



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC. CASE NO. 278 OF 2017**

**KENYA POWER & LIGHTING COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**GIMALU HEALTH ESTATE LIMITED.....DEFENDANT**

**JUDGMENT**

1. In the Plaintiff dated 15<sup>th</sup> November, 2002, the Plaintiff averred that under the Electric Power Act, No. 11 of 1997, it is empowered and/or licensed to generate, produce, transit and supply power within the country; that under the license issued to it, it is in the process of constructing a 220KV transmission line from Olkaria to Nairobi and that the transmission line is designed to pass through L.R. No. 167/9 (*the suit property*) owned by the Defendant.
2. The Plaintiff averred that in the year 1998, it gave notice to the Defendant of its intention to lay an electric supply line over the suit property; that the Defendant, through one of its Directors, confirmed to the Plaintiff that it had no objection to the line passing over its land and that on 15<sup>th</sup> March, 1998, the Defendant's Director signed a Wayleave agreement.
3. According to the Plaintiff, during the survey work, the Defendant's crops valued at Kshs. 1,607 were damaged; that the Plaintiff paid to the Defendant the sum of Kshs. 1,607 for the damaged crops and that by a letter dated 6<sup>th</sup> March, 2002, one of the Defendant's Directors demanded that the Defendant should be paid a sum of Kshs. 72,140,000 as compensation.
4. The Plaintiff's claim against the Defendant is for an order of injunction restraining it from obstructing or interfering with the Plaintiff's works, namely, laying of electric supply line on L.R. No. 167/9, and an assessment by the court of the compensation payable to the Defendant under the provisions of the Electric Power Act.
5. In its Amended Defence and Counter-claim dated 25<sup>th</sup> June, 2003, the Defendant averred that the Plaintiff has never given any notice to the Defendant either orally or in writing of the intended construction of the power line; that the Defendant has never given any consent or signed an agreement and that the Defendant is a stranger to the Agreement of 15<sup>th</sup> March, 1998.
6. The Defendant averred that it is a Limited Liability Company; that any decision of the company has to be by way of a resolution of the Board and that the acts of the Plaintiff of forcefully entering into the Defendant's land amounts to compulsory acquisition of land contrary to the provisions of Section 75 of the Constitution (*repealed*).
7. In its Counter-claim, the Defendant averred that it is in the process of constructing a Memorial Academy in honour of one of its original Directors, the late James Gichuru; that the proposed project by the Plaintiff cuts across the area earmarked for the said Academy and that the Defendant has already incurred losses in architectural drawings, preparation of the bill of quantities and other incidental expenses in preparation of the project.
8. The Defendant finally averred in the Counter-claim that by constructing and erecting high tension cable wires across its land, it has been deprived the use of the land under the high tension cables and the land adjacent to the high cables and that it will suffer special damages to the tune of Kshs. 72,140,000.
9. In the Counter-claim, the Defendant is praying for a declaration that the acts of the Plaintiff amounts to trespass and is a violation of the Defendant's rights as protected by Section 75 of the Constitution (*repealed*); a permanent injunction, general damages for trespass and special damages to the tune of Kshs. 72,140,000 together with interest.
10. This suit proceeded for hearing on 30<sup>th</sup> October, 2018 when PW1, DW1 and DW2 testified.
11. The Plaintiff's Chief Wayleaves Officer, PW1, informed the court that on or about 1998, the Plaintiff proposed to construct a 220KV transmission line from Olkaria to Nairobi; that the transmission line was designed to pass through L.R. No.167/9 (*the suit property*), which

land is owned by the Defendant, and that when the survey work was concluded, the Plaintiff gave notice to the Defendant of its intention to lay the said line on a portion of the suit property.

12. According to the Plaintiff, based on the Agreement between the Plaintiff and the Defendant, the Plaintiff started the process of laying the electric line across the suit property and paid to the Defendant compensation for the destroyed crops and that while on site, one of the Defendant's Directors did a letter alleging that the Plaintiff had not sought authority or paid to the Defendant compensation and demanded for an unconscionable claim of Kshs. 72,140,000.

