



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELC NO. 359 OF 2014

JOHNSON MAINGA MOGAKA.....PLAINTIFF

-VERSUS-

KENYA POWER AND LIGHTING COMPANY.....DEFENDANT

JUDGMENT

1. On 23rd September 2014, the Plaintiff filed this suit vide a Plaint dated 24th August, 2014 seeking that judgment be entered against the Defendant for:

- a. Special damages - **Ksh 1,265,000/**,
- b. General damages, for trespass, punitive and aggravated damages.
- c. Costs of this suit.
- d. Interest for (a) and (b)
- e. Such further relief as this Honourable Court may deem fit.

2. The Plaintiff claims that he is the registered owner of all that parcel of land known as **L.R. NO: WEST MUGIRANGO/BOGICHORA/397** situate at Nyamira County, within the Republic of Kenya. (Herein after referred to as "the suit property"). In or about the month of February 2014, the Defendant's servants and/or agents entered into the suit property immediately commenced to cut down trees, banana stalks and napier grass thereon.

2. The Defendants cut several trees and the ground was cleared. After that, they dug holes and brought poles into the suit property. The Defendant's agent's then laid out poles, which they fixed on the ground and thereafter put cables through them.

4. The Defendant's agents and/or servants did not consult the Plaintiff before doing the said acts and have continued to do so despite several notices to stop.

5. The Defendant thereon installed a power transmission line through the suit property and that was not the first time the Defendant trespassed into the suit property.

6. It is the Plaintiff's case that the Defendant has forcefully attempted to create an easement over the suit property without compensating him for the use or destruction of the suit property and it continued to occupy the Defendant's land without his consent.

7. The Plaintiff contends that owing to the Defendant's actions he has been subjected to and has suffered great mental anguish, and has suffered loss and damage.

8. In response to the above claims by the Plaintiff, the Defendant filed a Defence dated 27th October, 2014 in which it denied all the allegations against it. However, on a without prejudice basis the Defendant claimed that if its agents entered the suit property, the said entry did have the Plaintiff's approval. The Defendant further stated that it was not aware of the losses and damages suffered by the Plaintiff. It further averred that it has never received any demand notice from the Plaintiff or any notice of intention to sue from the Plaintiff. It also denied the jurisdiction of the court.

9. The matter came up for hearing on 25th September, 2017. Unfortunately, both parties were absent hence it was dismissed for want of prosecution.

10. The Plaintiff subsequently moved this court vide an application dated 16th January, 2018 wherein the matter was reinstated and fixed for hearing on 1st October, 2018.

11. On the hearing date, the advocates for all parties were present. However, the Defendant's counsel sought for an adjournment on the ground that he was not ready to proceed. In as much as the court did not find the reasons given by the Defendant sufficient, it granted the adjournment to the defendant to enable them put their house in order. Noting that the matter was one that parties could try to resolve out of court, the court directed that the matter be mentioned after a period of 90 days to confirm whether parties had reached a settlement.

12. On 28th March 2019, the matter was mentioned in court to confirm whether parties had reached a settlement. However, neither the Defendant's agent nor its advocates was present in court. The Plaintiff's Advocate who was present in court confirmed to the court that parties were unable to agree and prayed for a hearing date.

13. From the court record, the matter was on diverse dates mentioned for purposes of setting a date for hearing, but the Defendant did not appear by itself or through its advocate despite being duly served.

14. The matter was finally fixed for hearing on 9th November, 2019 in the absence of the Defendant. After the court ascertaining that the Defendant had properly been served through his advocate but failed to attend court, it proceeded to hear the Plaintiff and his witnesses.

15. After the testimonies of the Plaintiff and his witnesses the Court directed parties to file their written submissions. The Plaintiff filed his written submissions on 8th December, 2019. However, the Defendant did not file its submissions despite being served with notice to do so by the Plaintiff.

ISSUES FOR DETERMINATION

16. Having considered the pleadings, testimonies of the Plaintiff and his witness together with the exhibits tendered by the Plaintiff, as well as the written submissions filed by the Plaintiff, the following issues arise for determination;

i. Whether the Defendant trespassed on the suit property

ii. Whether the Plaintiff is entitled to damages for the trespass

ANALYSIS AND DETERMINATION

Whether the Defendant trespassed on the suit property.

17. Black's Law Dictionary 10th Edition at pg. 1642 defines trespass as unlawful acts committed against the person or property of another especially wrongful entry of another's land.

