



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 29 OF 2016

CONSTANCE TUNDA VUKO.....APPELLANT

VERSUS

KENYA POWER & LIGHTING CO. LTD.....1ST RESPONDENT

LUCY KIMANGU.....2ND RESPONDENT

(Being an Appeal from the decision and judgement of the Chief Magistrate's Court in CMCC No. 279 of 2012 at Malindi - Hon. Y.A. Shikanda, S.R.M.)

JUDGEMENT

1. Constance Tunda Vuko, the Appellant was the plaintiff in Malindi CMCC No. 279 of 2012 in which she had initially sued the 1st Respondent, Kenya Power & Lighting Co. Ltd seeking a declaration that the 1st Respondent was not entitled to request her to pay for any meter relocation and new quotation charges in the absence of an application for such re-location and quotation from her. She also prayed that an injunction be issued to restrain the 1st Respondent by itself, servants or agents from disconnecting power supply to her premises or whatsoever in any manner interfering with her electricity supply pending the hearing and determination of the suit.

2. In the course of the hearing of the matter, Lucy Kimangu, the 2nd Respondent was enjoined as the 2nd Defendant. As a consequence, the Appellant amended her plaint and introduced an additional prayer targeted against the 2nd Respondent in which she sought a declaration that the 2nd Respondent was estopped from complaining about the presence of the electricity meters on her plot and that if the said meters were to be relocated, the 2nd Respondent was to foot any expenses arising therefrom.

3. At the conclusion of the trial, the Magistrate dismissed the Appellant's case stating that:

“In view of the above considerations, the inescapable conclusion is that the plaintiff has no cause of action against the defendants or any of them. The suit must of necessity fail. Consequently, I make the following orders:

i. The plaintiff's suit against both defendants is hereby dismissed;

ii. The defendants are awarded costs of the suit as against the plaintiff.

For avoidance of doubt, the court has not ordered for relocation of the plaintiff's meters and cables. This is because there is no counter-claim by the defendants. Further, the temporary orders of injunction granted on 5/11/2012 stand discharged.”

4. The Appellant being aggrieved by the said decision filed the instant appeal raising fifteen grounds. In summary she accuses the trial court of improper and wrong analysis of the facts and evidence; failure to evaluate and consider relevant considerations and dwelling on irrelevant facts and matters; making findings on facts and evidence not pleaded by the parties; and wrong application of the law to the facts of the case.

5. The advocates for the parties opted to rely on the written submissions filed in this appeal.

6. This being a first appeal, the Appellant is entitled to a fresh consideration of the evidence adduced at the trial and this court's take on the application of the law to that evidence.

7. The Appellant commenced her submissions by stating that the trial court erred in concluding that she had no cause of action against the 1st

and 2nd respondents. It was her case that the meaning of a cause of action is found in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** wherein it was stated that:

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.”

8. The Appellant’s case is that she had a cause of action against the respondents founded on the 1st Respondent’s threat to disconnect her electricity supply if she did not pay for the relocation of electric meters and power lines situated in the 2nd Respondent’s premises. It is the Appellant’s case that the grant of a temporary injunction to her by the trial court was sufficient evidence of the fact that she had a cause of action against the respondents.

9. According to the Appellant, it was erroneous for the trial court to hold that she had no cause of action against the respondents yet she had tendered evidence showing that electricity supply to her premises would be disconnected owing to an oral complaint by the 2nd Respondent and which fact was not denied by any of the respondents. Further, that the 1st Respondent’s action of issuing her with a defective installation notice is a clear attestation of this fact.

10. Asserting that the trial Magistrate erred in concluding that the doctrine of estoppel was not applicable in the circumstances of her, the Appellant stated that the power lines and meters were installed in 2004 prior to the sub-division of the plot in 2006 and the 2nd Respondent only raised complaints about the meters and power lines in 2012. To the Appellant, the 2nd Respondent was estopped from raising complaints six years after the sale of the plot to her as she is deemed to have agreed to the arrangement.