13. According to PW1, the power lines are and have been in place since then and serving Nairobi and that the only issue remaining in this matter is the payable compensation by the Plaintiff to the Defendant. In cross-examination, PW1 stated that before they commenced works on the suit property, they sought for consent from the Defendant in 1998 and that the notice to the Defendant was given in 1998 whereafter a Wayleave Agreement was signed.

14. PW1 informed the court that the width occupied by the transmission line over the suit property was 40 meters; that the survey plan shows the area of the suit property that was to be taken up by the Plaintiff's project and that a valuation report on the amount to be paid to the Defendant was done before the survey works commenced.

15. PW1 stated that the agreed compensation for the portion of the suit property taken up by the project was Kshs. 3,800,000; that the Defendant later came up with a different figure of Ksh 72,000,000 and that they were unable to agree on that figure. PW1 informed the court that the electric transmission lines cover an area of 3 acres of the Defendant's land.

16. The Defendant's Director, DW1, informed the court that on 2<sup>nd</sup> November, 2002, she was informed that the Plaintiff's employees had invaded the suit land and were in possession of a court order. It was the evidence of DW1 that she was never involved in the survey works for the construction of the electric transmission line over the suit property and that they have never agreed with the Plaintiff on the payable amount as compensation.

17. DW1 stated that the Agreement dated 1<sup>st</sup> March, 1998 is unknown to the Defendant; that Mary Nyaguthii Gichuru who purportedly signed the Agreement passed on and that the said Mary Nyaguthii never raised the issue of the said letter in the Defendant's Board meetings.

18. In cross-examination, DW1 stated that the late Mary Nyaguthii did not represent the Defendant while signing the Agreement of 1<sup>st</sup> March, 1998 although she was one of the Directors. According to the evidence of DW1, the Defendant had three Directors at the time of signing the Agreement of 1<sup>st</sup> March, 1998 and that the suit land is a prime piece of land.

19. DW1 stated that the Defendant has never been paid the alleged sum of Kshs. 1,607 or at all and that the land occupied by the Plaintiff's transmission line is more than what is indicated in the purported agreement between the Plaintiff and the Defendant.

20. The Valuer, DW2 stated that he prepared a valuation report dated 12<sup>th</sup> March, 2012 upon receiving instructions from the Defendant's advocates. It was the evidence of DW2 that the suit land is situated along the Nairobi-Limuru Road and measures approximately 21.2 Ha; that there is a power Wayleave cutting across the suit property; that the wayleave comprises of two pylons erected on a portion of the suit land and that high voltage wires are situated between the two pylons comprising the Olkaria-Dandora Power Wayleave.

21. DW2 stated that the area covered by the Wayleave is approximately 4.8 acres and that the value of land occupied by the wayleave is Kshs. 58 million as at the time of preparing the Report in the year 2012. Currently, it was the evidence of DW2 that the land is valued at Kshs. 89,000,000.

22. In cross-examination, DW2 informed the court that the length of transmission line crossing a portion of the suit property measures 280 meters while its width is 30 meters; that the additional wasted land is 20 meters and 10 meters on either side of the wayleave and that he was not sure of the value of the Wayleave in the year 1998.

#### **Submissions:**

23. The Plaintiff's advocate submitted that from the actions of the Defendant, and from the observation of the court when delivering its Ruling on 10<sup>th</sup> December, 2002, it is clear that a binding agreement was entered into between the Plaintiff and the Defendant on 15<sup>th</sup> March, 1998; that it is because of the said Agreement that the Plaintiff began its works on the suit land and that the rule of estoppel is applicable in this matter.

24. Counsel submitted that pursuant to the various correspondences between the Plaintiff and the Defendant, the Plaintiff does not oppose the idea that the Defendant is entitled to compensation; that in the year 2002, an acre of land at market value was Kshs. 1,200,000, which the Plaintiff is willing to pay, and that the Defendant's Valuer did not state the value of the suit land in 1998. According to the Plaintiff's advocate, the land that was taken up by the Plaintiff's transmission line is approximately 3.21 acres and that the total payable compensation is Kshs. 3,852,000.

25. The Defendant's advocate submitted that the Defendant suffered loss and damage for the trespass occasioned by the Plaintiff to the tune of Kshs. 72,140,000; that the line to be affected by the Wayleave where the Plaintiff has put up high tension density power line is 3.21 acres for the Wayleave and 1.6 acres being the waste land that cannot be used for development and that the proposed Academy could not have been constructed next to the power line.

