



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL CASE NO.85 OF 2005

NAZMUDIN SHARRIF.....1ST PLAINTIFF

ALTAF SHARRIF.....2ND PLAINTIFF

FEROZ SHARRIF.....3RD PLAINTIFF

ARIF SHARRIF.....4TH PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

JUDGEMENT

The Plaintiffs originally moved to this Court by their plaint dated 30th September 2005 and which was later amended on 12th February 2013 seeking the following reliefs against the defendant:

I. Exemplary and aggravated damages for trespass

II. Special damages of Ksh.32,743,721

III. Costs of the suit

IV. Interest on (I), (II) and (III) at Court rates from the date of filing the suit till payment in full.

V. Any other relief the Honourable Court can deem fit and just to award.

The basis of the Plaintiff's claim is that at all material time relevant to this suit, they were the registered owners of land parcel No. **BUNGOMA/TOWNSHIP/608** (the suit premises) and in or about February 2001, the defendant unlawfully, without any colour of right and in total disregard to the plaintiffs' possession thereof trespassed on the suit premises by erecting service lines, cables and stay wire without first obtaining the plaintiffs consent in writing. And despite the plaintiffs' protestations, the defendant had neglected to remove the said service lines, cables and stay wire nor seek the plaintiffs' approval and had continued erecting the service lines cables and stay wire on the suit premises hence rendering the said trespass provocative and a gross violation of the plaintiffs' rights. That the said trespass continued unabated until 17th October 2002 when the defendant's personnel removed their offending lines without making any amends, apologies or explaining their acts of trespass and continued occupation of the plaintiffs property. As a result, the plaintiffs were unable to commence construction of a multi-million shopping complex on the suit premises for a period of 15 months which resulted in substantial loss of Ksh.32,743,721 as particularized in paragraph 6 of the amended plaint. The plaintiffs therefore commenced proceedings against the defendant by filing **BUNGOMA SPMCC CASE NO.333 of 2002** seeking injunctive relief and the removal of the offending lines, cables and wires but since the lower Court had no jurisdiction, the plaintiffs filed this suit.

The defendant filed a defence denying that the plaintiffs are the registered proprietors of the suit premises or the allegations of trespass levelled against it. The defendant pleaded that the plaintiffs are not entitled to the remedies sought and that this suit is time barred and is therefore an abuse of the Court process and further, that the plaint is not even properly verified and this suit should be dismissed with costs.

A reply to the defence was filed in which the plaintiffs reiterated fully the contents of their plaint and denied that the suit is out of time or that plaint was not properly verified.

The trial commenced before **OMOLLO J** on 19th November 2011 when the 1st plaintiff **NAZMUDIN SHARRIF (PW1)** and **ENOCK BARONGO (PW2)** testified.

The hearing was adjourned to 10th December 2012 when **GEORGE OBONDO OGUTU (PW3) and ALTAF ABDULLAHI SHARRIF (PW4)** who holds a power of attorney on behalf of **FEROZE SHARRIF** (the 3rd plaintiff) testified. The plaintiffs' case was then closed on 27th February 2014 after **NAZMUDIN SHARRIF (PW1)** had been re-called to produce some receipts after which the defence case was fixed for hearing on 30th June 2014.

Following **OMOLLO J's** transfer to Mombasa, the late **MUKUNYA J** took over on 9th December 2014 and the parties agreed that the case proceeds from where **OMOLLO J** had left it. However, when the hearing next came up on 4th May 2015 for the defence case, there was no attendance by the defendant's representative or their Counsel and on the application by Counsel for the Plaintiffs, **MUKUNYA J** marked the defence case as closed and invited submissions for 10th June 2015. The parties subsequently filed a consent allowing the defendant to re-open its case and call witnesses. When the defence case came up for hearing on 4th October 2017, again there was no appearance by the defendant or its Counsel and **MUKUNYA J** closed the defence case and on 18th December 2017 delivered a judgement in favour of the plaintiffs in the sum of Ksh.16,665,616 made up as follows:

(a) Loss of rental income from the shops Ksh.5,852,831/-

(b) Loss of income from supermarket Ksh.9,598,261/-

(c) Ksh.414,524 as agreed by the parties

(d) Exemplary damages Ksh.500,000

(e) Costs and interest from the date of judgment

The judgement was however set aside by consent of the parties by a letter dated 14th May 2018 and the defendant was allowed to call witnesses. That was confirmed by the parties when they appeared before me for directions on 21st May 2018 when I took over the matter.

That allowed **Mr. OWITI AWUOR (DW1)** the defendant's Manager for legal services to testify and he adopted as his evidence the statement signed by him on 13th June 2018 and also produced as the defendant's documentary evidence, the list of documents dated 3rd November 2009. He denied that the defendant had placed power lines on the suit premises adding that such lines are invariably placed along road reserves which was the position in this case. The witness also doubted if the plaintiffs could have commenced construction on the suit premises in July 2002 when the power lines were in situ.