11. The Appellant conceded that it is not in dispute that the 2nd Respondent purchased a sub-division of Plot No. 40 Watamu from her and that the same was sold free of any encumbrances. In her view, if the presence of the power lines and meters supplying her premises with electricity were to be construed as encumbrances on the 2nd Respondent’s land, then the 2nd Respondent must be held to have acquiesced to their presence by not seeking their relocation for six years. She was thus estopped from seeking the relocation now. The Appellant cited the decision of the Court of Appeal in the case of **748 Air Services Limited v Theuri Munyi [2017] eKLR** in support of her assertion that the doctrine of estoppel was available to her in this case.

12. The Appellant concluded this point by submitting that the 2nd Respondent ought to have been found to have acquiesced and waived her rights as to cause the Appellant to rightfully expect her to continue with the same arrangement which if now altered will prejudice her by having her electricity supply disconnected by the 1st Respondent and having to foot the bill for relocation of the electric meters and power lines.

13. On her claim that the trial Magistrate based his findings on facts and matters which were not pleaded by the parties before him and also considered irrelevant factors and omitted relevant factors, the Appellant submitted that the trial Magistrate delved into matters not pleaded and went on a frolic into matters not germane and relevant to the case before him hence arriving at a decision not supported by the law, facts and evidence.

14. The Appellant submitted that parties are bound by their pleadings and failure to abide by this principle entitles a party to succeed on appeal. The Appellant cited the decision of the Court of Appeal in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** in support of this point. In the cited case, after citing various authorities, the Court of Appeal held that:

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error and the appeal succeeds on that score.”

15. In order to demonstrate that the trial Magistrate went out of the pleadings and evidence, the Appellant submitted that the trial Magistrate delved into a preliminary objection by the 2nd Respondent that had been filed but abandoned in the course of the hearing.

16. According to the Appellant, the trial Magistrate erred in law and fact by reaching the conclusion that the 2nd Respondent had not consented to the existing arrangement of having electricity meters and cables in her premises yet she was able to prove tacit admission of such arrangement.

17. It was the Appellant’s case that the 2nd Respondent had by her conduct acquiesced and waived her rights by agreeing to have the electric lines on her plot and also by occupying the plot without complaints for six years. It was her view that this was evidence that the 2nd Respondent had impliedly consented to the same and was therefore estopped from denying this fact.

18. The Appellant submitted that although the trial Magistrate had found that the respondents had rightly demanded for relocation and that relocation ought to be done, he had at the same time declined to order relocation saying there was no counter-claim. In the Appellant’s view, this shows that the trial Magistrate dwelt on irrelevant matters and failed to consider relevant matters thus reaching a conflicted decision.

19. The Appellant concluded her submission on this issue by stating that the trial court did not settle the issues before it adequately as it failed to determine the issue of the relocation of the power lines and meters. According to the Appellant, her case was based on the threat by the 1st Respondent to disconnect her power supply based on a defective installation notice and which issue was never dealt with by the trial court to conclusion.

20. On her assertion that she was not supposed to pay for meter relocation as she had not made a request for such relocation, the Appellant submitted that if there was indeed any illegal connection, extension and/or installation of electric meters or cables, then the same is attributable to the 1st Respondent as it initially installed the electricity on her property and did the subsequent separation and relocation of the electric meter serving the 2nd Respondent's plot.

21. It was the Appellant's submission that she did the initial installation of electricity as per the conditions and specifications of the 1st Respondent and there was therefore no basis for the 1st Respondent to coerce her to undertake relocation of the meters and cables on the strength of an oral application by the 2nd Respondent and without an application from her. She stressed that the notice from the 1st Respondent alleging defective installation was thus illegal.

22. The Appellant insisted that she had proved her case on a balance of probabilities and the orders ought to have been granted to her.

23. The Appellant ended her submissions by asserting that it was unjust to condemn her to meet the costs of the case as she had a legitimate complaint and the court had found that the respondents had not made any counterclaim.