#### **Analysis and Findings:**

26. This suit was filed by the Plaintiff in the year 2002. By then, the Plaintiff was a holder of a license issued to it under the provisions of the Electric Power Act, Act No. 11 of 1997. The said license empowered the Plaintiff to generate, produce, transmit and/or supply power within the Republic of Kenya. The Act was subsequently repealed by the Energy Act, 2006.

27. It is not in dispute that pursuant to its mandate under the then Electric Power Act, the Plaintiff conducted survey works in 1998 with a view of constructing a 220KV transmission line from Olkaria to Nairobi. After the said survey works, it was established that the 220KV transmission line was to pass over L.R. No. 167/9 owned by the Defendant.

28. According to the Plaintiff, it obtained the Defendant's consent to construct the electric transmission line over its land pursuant to the provision of the Act; that one of the Defendant's Director signed the said consent on 15<sup>th</sup> March, 1998 and that it therefore commenced works of putting up pylons and transmission lines over the suit land.

29. It is the Plaintiff's case that while undertaking the said works over a portion of the suit property, one of the Defendant's Directors alleged, by way of a letter dated 6<sup>th</sup> March, 2002, that the Plaintiff had entered on the suit land without its authority, and demanded that the Plaintiff vacates the suit land.

30. It is on the basis of the objection by one of the Defendant's Directors to have the transmission line pass over a portion of the suit land that the Plaintiff filed the current suit. In its Ruling of 10<sup>th</sup> December, 2002, the court restrained the Defendant or its agents from obstructing or stopping the Plaintiff from entering the portion of its land for the construction of the electric transmission line pending the hearing and determination of the suit. It is on the basis of the said Ruling that the Plaintiff completed the construction of the 220KV transmission line from Olkaria to Nairobi.

31. On the other hand, the Defendant has denied ever giving its consent or signing the Agreement dated 15<sup>th</sup> March, 1998. Consequently, the Defendant is claiming for a declaration that the acts of the Plaintiff amounts to trespass; general damages for trespass and special damages to the tune of Kshs. 72,140,000, together with interest at the prevailing bank commercial rates.

32. The Plaintiff's witness, PW1, produced in court an Agreement between Gimalu Estate and the Plaintiff dated 15<sup>th</sup> March, 1998. The said Agreement was signed by the late Mary Nyaguthii Gichuru, who was one of the three Directors of the Defendant.

33. The Defendant's other Director, DW1, informed the court that the late Mary Nyaguthii Gichuru did not have the consent or resolution of the company to sign the Agreement of 15<sup>th</sup> March, 1998, and that the said Agreement cannot therefore bind the Defendant.

34. The issue of whether the late Mary Nyaguthii Gichuru had the authority of the Defendant to sign the Agreement of 15<sup>th</sup> March, 1998 or not could only be ascertained if DW1 produced the Memorandum and Articles of Association of the Defendant in evidence. It is trite that a Limited Liability Company is usually, if not always, regulated by its Articles of Association. Having not exhibited the Defendant's Articles of Association, the Defendant did not prove that one of its Directors could not bind it by signing the letter of 15<sup>th</sup> March, 1998.

35. I have read the Agreement of 15<sup>th</sup> March, 1998. According to the said Agreement, the Defendant granted to the Plaintiff the right of easement to maintain, alter, use, repair, renew, remove and inspect an electrical line erected across the suit property. That being the case, the Plaintiff complied with the provisions of Section 45(2) of the Electric Power Act (*repealed*) which provided as follows:

***“A licensee who has obtained authorization from the Minister and who intends to lay an electric supply line on the land of another person shall give notice in writing to the owner of that land of his intention, after the expiration of fourteen days from the date of the notice on a specified day to enter upon that land for the purpose of fixing the location of the electric supply line, and within fourteen days of entry shall serve the owner with a statement in writing containing full particulars of the description and proposed location of the electric supply line”***

36. Section 45(3) of the Act provides that an owner of the land who asserts in writing to the laying down of the electric supply line is entitled to compensation as may be agreed upon. From the correspondences produced in this matter, it would appear that the bone of contention between the Plaintiff and the Defendant is the payable compensation for the land that was taken up by the electric transmission lines.

