



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 35 OF 2015(O.S)**

**AHMED SHEIKH AMIN MSELLEM.....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LTD....DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated 5<sup>th</sup> March 2015 as amended on 1<sup>st</sup> November 2018, Ahmed Sheikh Amin Msellem (the Plaintiff) prays for a determination of the following questions:-

**a. Whether the actions (of) the Kenya Power & Lightning Company Ltd (the 1<sup>st</sup> Defendant) and Rural Electrification Authority(the 2<sup>nd</sup> Defendant) in encroaching and constructing a power line over Plot No. 12 Group 1 Takaungu is unlawful, illegal and (a) violation of Constitutional right to private property;**

**b. Whether an Order should be issued by this Honourable Court directed against Kenya Power & Lighting Company Ltd and Rural Electrification Authority, the Defendants herein jointly and severally, compelling them to pull down and remove at their costs, power lines which they have erected right across Plot No. 12 Group 1 Takaungu, and restore the soil thereon back to how it was prior to the erection of the said power line;**

**c. Whether an order by this Honourable Court should be issued compelling Kenya Power & Lighting Company Ltd to provide compensation for the damages occasioned by felling down mature trees on the subject Plot, including coconuts, mangoes and cashew nuts among other indigenous trees to create way for the power line complained of, which in terms of the Valuation Report by Ms Pivot Valuers Ltd, stands at Kshs 274,500/- and for the loss of future income.**

2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff and is premised on the grounds:-

**a. That the Defendants have without any colour of right and without the consent of the Plaintiff moved into the suit property and hurriedly constructed a power line right across it;**

**b. That as at the time the power line was constructed, the Plaintiff had already caused the suit property to be resurveyed and a road had been created for purposes of the power line;**

**c. That the manner in which the line was constructed right across the property completely lowered its value and made it difficult to be used for other development purposes; and**

**d. That in the process of clearing the path for the line, the Defendants caused a huge destruction of indigenous trees thereon and thereby subjecting the Plaintiff to unnecessary loss.**

3. In a Replying Affidavit sworn on its behalf by its Assistant Way Leaves Officer Richard Otaro and filed herein on 12<sup>th</sup> October 2015, the 1<sup>st</sup> Defendant denies that it has encroached into the Plaintiff's property and/or erected any power lines thereon.

4. The 1<sup>st</sup> Defendant avers that the line the Plaintiff complains about is a high voltage 33 kV transmission line which runs from Takaungu to Vuma Primary School within Kilifi County which line is being constructed by the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant further asserts that it was the responsibility of the 2<sup>nd</sup> Defendant to seek for way leaves consent from the land owners and to offer compensation for damage caused to the land owners as a result of the construction of the line.

5. The 1<sup>st</sup> Defendant avers that even though the electricity line has since been handed to itself by the 2<sup>nd</sup> Defendant, the issue of the way leaves nevertheless remains the responsibility of the 2<sup>nd</sup> Defendant who constructed the power line.

6. From the record, it is evident that the suit was initially instituted solely against the 1<sup>st</sup> Defendant. However, by an application dated 26<sup>th</sup> August 2016, the 1<sup>st</sup> Defendant sought the following orders:-

**a) That this Honourable Court be pleased to join the Rural Electrification Authority as a Defendant to this suit; and**

**b) That this Honourable Court be pleased to order that the Originating Summons be amended in such manner as may be necessary and the amended Originating Summons be served upon the new Defendant.**

7. In a Ruling delivered herein on 15<sup>th</sup> November 2017, the Court granted the 1<sup>st</sup> Defendant's prayers. The Originating Summons was however not amended until 15<sup>th</sup> November 2015 some one year later and I did not find any evidence that the same had been served upon the 2<sup>nd</sup> Defendant as at the time this matter proceeded to hearing by way of affidavit evidence.

8. I have considered the Plaintiff's Originating Summons and the response thereto by the 1<sup>st</sup> Defendant. I have also perused and considered all the Affidavits filed by the parties herein.

9. The Plaintiff herein is one of the 17 beneficiaries of the estate of one Salim Bin Mbarak Dahman, who according to an Indenture annexed to the Supporting Affidavit to the Originating Summons, passed away at Mombasa on 22<sup>nd</sup> May 1933. Prior to his death, the deceased was the registered owner of the suit property measuring 11.19 acres.

10. It is the Plaintiff's case that they have been in occupation of the suit property which they have been using for farming and they have planted mango trees, coconuts and cashew nuts thereon.

