to the Mpeketoni Electricity Project(MEP) Chairman (PW3) as follows:-

**“Ref: Proposed New Power Station Site**

**In our meeting with your representatives held at Mpeketoni on 13<sup>th</sup> July 2005, it was agreed that the present power station site is too small for any expansion. We further noted that you were already contemplating moving to a new site.**

**For us to move forward please notify us immediately you identify a new site for the new power station.”**

51. This letter in my view puts to rest the contestation by the 1<sup>st</sup> Defendant that it was to manage the power station on an agreed existing government land. Indeed, subsequent to this communication, Mpeketoni Electricity Project(MEP) wrote to the District Development Committee(DDC) two weeks later on 16<sup>th</sup> August 2005 requesting for allocation of at least ten acres of land to be excised from “the present forest department land(Plot No. 2834) off the Mpeketoni-Shikomani Road.”

52. Mpeketoni Electricity Project (MEP’s) request was approved but for only 1.94 Ha of land at a District Development Committee (DDC) meeting held on 8<sup>th</sup> December 2005 and attended by among others a Mr. Fumo M Fumo as a representative of the 1<sup>st</sup> Defendant. Again, contrary to the testimony of DW2 before this Court, it is clear that as early as 30<sup>th</sup> March 2006 before they installed their machinery in the suit property, the 1<sup>st</sup> Defendant was aware of this development and that the site belonged to Mpeketoni Electricity Project (MEP). In a letter dated that day (Plaintiff’s Exhibit 11) addressed to the Town Clerk Mpeketoni Town Council, the 1<sup>st</sup> Defendant’s Chief Manager, Distribution and Customer Services John Ombui stated as follows:-

**“Re: Request for Approval of Drawings for Power Station at Mpeketoni Electricity Project New Site.**

**Mpeketoni electricity Project is a community owned electricity supply scheme for Mpeketoni town.**

**The Ministry of Energy through Kenya Power & Lighting Company has provided for funds for upgrading the generation capacity of the power station to meet the demand.**

**A new site on Plot No. 2834 has been allocated to Mpeketoni Electricity Project for the construction of a new power station using these funds. We are in the process of constructing the aforementioned Power Station at this new site.**

**Enclosed herewith find a set of drawings for the design layout and those of the buildings of the power station for your approval.”**

53. The sub-division of the suit property from the original Lamu/Lake Kenyatta 1/2834 was indeed confirmed by the 2<sup>nd</sup> Defendant’s witness (PW3) who was the Land Adjudication and Settlement Officer, Lamu. PW3 testified that the parcel of land hitherto reserved for the Forestry Department was sub-divided and part thereof (the suit property) allocated to Mpeketoni Electricity Project(MEP) following approval by a full District Development Committee(DDC) meeting. PW3 told the Court that the allocation process was open and it involved both their Department and the District Development Committee (DDC).

54. In view of Section 143 of the Registered Land Act (now repealed) I did not think that the 1<sup>st</sup> Defendant can now turn around and challenge the sub-division and creation of the suitland in the name of the said Mpeketoni Electricity Project (MEP) in the manner the Defendants purport to do herein. The Defendants did not table any evidence of fraud or illegality in the process leading to the allocation of the land to Mpeketoni Electricity Project (MEP) and I did not find any myself.

55. As it turned out, the arrival of the 1<sup>st</sup> Defendant on the scene also marked the beginning of the end for Mpeketoni Electricity Project (MEP). PW3 told the Court that when the Mpeketoni Electricity Project (MEP) management went back to the Permanent Secretary Energy after the registration of the suit property, it emerged that the Ministry was no longer interested in assisting them on the ground that the Government could only get involved in the Project through the 1<sup>st</sup> Defendant Power Company. The 1<sup>st</sup> Defendant was going to take over the supply of electric Power which had been the very reason for the existence of Mpeketoni Electricity Project (MEP).