24. The Appellant urged this court to allow her appeal on the following terms:

“I. That the judgement and decree of the trial magistrate dated the 20th day of July 2016 and delivered on the 24th day of July 2016 be set aside and reversed and that judgement be entered for the Appellant as sought in the subordinate court in the amended plaint dated the 5th of December 2012.

II. That the costs of this appeal and the suit in the subordinate court be borne by the Respondents.”

25. Responding to the Appellant's submissions, the 1st Respondent asserted that what is in contest is whether the Appellant has proven an overriding interest over the 2nd Respondent's property capable of being enforced.

26. According to the 1st Respondent, the Land Registration Act, 2012 clearly defines overriding interests and for electric lines to be an overriding interest vis-à-vis a title the provisions of the Energy Act, 2006 have to be followed in terms of consent of the private land owner. The 1st Respondent submits that Article 40 of the Constitution and the land laws entrenches the sanctity of title and any claims that infringe on that right have to be made pursuant to statute.

27. It is the 1st Respondent's case that the Appellant has failed to prove that she has an overriding interest over the 2nd Respondent's title as the same was never captured in the sale agreement and neither was it registered against the 2nd Respondent's title. The decision in **Pauline Wambui Ngari v John Kairu & another [1997] eKLR** is cited as illuminating the law on overriding interests.

28. Turning to the trial court's determination that the Appellant had not established any cause of action, the 1st Respondent asserts that the said finding was correct as the Appellant's suit as pleaded wholly failed to establish an infringement of any right or entitlement she had against the 2nd Respondent's property. It is the 1st Respondent's position that the injunction relief granted was simply meant to protect the subject matter and the trial court was only acting cautiously in issuing the order.

29. As to whether the Appellant had established any estoppel, the 1st Respondent submits that she did not. According to the 1st Respondent, the Appellant had not adduced any evidence to show that the 2nd Respondent created or encouraged the belief that the Appellant would have any right over her property; and further, there is no evidence that the Appellant acted in reliance of such belief. The decision of the Court of Appeal in **Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another [2014] eKLR** is cited as establishing the ingredients of proprietary estoppel.

30. The 1st Respondent submits that from the evidence of the 2nd Respondent it was clear that she did not acquiesce to the presence of the meters on her plot and complained directly to the Appellant and then to the 1st Respondent.

31. The 1st Respondent concludes that since it did not have any easement/wayleave of its own under the Energy Act, 2006 and their being no encumbrance on the 2nd Respondent's title, it was forced to seek relocation of the meters through a defective installation notice.

32. In opposition to the appeal, the 2nd Respondent filed submissions on 18th September, 2017. On the Appellant's submission that she had a cause of action as interlocutory orders had been granted, the 2nd Respondent submitted that such an argument was misguided since for an injunction to be granted one only needed to show whether he had established a prima facie case, or would suffer irreparable injury incapable of being cured by an award of damages or the court on a balance of convenience finds that an interlocutory order is deserved. It is the 2nd Respondent's position that it is only upon the full consideration of facts presented that a court of law can determine whether a plaintiff does indeed have a cause of action against a defendant.

33. The 2nd Respondent concluded on this point by asserting that she is the duly registered owner of the plot under the doctrine of *quicquid plantatur solo, solo cedit* [something that is or becomes affixed to the land becomes part of the land] and the Appellant cannot therefore purport to have any cause of action over any chattels or fixtures on her property.

34. On the application of the doctrine of estoppel to this case, the 2nd Respondent asserted that the trial court reached the correct decision as she did not have any agreement with the Appellant to leave any electricity power meters or lines on her property. It was the 2nd

Respondent's position that if there was indeed such an agreement, nothing would have stopped them from including such a clause in the sale agreement. The 2nd Respondent further submitted that she had all along conducted herself in a manner that showed that she was for the removal of the meters and lines from her property hence her complaint to the 1st Respondent which led to the Appellant being asked to relocate her meters.

35. On the Appellant's claim that the trial Magistrate based his findings on irrelevant matters, the 2nd Respondent submitted that the trial Magistrate was within the law in determining the question of jurisdiction which had been brought to his attention through the preliminary objection filed by the 2nd Respondent.