He also dismissed the reports produced by the plaintiffs as based on presumptions adding that the figures in the report are of 2009 yet the allegations levelled against the defendant occurred during the period 2001 to 2002. He added further that as per the Certificate of search filed by the defendant, the plaintiffs obtained title on 7th April 2005.

Submissions were thereafter filed both by **MR. MASINDE ADVOCATE** instructed by **MASINDE & COMPANY ADVOCATES** for the plaintiffs and **Mr. SIGEI ADVOCATE** instructed by **SINGOEI, MURKOMEN AND SIGEI ADVOCATES** for the defendant.

I have considered the evidence as recorded both by my predecessors and myself, the documentary evidence and the submissions by Counsel.

In my view, the following issues call for my determination:

- 1. Whether the suit is time barred**
- 2. Whether the plaintiffs are the owners of the suit premises**
- 3. Whether the defendant trespassed on the same and;**
- 4. If so, the quantum of both special and general damages available to the plaintiffs**
- 5. Who shall bear the costs.**

1. WHETHER THE SUIT IS TIME BARRED

It has not been submitted in what respect this suit is time barred. A trespass is a continuing tort. The cables were placed on the suit premises in 2001 and removed in October 2002. This suit was filed in September 2005. It is not time barred.

2. WHETHER THE PLAINTIFFS ARE THE OWNERS OF THE SUIT PREMISES

NAZMUDIN SHARRIF (PW1) testified that he and the other plaintiffs bought the suit premises on 14th February 2000 from the late **Hon. PETER KISUYA** and intended to use it for the construction of a super market, stalls, restaurant and a bar. He recalled that in the same month, a representative of the defendant approached him seeking his consent to sign wayleaves but he declined as he had use for the suit premises. The witness also produced as part of their evidence the Certificate of lease with respect to the suit premises.

Under section 27 of the repealed Registered Land Act under which the said Certificate was issued, the plaintiffs who are named as the proprietors therein are therefore vested with the absolute ownership of the suit premises together with all the rights and privileges belonging or appurtenant thereto. No evidence was led by the defendant to suggest that the said Certificate was obtained fraudulently. Indeed **GEORGE OBONDO OGUTU (PW3)**, the Land Registrar Bungoma, confirmed in his testimony that the plaintiffs acquired ownership of the suit premises on 16th February 2000.

All that I heard **Mr. OWITI AWUOR (DW1)** the defendants witness say is that the said Certificate was issued in 2005 when the suit was filed. That does not take away the fact that from 2000 when the plaintiffs purchased the suit premises from **Hon. KISUYA**, they were entitled to the beneficial enjoyment thereof which includes ejecting trespassers and suing for damages. I have no hesitation in finding therefore that not only are the plaintiffs the proprietor of the suit premises but they are entitled to maintain an action for trespass against the defendant.

3. WHETHER THE DEFENDANT TRESPASSED ONTO THE SUIT PREMISES BY LAYING CABLES E.T.C. THEREON

Both **NAZMUDIN SHARRIF (PW1)** and his brother **ALTAF SHARRIF (PW4)** testified in their evidence in chief that the defendant erected their power lines on the suit premises without their consent. Part of the documentary evidence produced by the plaintiffs is a demand letter by their advocates dated 16th March 2001 addressed to the Defendants Managing Director. In paragraph two of the said letter, it is stated as follows:

1. "On diverse dates in the month of February 2001, your personnel from your Construction Department erected a service line across our clients plot without our client's consent or permission contrary to the Wayleaves Act and Tortious Act (sic) our clients rights have been contravened and the value of their property diminished as they are unable to carry out any developments on the property."

The Defendant responded by their letter dated 3rd April 2001 saying they were ***"instituting investigations into your client's allegations. We shall revert to you as soon as the position is established."***

There is no indication whether those investigations were ever carried out and with what results. The Defendant has made a mere denial in the defence.

Under **Section 46(1) of the Energy Act**, no person shall enter upon any land other than his own to lay or connect electricity supply lines without the permission of the owner. Sub-section (2) of that provision provides as follows:

(2) "The permission sought in sub-section (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry" Emphasis added.

The Defendant has not availed any such notice as required by law that authorized them to lay their cables on the plaintiffs' land. The Defendants witness **AWUOR OWITI (DW1)** stated in paragraph 4 of his witness statement as follows:

"I did establish that the Defendant has never trespassed into the plaintiff's property at any given point in time and erected poles and or installed power lines therein."

However, there is uncontroverted evidence that the plaintiffs had earlier filed **BUNGOMA SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE NO.333 of 2002** seeking an order restraining the Defendant from erecting service lines on the suit premises. An order was issued on 16th July 2002 and according to **NAZMUDIN SHARRIF (PW2)** it was not until 17th October 2002 that the offending cables were removed. The subordinate Court could not have issued the order dated 16th July 2002 unless it was satisfied that the Defendant was trespassing on the suit premises. In the circumstances, I am satisfied that the plaintiffs have established a case of trespass on the suit premises by the Defendant.