37. The Defendant has demanded for Kshs. 72,140,000 being the payable compensation for the land taken up by the electrical lines crossing a portion of the suit land. The said figure has been broken down in the Defendant's letter dated 23<sup>rd</sup> September, 2002 addressed to the Plaintiff's Principal Wayleave Officer as follows:

***“The portion of the land you require from our land above (L.R No. 157/9) has been reserved for the development of “James Gichuru Memorial Academy”. The academy is being developed by late James Gichuru's children and grandchildren for his memory. This development has been planned over the last two years and we are just about to award the contract for the construction of the academy.***

***The portion you require for your power transmission cuts across the academy development. If it is a must that your transmission has to pass through the development, then we require to re-plan it in particular to remove the buildings that are under the power lines and those too near for habitation because of the power lines.***

***As a result, we require the following compensation including the acquisition of the wayleave:***

***a. Wayleave requirement 3.21 acres @ Kshs. 4,000,000 per area 12,840,000.00***

**b. Cost incurred with the consultants including Architects, Qs, Planners and Engineers e.t.c. thus far (12% of BQ) 29,000,000.00**

**c. Waste land – land that cannot be used for the development of academy.... buildings at least 20 meters from your wayleave on one side only which is approximately 1.6 acres at price in “a” above 6,400,000.00**

**d. Re-planning and re-design to move the academy**

**from your wayleave (50% of the original cost) 14,500,000.00**

**Sub-total 62,740,000.000**

**e. The inconveniences and lost time for the academy 15% of the above cost 9,400,000.00**

**Total amount payable 72,140,000.00**

**In words Kenya shillings seventy two million one hundred forty thousand only.**

**On full payment of the above amount we shall allow you to start your construction and shall sign the wayleave documents required.”**

38. The Defendant produced in evidence the “*proposed James Gichuru Memorial Academy*” approximate estimates. However, the approved development plan of the proposed academy was never produced in evidence.

39. Indeed, the Defendant did not produce in evidence any documents showing that the construction of the electric power line across a portion of the suit land measuring 3.21 acres would affect the construction of an academy. In the absence of approved site plans (*which would have shown the site of the alleged “academy”*) the Defendant cannot claim for the costs that were incurred “*with the consultants, waste land that cannot be used for the development of the academy and the cost for the re-planning and re-design to move the academy*”.

40. The Plaintiff produced in evidence the valuation report of Tyson’s Limited dated 6<sup>th</sup> March, 2003. The said report gives the market value of the land “*along the Kenya Power and Lighting Company Limited Wayleave Trace across the above property L.R. Number 167/9 (part)*” as Kshs. 1,200,000 per acre. The report does not however state the acreage of land taken up by the electric line.

41. On the other hand, the Defendant produced in evidence the valuation report dated 12<sup>th</sup> March, 2012. The said report shows the area covered by the wayleave to be approximately 4.81 acres made up as follows: Wayleave, 3.21 acres; Wasteland, 1.60 acres. According to the report of 1<sup>st</sup> March, 2012, “the value of the land occupied by the wayleave is Kshs. 58,000,000.

42. In cross-examination, DW2 was unable to state the value of the land in 1998. Considering that this suit was filed in 2002, the compensation that the Defendant is entitled to is the value of the land that was taken up by the electric power line in the year 2002, which figure was given by Tysons Limited as Kshs. 1,200,000 per acre. That being the case, and the wayleave area being 3.21 acres, the Defendant is entitled to a sum of Kshs. 3,852,000 as compensation.

43. For those reasons, I partially allow the Plaintiff’s *Plaint* and the Defendant’s *Counter-claim* as follows:

**a) A permanent injunction be and is hereby issued restraining the Defendant from obstructing or stopping the Plaintiff from entering on a portion of L.R. No. 167/9 to construct, lay, connect, repair and/or maintain an electric power supply line thereon.**

**b) The Plaintiff to pay the Defendant Kshs. 3,852,000 being compensation for a portion of L.R. No. 167/9 measuring approximately 3.21 acres.**

**c) The Plaintiff to pay interest on the above amount at court rates from 15<sup>th</sup> November, 2002 until payment in full.**

**d) Each party to bear its own costs.**

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31<sup>ST</sup> DAY OF JANUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**