11. It is the Plaintiff's case that sometime in the year 2013, the 1<sup>st</sup> Defendant encroached onto the suit property and proceeded to erect electricity power lines thereon without the Plaintiff's authority and/or permission. It is further his case that the manner in which the power lines were constructed right across the suit property completely diminished the value of the subject land as a result whereof the Plaintiff and other beneficiaries of the estate have suffered loss and damage.

12. In its response, the 1<sup>st</sup> Defendant denies that it encroached onto the suit property. On the contrary, the 1<sup>st</sup> Defendant asserts that the power line the Plaintiff complains about is a high voltage 33 kV transmission line which was constructed by the 2<sup>nd</sup> Defendant. While admitting that the line has now been handed over to itself by the 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant avers that the responsibility of seeking consent for wayleaves and compensating the owners thereof remains that of the 2<sup>nd</sup> Defendant.

13. While the 2<sup>nd</sup> Defendant, a body corporate established under Section 66 of the Energy Act were formally joined in these proceedings by an order issued by this Court on 15<sup>th</sup> November 2017, I did not find any evidence of their being formally invited into these proceedings. At any rate, they neither entered appearance nor filed any defence herein.

14. In an Affidavit sworn by its Chief Legal Officer-Litigation and Prosecution in support of its application dated 26<sup>th</sup> August 2016 to have the 2<sup>nd</sup> Defendant enjoined in these proceedings, the 1<sup>st</sup> Defendant avers at paragraph 3 and 4 thereof as follows:-

**“3. That the high voltage 33 kV electricity line that the Plaintiff is complaining about was erected by the Rural Electrification Authority sometime in 2013 and handed over to Kenya Power & Lighting Company Ltd after completion.**

**“4. That it was the sole responsibility of the Rural Electrification Authority to seek for wayleaves consent from the Plaintiff herein and offer compensation for damage occasioned to the Plaintiff's land as a result of construction of the said electricity power line.**

15. From a perusal of the said Affidavit and the main one filed in response to the Originating Summons, it was clear to me that the 1<sup>st</sup> Defendant does not deny that the electric power lines were erected without the permission of the Plaintiff. Neither does it deny that the Plaintiff and the other beneficiaries were not compensated for the use of their land.

16. According to the Plaintiff, he personally witnessed when the power lines were being constructed. It was further his evidence that those who were carrying out the construction wore protective garments with the 1<sup>st</sup> Defendant's Kenya Power and Lighting Company logo emblazoned thereon. While the mere fact that the construction workers wore such garments may not be conclusive proof that they were the 1<sup>st</sup> Defendant's employees, it was telling that the 1<sup>st</sup> Defendant did not indicate at what point in time the power lines were handed to itself. All that the 1<sup>st</sup> Defendant states is that the lines were handed to itself by the 2<sup>nd</sup> Defendant upon completion.

17. It was equally telling that the 1<sup>st</sup> Defendant did not reveal the terms and conditions upon which the power lines were handed to itself on the undisclosed date. By applying to have the 2<sup>nd</sup> Defendant enjoined in these proceedings as a Defendant, it was evident to me that the 1<sup>st</sup> Defendant sought to have the 2<sup>nd</sup> Defendant to indemnify itself against any award that may issue as a result of their actions.

18. As it were, the 1<sup>st</sup> Defendant did not place anything before this Court to prove that it was the 2<sup>nd</sup> Defendant that constructed the power

lines in question. Having admitted that at the time of institution of this suit they had taken over and were the ones running the power lines that were built on the Plaintiff's land without his permission and/or compensation, they must take full responsibility for their continued existence on the Plaintiff's land.

19. Prior to the filing of this suit, the Plaintiffs Advocates on record had by a Demand Letter dated 27<sup>th</sup> August 2013 written to the 1<sup>st</sup> Defendant's Coast Region Manager demanding the stoppage of the construction of the power line and compensation for the trees destroyed. That letter elicited no response from the 1<sup>st</sup> Defendant.

20. In the result, I am satisfied that the Plaintiff's suit is merited and I proceed to grant the orders sought in the Originating Summons as follows:-

**i. A declaration is hereby issued that the actions of the Defendants in encroaching and constructing a power line over Plot No. 12 Group I Takaungu is unlawful, illegal and a violation of the Plaintiff's right to property.**

**ii. An order is hereby issued directing the Defendant to pull down and remove at its cost, the power lines erected on the suit property.**

**iii. The Defendants are hereby directed to pay the Plaintiff the sum of Kshs 274,560/- being compensation for the damages occasioned by felling down mature trees on the suit property; and**

**iv. The Plaintiff shall have the costs of the Originating Summons.**

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of February, 2020.**

**J.O. OLOLA**

**JUDGE**