4. QUANTUM OF DAMAGES AVAILABLE TO THE PLAINTIFFS ARISING OUT OF THAT TRESPASS

The plaintiffs sought both Exemplary and aggravated damages for trespass as well as special damages.

On the special damages, there was, uncontroverted evidence that the plaintiffs intended to use the suit premises as a super-market, shops and a restaurant. There was a report from PKF a firm of Accountants and Business Advisers which was produced by **ENOCK BARONGO (PW2)** quantifying the loss that the plaintiffs suffered as a result of delays by the Defendant in removing their service lines from the suit premises. The loss included loss of rental income, rising construction costs and loss of profits from the supermarket for 15 months.

By their amended plaint, the plaintiffs sought special damages of Ksh.32,743,721. According to page 10 of the report from PKF dated May 2009, the plaintiffs made the following losses:

- 1. Rental income from shops – Ksh.5,852,831**
- 2. Rental income from supermarket – Ksh.9,598,262**
- 3. Loss of net profit from food court, bar and restaurant Ksh.3,043,407**

4. Escalation of costs of construction Ksh.1,617,786

5. Interest on borrowing Ksh.2,500,000

6. Interest on above claims accruing from October 2002 to May 2009 – Ksh.18,840,704.

According to the oral evidence of **ENOCK BARONGO (PW2)**, the Plaintiffs total loss as at May 2009 was Ksh.41,564,378 and Ksh.51 Million as at the time the witness was testifying on 19th December 2012. However, I find some of the claims to be speculative. For instance, there is no evidence that the plaintiffs borrowed money and therefore the interest on borrowing is not available. So too the loss of profits from the food court, bar and restaurant. In his submissions Counsel for the Defendant submitted that the report by PKF is not admissible because it was not produced by the maker as required under **Section 35(4) of the Evidence Act**. However, the record is clear that the said report was produced on 19th November 2012 by **ENOCK BARONGO (PW2)** and marked as Exhibit No. P5. It is rather late in the day to raise issues about its admission in evidence. And in attempting to assail the plaintiffs in the manner in which they led evidence to prove the claim for special damages, Counsel for the Defendant cited the case of **CAPITAL FISH KENYA LTD V KENYA POWER & LIGHTING COMPANY LTD 2016 eKLR** to the effect that *“pieces of paper produced as evidence of income could not be accepted as correct accounting practice”* and therefore *“did not constitute proof of special damages.”* That may be so. However, I do not for once consider the report by PKF to come within the description of *“pieces of paper”*. **ENOCK BARONGO (PW2)** who produced the report gave his professional qualifications which included a Masters Degree in Finance and in my view, the said report is credible evidence upon which a claim for special damages can be founded. In any case, as was held by the Court of Appeal in **MITCHELL COTTS (K) LTD V MUSA FREIGHTERS (2011 eKLR)** special damages can be proved by other evidence. The report by PKF is quite clear on what rental income the plaintiffs would have earned having done a comparison of neighbouring properties. It is also clear that the construction on the suit premises stalled for some 15 months. Costs obviously escalated.

I find that the plaintiffs have proved the following special damages claims as required in law.

(a) Loss of rental income from shops – Ksh.5,852,831

(b) Loss of rental income from supermarket – Ksh.9,598,262

(c) Escalation on construction costs due

to delays – Ksh.1,617,786

TOTAL - Ksh.17,068,879

Although Counsel for these parties admitted by consent some receipts including for Ksh.414,000 being the fees for the report by PKF and Ksh.121,800 for consultancy, those sums were not specifically pleaded. The Court can only award what is pleaded and proved and although those sums were proved, they were not pleaded and are not available to the plaintiffs.

The plaintiffs also sought Exemplary and aggravated damages. Exemplary damages are meant to punish the defendant for oppressive and arbitrary conduct. They may also be awarded where the defendant has acted recklessly. In this case, the defendant is a statutory body well aware that under the **Energy Act**, it must obtain the consent of the owner of any land upon which it intends to lay its power lines. It nonetheless continued with its trespass on the plaintiffs' land and it was not until the plaintiff obtained a Court order that it removed the offending lines. Neither Counsel made any quantification as to the amount of damages that the Court should award under the head of exemplary damages. It is always a good practice for Counsel to quantify what they consider reasonable even if what they seek is the dismissal of the suit. In the circumstances of this case, I will award Ksh.500,000 as Exemplary damages.

There will be judgement for the plaintiffs against the defendant in the following terms:

1. Special damages Ksh.17,068,889

2. Exemplary damages Ksh.500,000

3. Costs

4. Interest on (1) from date of filing suit and on (2) from date of this judgment.

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018

Judgement dated, delivered and signed in open Court this 4th day of October 2018 at Bungoma.

Mr. Masinde for plaintiffs present

Ms. Mumalasi for Mr. Sigei for Defendant present

Right of Appeal.

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018

MS. MUMALASI: Pray for 30 days stay of execution and certified copies of proceedings and judgement.

MR. MASINDE: No objection.

COURT: Stay of 30 days is granted. Certified copies of proceedings and judgement to issue upon payment of the charges.

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018