36. According to the 2nd Respondent the Appellant did not prove her case to the required standards. It was the 2nd Respondent's position that the Appellant could not purport to have rights over her property as she relinquished those rights the moment she sold the land to her.

37. On the question of costs, the 2nd Respondent submitted that she was entitled to the same as attempts to solve this matter out of court had been spurned by the Appellant. She urged this court to dismiss the appeal.

38. Looking at the evidence adduced at the trial and the submissions made during the appeal, it is clear that the only issue for the consideration of this court is whether the trial Magistrate was correct in reaching the conclusion that the doctrine of estoppel was not applicable in the circumstances of this case.

39. The facts in this matter were largely undisputed. The Appellant was the owner of plot No. 40 Watamu at the time she was supplied with electricity by the 1st Respondent in 2005. In 2006, the Appellant sub-divided the said plot into several sub-plots and sold one of the portions being Plot No. 974 to the 2nd Respondent. The electricity supply meters fell in the 2nd Respondent's plot. In 2011 an illegal extension notice was issued to the Appellant by the 1st Respondent. The Appellant subsequently moved to court in 2012 after the 1st Respondent threatened to disconnect her electricity supply.

40. The dispute was whether there was an agreement between the Appellant and the 2nd Respondent that the meters would remain in the 2nd Respondent's plot and the same power line would also serve the 2nd Respondent. The Appellant insisted that there was an oral agreement to that effect but the 2nd Respondent denied the existence of such an understanding.

41. The trial Court after considering the evidence adduced ruled against the existence of such an oral agreement. I, will get back to this issue in due course.

42. The parties in this appeal took up issue with the trial Magistrate's finding that the Appellant had not established a cause of action. Their submissions on this issue are as captured hereinabove.

43. The 9th Edition of **Black's Law Dictionary** at page 251 states that a cause of action is "[a] group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person."

44. Therein, Edwin E. Bryant is cited as defining a cause of action in the **Law of Pleading Under the Codes of Civil Procedure 170 (2d ed. 1899)** thus:

"What is a cause of action? Jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be – (a) a primary right of the plaintiff actually violated by the defendant; or (b) the threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions or suits for injunction; or (c) it may be that there are doubts as to some duty or right, or the right beclouded by some adverse right or claim, which the plaintiff is entitled to have cleared up, that he may safely perform his duty, or enjoy his property."

45. Based on the said definition, it is clear that the plaintiff had a cause of action. Her claim was that an oral agreement between her and the 2nd Respondent had allowed her to maintain her meters on the 2nd Respondent's property. She was also asserting that if the meters were to be moved the cost ought to have been met by the 2nd Respondent. Her case was that the 1st Respondent was wrong in claiming that her electricity line was an illegal extension. Whether her cause of action was sustainable is a different thing altogether. What is important is that she had a justiciable issue that she had presented to the court and it cannot be said that she had no cause of action against the respondents.

46. The real question in this appeal is whether the Appellant was deserving of the orders sought in light of the evidence that was presented to the court. That takes me to the question as to whether the Appellant had established that the doctrine of estoppel was applicable in this case.

47. In **Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another [2014] eKLR** the Court of Appeal citing the English case of **Taylor's Fashions Ltd v Liverpool Victoria Trustees Co. Ltd (1982) Q2B 133** provided the ingredients of estoppel thus:

"It is possible to trace proprietary estoppel right back to the 17th century and for many years, there have been many attempts to lay down a definitive test for it. The case of Taylor's Fashions Ltd vs. Liverpool Victoria Trustees Co. Ltd (1982) QB 133, 151H-152A, per Oliver J shows that, in determining whether or not proprietary estoppel operates in a case, the court will look for three elements:

(i) A believed that he had or was going to have a right in or over B's property;

(ii) B created or encouraged the belief; and

(iii) A acted in reliance of the belief.”