Section 3 (1) of the Trespass Act, Cap 294 provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

18. In the instant case, the procedure of laying electric supply lines is set out in Energy Act, Cap 314 Law of Kenya. Section 46 of that Act provides as follows:

"(1) No person shall enter upon any land, other than his own-

a. To lay or connect an electric supply line; or

b. To carry out a survey of the land for the purposes of paragraph (a) except with the prior permission of the owner of such land.

(2) The permission sought in subsection (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry."

19. Sections 47 and 52 of the Energy Act provides as follows:

47. (1) An owner, after the notice and statement of particulars under Section 46, may assent in writing to the construction of the electric supply line being paid such compensation as may be agreed and any assent so given shall be binding on all parties having an interest in the land, subject to the following provisions-

a. That any compensation to be paid by the licensee giving notice to the owner, in cases where the owner is under incapacity or has no power to assent to the application except under this Act, shall be paid to the legal representative of the owner;

b. That an occupier or person other than the owner interested in the land shall be entitled to compensation for any loss or damage he may sustain by the construction of the electric supply line, so long as the claim is made within three months after the construction of the electric supply line.

52. The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss of damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.”

20. It is clear from the above provisions that permission of the registered proprietor is required before entering such land and laying electric supply lines. Moreover, a notice is required to be given, which notice should be accompanied by a statement giving the particulars of entry. After the notice, an owner may give assent and is entitled to compensation.

21. In the instant case, there is no dispute that the Plaintiff is the legal owner of the suit property. In its defense, the Defendant has not demonstrated whether it made any attempt to obtain permission to enter the plaintiff's land and lay the electric supply lines. It is the Plaintiff's testimony that the Defendant did not obtain consent for the erection of electric power poles and power lines. From the aforementioned provisions of the law, it is explicit that the consent of the Plaintiff is mandatory. In this case, the Plaintiff's consent was not obtained. The Defendant also failed to compensate the Plaintiff as required. No doubt the Defendant's actions amount to trespass and the trespass is continuing.

22. The Defendant attempted to list wayleave consent as one of its exhibits but did not produce or file the same in court. It is imperative to note that, a wayleave is an analogous right governed under Sections 143 to 149 of the Land Act, 2012. The Act provides the manner in which wayleaves and other rights of way should be created and maintained. Section 148 of the Land Act provides specifically for compensation for rights of way such as wayleaves. There was no evidence presented to the court to support the Defendant's claim that it obtained consent of the Plaintiff to erect the electric poles and lines on the Plaintiff's land. It is therefore my finding and I so hold that the Defendant trespassed onto the Plaintiff's land and the trespass is continuous.

Whether the Plaintiff is entitled to Special and General Damages.

23. For special damages, the Plaintiff has claimed Kshs. 1,265,000/= which is based on a valuation report dated 7th February, 2014 prepared by Otundo & Associates Valuers. It is trite law that special damages require to be specifically pleaded and proved. In this case, the Plaintiff has pleaded and proved his claim through production of the valuation report. The said report has not been challenged by the Defendant. It is therefore my finding that the Plaintiff is entitled to the sum of Kshs. 1,265,000/= as special damages.

24. With regard to general damages for trespass, the issue that arises is how does the court quantify the damages? This question was answered by E. Obaga J in the case of **Philip Ayaya Aluchio v Crispinus Ngayo [2014]eKLR** where it was held as follows:

“The Plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately after the trespass or the costs of restoration, whichever is less.

25. In this case the Plaintiff has only provided this court with the open market value of the part of the suit property that has been destroyed by the Defendant which is estimated to be Kshs. 1,100, 000/=. The report has however not given the cumulative value of the suit property before and after the trespass. This makes it difficult to assess the general damages.

26. In **Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR** where the court faced such a similar situation it was held as follows:

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff's land and conduct some excavation. For this reason, I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

27. Being duly guided by the above decisions, I award the Defendant damages in the sum of Kshs. 1,100,000/= (One million, one hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.

28. In conclusion, I find and hold that the Plaintiff has proved his case on a balance of probabilities and I enter judgment for the Plaintiff against the Defendant as follows:

- a. General damages for trespass in the sum of Kshs. 1,100,000/=.
- b. Special damages in the sum of Kshs. 1,265,000/=.
- c. Costs of this suit.
- d. Interest on (a) and (b) at court rates from the date of filing until payment in full.

DATED, SIGNED AND DELIVERED AT KISII THIS 11TH DAY OF MARCH, 2021.

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J.M ONYANGO

JUDGE