56. In the circumstances Mpeketoni Electricity Project (MEP) members resolved to dispose all their assets including the parcels of land that it owned and to share the proceeds thereof. Perhaps given the fact that it already had its equipment on the land, the 1<sup>st</sup> Defendant was the first entity that was approached by Mpeketoni Electricity Project (MEP) to buy the land. In their letter dated 20<sup>th</sup> March 2008 addressed to Mpeketoni Electricity Project (MEP), the 1<sup>st</sup> Defendant's Coast Regional Manager Joseph Mkomba responded to the offer as follows:-

**“RE: SALE OF MEP PLOT-MPEKETONI**

**We acknowledge receipt of your letters in reference to the above plot that you intend to dispose and thank you for giving us an opportunity to purchase before putting it in the market.**

**We are consulting with our head office and will revert back soonest possible when a decision is made. Kindly forward to us a copy of the title for fast decision making.**

**We also take this opportunity to thank you for your co-operation during take over of electricity network by Kenya Power & Lighting Company.”**

57. Once again, the claim by the 1<sup>st</sup> Defendant that Mpeketoni Electricity Project (MEP) sold the land without its knowledge or consent falls on its knees. After waiting for a response from the 1<sup>st</sup> Defendant for two (2) years, and after the Ministry of Energy declined to compensate them for the said asserts and instead advised them to dispose of the same to mitigate their losses, Mpeketoni Electricity Project (MEP) put the suit property for sale in the open market.

58. From the evidence adduced before me the sale of the property attracted three (3) bidders with the Plaintiff emerging as the highest bidder. The Plaintiff thereafter paid the purchase price in full and was registered as the owner of the suit land on 2<sup>nd</sup> July 2010.

59. In light of the foregoing circumstances, I had no doubt in my mind that the Plaintiff's claim for possession of the suit property is justified. As a company incorporated in April 2010 after the suitland was already registered in the name of Mpeketoni Electricity Project (MEP), the Plaintiff had no way of knowing the antecedents surrounding the property. The 1<sup>st</sup> Defendant as contracted cannot insist on resisting the Plaintiff's claim on behalf of the Government which allowed it to enter in the suitland in the first place, and after allocating the same land to a private community based organization.

60. Accordingly when they received notice of the change of ownership from the Plaintiff, it behoved the 1<sup>st</sup> Defendant to vacate the land and its continued stay on the land even long after it had ceased generation of electricity therefrom amounts to trespass. According to the Plaintiff, they have suffered loss and damage as a result of the trespass and they claim exemplary and general damages.

**61. Halburys Laws of England 4<sup>th</sup> Edition Vol. 45 at Paragraph 16, 1503 provides as follows on computation of damages in an action for trespass:-**

**a. If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.**

**b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.**

**c. Where the defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.**

**d. Where there is an oppressive, arbitrary or unconstitutional trespass by a government official or where the defendant cynically disregards the rights of the Plaintiff in the land with the object of making gain by his unlawful conduct, exemplary damages may be awarded.**

**e. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.**

62. In *Nakuru Industries Ltd –vs- SS Melita & Sons (2016)eKLR*, the Court held that:-

**“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has**

**been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land. The overriding principles is to put the Claimant in the position he was prior to the infliction of the harm.”**

63. In the instant case, the 1<sup>st</sup> Defendant was the first to be offered the suit property for sale. After some two (2) years in which they never made any offer, Mpeketoni Electricity Project (MEP) invited bids from the general public to purchase the same. The Plaintiff made successful bid, purchased the property and was registered as the owner thereof on 2<sup>nd</sup> July 2010. Subsequently, the Plaintiff demanded by various letters (Pexh 8 (a), (b) and (c) that the 1<sup>st</sup> Defendant who was then in occupation yields the same. The 1<sup>st</sup> Defendant declined to do so to-date.