48. The same Court commenting on the same subject in **748 Air Services Limited v Theuri Munyi [2017] eKLR** cited with approval its decision in **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR** in which it held that:

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited vs Development Finance Company of Kenya Limited, [2009] eKLR*. The words waiver, estoppel and acquiescence have also been defined by the Halsbury’s Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-

“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him”.”

49. A perusal of the judgement appealed against shows that the trial court found that there was no understanding between the Appellant and the 2nd Respondent that the meters serving the Appellant’s premises would remain on the 2nd Respondent’s plot.

50. In her evidence, the Appellant told the court that she applied for connection of power in 2004 and the application was approved through a letter dated 20th May, 2005. She thereafter made payment and the 1st Respondent supplied her with power. Her evidence was that it was in 2006 when she agreed with the 2nd Respondent that each one of them would pay for their consumption of electricity although the bills came in the Appellant’s name.

51. According to the Appellant, it was only in November, 2011 that she was summoned by the manager of the 2nd Respondent at Malindi and informed about the 2nd Respondent’s complaint about the power supply. The Appellant was acceptable to relocation of the power meters and cables on condition that she would not pay for such relocation. She was later issued with a notice of illegal extension and a quotation for the relocation. This was later followed by threats of disconnection by the 1st Respondent.

52. On her part, the 2nd Respondent’s evidence was that the meters were on her plot upon sub-division. She requested the Appellant to remove the meters but she did not respond.

53. When cross-examined, the 2nd Respondent testified that when she purchased the plot electricity had been connected but there were no meters. She at the same time stated that there was no electricity supply in her plot when she purchased it. She also stated that when she put up a store in 2005 the power lines were not in existence. She stated that she constructed the store in 2005.

54. Further cross-examination revealed that she purchased the plot in 2004 but the land sale agreement was signed in May, 2006.

55. Without bothering about the credibility of the Appellant and the 2nd Respondent, it is apparent that the land sale process took some time. As the sale was continuing, the process of the application, approval and installation of the electricity was also taking place. The 2nd Respondent stated that she did not agree for the Appellant’s meter box to remain on her plot.

56. The evidence therefore points to the fact that the 2nd Respondent had already taken over the possession of her plot at the time the meters were being fixed. If this was so, then the meters were fixed on her plot with her consent. This explains the fact that from 2006 until 2011 the 2nd Respondent never complained about the meter box belonging to the Appellant.

57. The facts as established would attract the application of estoppel against the 2nd Respondent. She had made the Appellant believe that she had a right over her property and she encouraged this belief when the meters were fixed with her knowledge and she never complained about them. She admitted that she never made a formal complaint to the Appellant even when she decided to complain to the 1st Respondent over five years later. I therefore find that the conclusion of the trial court that the 2nd Respondent was estopped from complaining about the meters was erroneous.

58. It was upon the 2nd Respondent to meet any expenses that were to be incurred in relocating the meters from her plot to that of the Appellant.

59. As for the notice of illegal installation issued by the 1st Respondent, it is clear that the same had no basis. The Appellant had followed the right process in having power installed and what was required was separation of the meters and relocation so that each party could have her meters on her plot. The action of the 1st Respondent was not backed by any law and neither was it reasonable and that explains why DW1 Geoffrey Situngu, the 1st Respondent’s business manager was at pains to explain or identify the regulations they used to issue the

notice to the Appellant. This is the kind of mess that providers of services like the 1st Respondent find themselves in when they unnecessarily entangle themselves in disputes between individual consumers. The 1st Respondent ought to have left the Appellant and the 2nd Respondent to resolve their dispute.

60. From what I have stated above, it is clear that the trial Court reached an erroneous decision. It ought to have entered judgement in favour of the Appellant. The appeal succeeds and the judgement of the trial Court is set aside and reversed. Judgement is entered for the Appellant as sought in the plaint amended on 5th December, 2012. This means that the Appellant's electricity cables and meter boxes will remain in the 2nd Respondent's premises who is however at liberty to move them to the Appellant's premises at her own expense. The Appellant shall have the costs of this appeal and the suit in the subordinate court from the respondents.

Dated, signed and delivered at Malindi this 3rd day of May, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT