



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND OF KENYA AT KISII

ELC CIVIL APPEAL NO. 16 OF 2018

JOHNSON MOSE NYANGAO.....APPELLANT

VERSUS

KENYA POWER AND LIGHTING CO. LIMITED.....RESPONDENT

(Being an appeal from the judgment of Hon. S.RM S. N.

Makila delivered on 16th November, 2018 in Kisii CMCC No. 434 of 2013)

JUDGMENT

INTRODUCTION

1. The Appellant filed a Plaint before the trial court claiming that in the year 2009, the Respondent entered his land parcel known as **NYANSIONGO SETTLEMENT SCHEME/105** (hereinafter referred to as 'the suit property') pursuant to a 14-day written notice for purposes of fixing electricity power supply lines. The said notice which was personally served upon the Appellant contained the full particulars and description of the exact location of his property where the lines were to be placed. The Respondent thereafter fixed the electricity lines on the suit property and the same are still in place to date. After the said electricity cables were fixed on the suit property, the Appellant demanded to be compensated by the Respondent. In line with the Respondent's request, he furnished the Respondent with all the relevant documents to prove that he was the lawful owner of the property but his demand fell on deaf ears. This is what prompted him to file suit against the Respondent for special damages amounting to 1,775,000, interest and costs of the suit.

2. The Respondent filed a Statement of Defence denying the Applicant's claim. The Respondent averred that the Plaintiff having consented to the construction of the power lines he was estopped from claiming for compensation for any loss or damage. That notwithstanding, the Respondent averred that the suit property had long been subdivided into two parcels known as **NYANSIONGO SETTLEMENT SCHEME/490** and **NYANSIONGO SETTLEMENT SCHEME/491** and sold to third parties. It was the Respondent's averment that the power line passed through parcel No. **NYANSIONGO SETTLEMENT SCHEME/491** and the occupants of the said parcel duly signed the way leave consent and were compensated accordingly. It was also the Respondent's averment that at the time of filing suit, the suit property was non-existent since it had been subdivided and thus the Appellants intended to defraud it.

3. The Trial court after hearing all parties delivered its Judgement on 16th November, 2018 dismissing the Appellant's suit on the ground that he had failed to prove his case against the Respondent since the suit property had since been sub-divided and the parcel on which the electricity lines were placed no longer belonged to the Appellant. The court further held that the Appellant ought to have filed his claim against the fraudsters who presented false documents to the Respondent for compensation since he who wishes to impeach ownership to a land on allegations of fraud has to prove the alleged fraud.

4. Aggrieved by the decision of the trial court, the Appellant filed this Appeal citing the following grounds;

- a) The learned trial Magistrate erred in law and fact in not holding that the Appellant had consented to the Respondent to enter into his private land and lay electric power lines or any other connected works subject to adequate compensation.
- b) The learned trial Magistrate erred in law and misdirected herself fundamentally regarding the rights and privileges of a registered owner of land.
- c) The learned Magistrate erred in law and in fact on the legality of titles the Respondent relied upon at the hearing.
- d) The learned Magistrate erred in law and in fact by not holding that the titles represented to the Respondent were obtained with intent to steal a march and unlawfully therefore null and void

e) The learned Magistrate made a finding against the weight of the evidence.

5. The Appeal was canvassed by way of written submissions and court directed the parties to file and exchange their submissions. The Appellant filed their submissions on 30th July, 2020. However, the Respondent did not file its submissions.

ISSUES FOR DETERMINATION

6. Having considered the facts of this case, the judgment of the trial court, the Grounds of Appeal as well as the submissions of counsel for the Appellant, the following issues arise for determination:

I. Whether the learned Trial Magistrate erred in law and fact by not compensating the Appellant after letting power line pass through his property.

II. Whether the Learned Trial Magistrate erred in law and in fact by not holding that the titles presented to the Respondent for compensation were null and void.

ANALYSIS AND DETERMINATION

Whether the learned Trial Magistrate erred in law and fact by not compensating the Appellant.

7. It is common ground that the suit property **NYANSIONGO SETTLEMENT SCHEME/105** prior to the contested subdivisions was registered in the name of the Appellant. It is also common ground that before placing the power lines on the suit property, the Respondent sought permission from the Appellant who was the registered owner of the parcel of land. It is evident from the evidence on record that the suit property is currently occupied by third parties whom the Appellant claims to be trespassers and fraudsters. Further, it is evident that the suit property was subsequently subdivided into parcels no. 489, 490, and 491. Parcel no. 490 is the location where the power lines have been placed and it happens to be the section that is occupied by persons the Appellant terms as trespassers and fraudsters. These occupants of the suit property are the ones who were compensated by the Respondents. Parcel no. 490 was further subdivided into parcels no. 2350, 2251, 2352 and 2372 and titles were issued to the said third parties.

8. The issue in contention is who between the third parties and the Appellant deserved to be compensated by the Respondent. The Respondents contended that by the time the construction commenced the suit property **NYANSIONGO SETTLEMENT SCHEME/105** had already been subdivided. The Respondent also contended that the power lines were placed on parcel 490 which had subsequently been subdivided into parcels no. 2350, 2251, 2352 and 2372.

9. The Respondent further contended that the power lines did not pass through parcel no. 491 which belonged to the Appellant and thus he did not deserve to be compensated. The Appellant on his part alleges that the suit property **NYANSIONGO SETTLEMENT SCHEME/105** is still intact and subdivisions of the same into parcels no. 489, 491 and 490 is illegal. It is therefore his contention that the Respondents wrongfully compensated persons who had illegally subdivided his land and the Respondents ought to be compelled to compensate him.

10. Just like the learned Trial Magistrate, I cannot help wondering why the Appellant did not see the need to enjoin the third parties to this suit if indeed they are fraudsters and trespassers as he claims. In his judgment, the trial Magistrate observed as follows;

“As regards the other people who are in occupation of the land, the plaintiff should have sued them together with the Defendant, particularly so if they are alleging that they purchased portions from the defendant. It will not be right to make an order against them before granting them an opportunity to be heard”.

11. From the above observation of the court, it is clear that the Plaintiff was not keen on suing the persons in occupation of the suit property.

12. Additionally, the Appellant did not tender any evidence to demonstrate that the Respondent was involved in the alleged fraud of subdividing the suit property. The Respondent presented before the court the official searches from the Land Registry to prove that the persons who were compensated were owners of the parcels of land where the power lines were placed. The titles of the said persons have not been impeached by the court. On the other hand, the Appellant made allegations of fraud against persons who were strongly not enjoined to the suit. Considering the evidence that was placed before the trial court, I cannot fault the learned trial Magistrate for holding that the Respondent had lawfully and rightfully compensated persons on whose property the power lines were placed.

Whether the Learned Trial Magistrate erred in law and in fact by failing to invalidate titles presented to the Respondent for purposes of compensation

13. As I have already observed hereinabove, the Appellant having discovered that the sub-division of the suit property was illegal, ought to have enjoined the persons who sub-divided his land to this suit so that the resultant titles could be declared null and void. As observed by the trial magistrate, it would be absurd for this court to make an adverse order declaring titles being held by third parties as null and void without affording them an opportunity to be heard.

14. The averment by the Appellant that the titles issued to third parties are null and void is a serious allegation that required the said third parties to be accorded a hearing as any orders to nullify their title without granting them an opportunity to be heard would amount to a violation of the third parties' right to a fair hearing which is enshrined in Article 50 of the Constitution of Kenya 2010.

15. In the end, I find that the Appeal has no merit and it is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JUNE, 2021.

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J.M ONYANGO

JUDGE