64. It is the Plaintiff's case that the refusal to yield the property has occasioned loss and damage. It is further their case that the 1<sup>st</sup> Defendant has deposited pollutants on the land that has diminished its value and rendered it useless for agricultural user. In support of the alleged diminution the Plaintiff called Robert Kariuki Wang'ombe (PW1) an expert in environmental impact assessment who produced a Report herein dated 6<sup>th</sup> January 2018 (Pex 1).

65. In his Report, PW1 concluded that the location and operation of the power generating plant has a negative impact on the agricultural and habitable potential of the land. The Report further concludes that during construction of the Project solid waste including packaging materials, plastics, and scrap metal were generated and that some which are not biodegradable may cause long-term injurious effects to the environment.

66. The Report does not however differentiate the effects to the environment when Mpeketoni Electricity Project (MEP) ran the project and what may have happened after the 1<sup>st</sup> Defendant took it over. At any rate, it was incumbent upon the Plaintiff to do due diligence prior to the purchase of the land. As it were, I was not persuaded that all the alleged deleterious effects were solely attributable to the 1<sup>st</sup> Defendants and further, that the Plaintiff was unaware of the same as at the time they put up a bid for the suit property.

67. It was however not lost on this Court that the 1<sup>st</sup> Defendant continued to use the suit premises for generation of electric power which it was selling to the area residents long after the Plaintiff had purchased the land and given them notice to vacate. At the trial, the 1<sup>st</sup> Defendant did not make any disclosures which could have helped the Court to determine how long the operations went on and whether it was making profit or losses out of the continued use of the suit property. Indeed, they prevented PW1 and PW4 from getting entry and access into the suit premises.

68. However while the 1<sup>st</sup> Defendant refused to confirm when if at all it had stopped operations on the land, it was clear from their letters culminating with the one dated 24<sup>th</sup> February 2015 addressed to various government departments including the 2<sup>nd</sup> Defendant herein that almost two years after this suit was filed, the 1<sup>st</sup> Defendant was still operating the Plant in the suit property while trying to pressurize various Government agencies to cause the property to be registered in its name.

69. In the result, it was clear to me that the Plaintiff has suffered loss as a result of the continuing trespass by the 1<sup>st</sup> Defendant. While the Plaintiff may still be able to use the land once the 1<sup>st</sup> Defendant removes its machinery and plant thereon, it was clear to me that its use will be restricted in light of the activities going on and its current state.

70. From the Valuation Report dated 7<sup>th</sup> October 2016 by PW4, the value of the land without any development was at that date Kshs 8,000,000/-. It was the Plaintiff's case that they had purchased the property at Kshs 2.4 Million for purposes of generating green power and planting of wheat. It is clear to me that due to the trespass by the 1<sup>st</sup> Defendant, they have been unable some ten years down the line to utilize the property.

71. Taking into account the circumstances of this case and the fact that the suit property may yet suffer more damage when the 1<sup>st</sup> Defendant removes its plant and machinery thereon, I am of the view that the sum of Kshs 10,000,000/- will reasonably compensate the Plaintiff in general damages.

72. I did not find any basis to award exemplary damages and/or to compel the Defendants to purchase the property. In the premises, Judgment is hereby entered for the Plaintiff against the Defendants jointly and severally in the following terms:-

**a. A Declaration is hereby issued that the continued occupation and use of the suit property by the Defendants from 2<sup>nd</sup> July 2010 is wrongful and actionable trespass.**

**b. A declaration that the continued occupation and use of the suit property by the Defendants from 2<sup>nd</sup> July 2010 occasioned environmental degradation and diminution in value of the suit property and the Defendants ought to atone for the mischief by damages.**

**c. General damages are hereby ordered in favour of the Plaintiff in the sum of Kshs 10,000,000/- with interest at Court rates from the date of this Judgment until payment in full.**

**d. The Plaintiff shall have the costs of this suit.**

**Dated, signed and delivered at Malindi this 6<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

JUDGE