



Karani v Kenya Power and Lighting Company Limited (Civil Appeal E038 of 2020) [2025] KEHC 12157 (KLR) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 12157 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E038 OF 2020**

**F WANGARI, J
MAY 16, 2025**

BETWEEN

ELIZAPHAN NYAGA KARANI APPELLANT

AND

KENYA POWER AND LIGHTING COMPANY LIMITED RESPONDENT

(Being an Appeal against the Ruling by the Senior Principal Magistrate Honourable Francis Kyambia delivered on 27th November, 2020 in Mombasa CMCC No. 218 of 2010)

JUDGMENT

1. The Appellant who was the Plaintiff in the lower court filed a suit via Plaint dated 02/02/2010 suing the Respondent who was the Defendant, for general damages for loss of use of land from August 2009. Prayers for injunction have already been overtaken by events.
2. The Respondents were accused of encroaching the Appellant's land without his authority or consent, by erecting 2 extension cables and main electricity pole on his main gate blocking the entry, thus interfering with the Plaintiff's quiet and peaceful occupation of his property. Despite demands to vacate the property, the Respondent refused to make good the demand.
3. In the Statement of Defence dated 12/03/2010, the Respondent denied all the averments by the Appellant and put him to strict proof thereof. The Respondent stated that the Appellant was malicious, vexatious and abusing the process of the court, and prayed that the suit be dismissed with costs.
4. Upon hearing the parties, the court delivered its judgment dated 20/11/2019 against the Respondent for Kshs. 2,160,000 being general damages for trespass to land. The Appellant was also awarded costs of the suit.



5. The Respondent having been dissatisfied with the judgment, filed a Notice of Motion dated 30/09/2019 seeking for review of judgment on grounds that the court did not consider the submissions filed by the Respondent, as they had not reached the court due to inadvertent error and clerical mistake.
6. The Appellant objected to the application stating that the court became functus officio after delivering its judgment hence it had no jurisdiction to determine the application. It was further stated that the application does not meet the threshold of Order 45 Rule 1 as the Respondent's submissions did not amount to new evidence.
7. In the Ruling delivered on 27/11/2020, the court found that it had jurisdiction to on account of Section 99 of the *Civil Procedure Act*, and found the omission of placing the Respondent's submissions on record as sufficient to warrant the review of the judgment. Having considered both the Appellant's and Respondent's submissions, the general damages earlier awarded were reviewed and substituted with an award of KShs. 500,000 with costs to the Appellant.
8. Aggrieved by this Ruling, the Appellant filed this appeal where he raised a total of six (6) grounds of appeal in its memorandum of appeal dated 18/12/2020. In summary, the grounds are follows: -
 - a. Failure of the trial court to consider the overwhelming evidence of encroachment of land.
 - b. Failure by the court to appreciate the fact that the Appellant was unable to occupy the suit premises.
 - c. Failure to allow some of the Appellant's claim.
9. The Appellants therefore sought for the appeal to be allowed and that judgement delivered on 27th November, 2020 be set aside and in its place, judgement be entered in favour of the Appellant as prayed in the plaint. The Appellants also sought for costs to be awarded to them.
10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. (See *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs Sunday Post Limited* [1985] EA 424 where in the latter case, the court therein rendered itself as follows: -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”
11. This court directed that the appeal be disposed off by way of written submissions. Both parties complied by filing their written submissions stating their rival positions.

Analysis and Determination

12. I have carefully considered the Record of Appeal, the submissions filed both for and against the appeal and the authorities cited as well as the law. I discern two (2) issues for determination which are as follows: -
 - a. Whether the appeal is merited; and
 - b. Who bears the costs?



13. It is trite that the legal burden of proof lies with the person who alleges. The Appellant bear the legal burden of proof to prove the claim against the Respondent. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows: -

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

14. The Plaintiff gave evidence he started construction on the suit property in year 2004. The Respondent put an electric pole in front of his gate for purposes of supplying his neighbor electricity. When the Respondent was asked to remove the offending pole, there was no response from their end, hence filing of the suit.

15. The Appellant relied on the photos of the scene as part of his evidence. The production of the photos was objected to by the Respondent. The court was to render its ruling on the same on 09/10/2015. However, from the proceedings, there is no record as to what orders the court gave on the issue.

16. The Respondent on the other hand gave evidence that the pole had already been erected before the Appellant bought the suit property. It was also stated that the Appellant was also getting his electricity supply from the said pole. There was no evidence in support of the same.

17. I note that on 27/09/2017, the Appellant sought to have the court visit the site in issue. The Respondent’s counsel one Mr. Mokaya objected saying it was not necessary. However, the court ruled that it would visit the site on 24/11/2017. On the day of the visit, the parties said that they had agreed to negotiate with a view to settle. However, the negotiations were unsuccessful and the matter proceeded.

18. The fact that the Appellant had the photos of the site which were not admitted and in the alternative, he sought to have the court visit the site, both which were objected to by the Respondent, and the fact that the Appellant produced receipts for building materials, in support of the evidence that there he was building a house, I find that the Appellant had proved that indeed the Respondent had encroached its land making it impossible to occupy his land. He is therefore entitled to general damages.

19. The Appellant submitted that the award of Kshs. 500,000 was too low and prayed that the award previously granted before the review be reinstated. The Respondent on the other hand said that the damages for trespass were not proved hence the damages are nominal, and the award of the lower court was grounded on the law for nominal damages.

20. The issue before this court is whether there is need for disturbing the damages awarded. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages in *Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another* 1957 KLR 27 as follows:

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.”

21. I have perused through the judgment of the court, submissions both in the lower court and on appeal, and the authorities cited by both parties. The court after considering the Respondent’s submissions awarded nominal damages as there was no proof of actual loss.



22. I am however into consideration of the evidence that the Appellant built a home with the intention of living there, but due to the Respondent's encroachment, he was forced to live in a rented premises. It is a fact that there were no rent receipts produced to show the amount of rent he paid.
23. The fact that the Respondents objected to the application by the Appellant to have the court visit the site as per the proceedings for 27/09/2017 makes the evidence of the Appellant believable, that he had built a house which he could not access. Due to the acts of the Respondent, the Appellant had to continue living in a rented house.
24. The fact that he did not produce rent receipts should not be a ground for denial of the award of general damages, which is discretionary. Within Shanzu area, a reasonable house with basic facilities, 10 years ago should be at an average rent of Kshs. 10,000 per month. For the 12 years the Appellant was deprived of access to his home, I find that he should be awarded for the same. I therefore award Kshs. 1,440,000/ = as general damages (being $10,000 \times 12 \times 12$).
25. I find no reason to disturb the award on costs in the lower court. The appeal having been partially successful, each party to bear its own costs.
26. Flowing from the above, I proceed to make the following disposition: -
 - a. The appeal is partially successful. The Ruling delivered on 27/11/2020 and the judgment delivered 20/09/2019 are hereby set aside.
 - b. The set aside judgment is substituted with the judgment of this court awarding general damages at Kshs. 1,440,000.
 - c. The award on costs in the lower court remains undisturbed.
 - d. Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 16TH DAY OF MAY, 2025.

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F. WANGARI

JUDGE

In the presence of:

M/S Bwire Advocate h/b for Gakuo Advocate for the Appellants

M/S Musyoki Advocate h/b for Mpamba Advocate for the Respondent

M/S Norah, Court Assistant

