



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 797 OF 2017

GEORGE JOSEPH KANG'ETHE.....1ST PLAINTIFF

ELLA KARWITHA KANG'ETHE.....2ND PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITED..... DEFENDANT

JUDGEMENT

By a Plaint dated the 4th July, 2017, the Plaintiffs' pray for judgement against the Defendant for:

- a) A declaration that the Defendant has trespassed on the suit properties without the Plaintiffs' consent and caused permanent and irreparable damages thereto;
- b) An injunction compelling the Defendant, its servants, agents or employees, to cease the trespass and remove all of the concrete poles with heavy duty electric cables from the suit properties;
- c) General damages;
- d) Compensatory damages;
- e) Costs of the suit
- f) Interest on (c), (d) and (e) above
- g) Any other relief this court may deem fit and just to grant

The Defendant filed its Statement of Defence dated 26th July, 2017 where it denied interfering with the Plaintiffs' possession and enjoyment of their suit properties. It further denied entering into the suit properties, cutting down trees, digging up holes or erecting concrete poles with heavy duty electric cables without the Plaintiff's consent or permission thereby occasioning permanent and irreparable damage on the suit properties. It further denied being served with demand or notice of intention to sue and sought for the suit to be dismissed with costs.

Evidence of Plaintiffs

The 1st Plaintiff as PW1 testified that he is the registered owner of land parcel number Ngong/Ngong/15678. It was his testimony that on or about 2013, the Defendant entered in his land without his knowledge, authority and permission proceeded to cut down trees, erected over 10 poles which were concrete and constructed high voltage cables thereon. Further, that the Defendant continues to trespass upon his land with impunity. He explained that once the electric posts were put on the land, he has been unable to sell it and the part occupied by electric poles cannot be developed hence he is unable to use his land. He claimed to have incurred losses as he tried to sell the land without success, yet it is a high prime area. He sought for orders as per the Plaint and any other relief the court deems necessary.

On cross examination he testified that the trespass occurred in 2013 or there about when he was using the land for agricultural purposes. He explained that he protested to the local offices and engaged the Defendant in 2017 through a demand letter. Further, that he used a small portion of the suit land for agriculture while he has also constructed houses thereon. He further testified that he suffered damages as a result of the trees that were cut. He confirmed lacking evidence from the Kenya Forest Service in respect to the type of trees and their value as his land is private property. He further confirmed having no proof of engagement with prospective buyers. On Re-examination he clarified that the high voltage cables supply power to Magadi Soda Company.

The second Plaintiff as PW2 testified that she is the registered owner of land known as L.R. No. Ngong/Ngong/15677. She explained that in 2013 the Defendant cut trees from her land, erected poles and put high voltage cables thereon. She confirmed incurring losses as she is unable to sell the houses, she had put up due to the poles and high voltage cables.

During Cross examination she testified that she was absent when the poles were erected on her land in 2013 but insisted it is the Defendant who had done so.

The Plaintiffs' produced the following documents as exhibits: Certificates of Title for LR Nos. Ngong/Ngong/15677 and 15678; Certificates of Official Search for LR Nos. Ngong/Ngong/15677 and 15678; Photographs of the Suit Properties; Demand Letter; Certified Copy of the Valuation Report dated the 12th March, 2018 on the properties known as Ngong/Ngong/15677 and 15678.

Evidence of the Defendant

The Defendant never presented any evidence in support of its Defence.

Submissions

Plaintiffs' Submissions

In their submissions, the Plaintiffs' raised two issues for determination to wit: Whether the Defendant has trespassed on their suit properties and if they were entitled to the reliefs sought in the Plaint. They submitted that they are the owners of the suit properties as evident in their Certificate of Titles and Certificates of official search. They contended that the Defendant did not issue them with any notice requesting for their permission to enter upon the suit properties but instead proceeded to intentionally, wilfully, knowingly and voluntarily enter therein, cut down trees, dig up holes including erecting concrete poles with heavy duty electric cables without their knowledge, consent, or any legal justification thus occasioning upon the suit properties permanent as well as irreparable damage. To buttress their assertions they referred to section 46 of the Energy Act, 2006 which provides that, "**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 purpose of paragraph (a) except with the prior permission of the owner of such land.**"(2) **Permission sought in subsection 1 above shall be done by way of notice which shall be accompanied by statement of particulars of entry.** They further relied on the case of **John Kiragu Kimani vs. Rural Electrification Authority (2018) eKLR**. The Plaintiffs submitted that once a trespass claim to land is established it is actionable per se and proof of general damages is not necessary. To support their arguments, they relied on the decision of: **Duncan Nderitu Ndegwa Vs Kenya Pipeline Company Limited and another (2013) eKLR**. The Plaintiffs' further submitted that the Court should compel the Defendant to cease trespassing on the suit properties and remove its concrete poles and heavy duty electric cables from thereon; otherwise the trespass will continue to occur rendering the Plaintiffs with the unnecessary burden of a continuing trespass and unlawful acquisition and alienation of their properties without compensation. To support these averments, they relied on the case of: **Samwel Motari Nyambati vs KPLC (2018) eKLR**. In regards to compensatory damages, they submitted that the Defendant's actions have occasioned them an injury that requires compensation. Further, they had demonstrated that the Defendant unlawfully entered the suit properties, and interfered with the use and occupation on the suit properties. To support this argument, they relied on the decision of **Kenya Tourist Development Corporation vs. Sundowner Lodge Limited (2018) eKLR**.

On mesne profits, the Plaintiffs submitted that the Defendant has been in unlawful occupation of the suit properties since 2013 and denied them income which they would have made therefrom. Further, that they entitled to mesne profits at the rate of Kshs. 250, 000 per month from 2013 until the Defendants vacate the properties.

Defendant's Submissions

The Defendant submitted that the Plaintiffs failed to prove that it installed electricity lines in their suit properties. It contended that the Plaintiffs were not present when the electricity poles were erected and it is not the only entity tasked with the laying of electricity lines. Further, that the Plaintiffs' suit against it, is premature and uncertain, and the claim of trespass is not proven to a reasonable degree. It further submitted that compensation for the felling of trees is a specific damage and ought to have been proved during the hearing. However, no documentation such as a certificate of cost from the Kenya Forest service was ever produced to illustrate the number of trees felled and their value. Further, that damages cannot be awarded for the felling of trees where the same has not been specifically proved. To support its arguments, it relied on the decision of **Phyllis N. Mbaluto vs. Kenya Power and Lighting Co. Ltd (2012) eKLR**. On general damages, it urged the Court to award the sum of Kshs. 100,000 and relied on the case of **Obadiah K. Macharia vs. Kenya Power and Lighting Company (2016) eKLR**.

Analysis and Determination

Upon consideration of the Plaint, Statement of Defence, Testimonies of the Witnesses, Exhibits and Submissions, the following are the issues for determination:

- Whether the Defendant trespassed on the Plaintiffs' land parcel numbers Ngong/ Ngong/ 15677 and 15678 respectively.
- Whether the Plaintiffs are entitled to the Orders sought in the Plaint.

It is not in dispute that the 1st and 2nd Plaintiffs are the registered proprietors of land parcel numbers Ngong/ Ngong/ 15678 and 15677 measuring 1.21 and 0.40 hectares respectively as evident in their respective Certificates of Title and Official searches. It is further undisputed that there exists electricity posts, high voltage cables and power lines erected in the Plaintiffs' suit properties as evident in the photographs. What is in dispute is that the Defendant never sought authority or consent from the Plaintiffs before the said electricity posts and high voltage power lines were erected over the suit properties. The Defendant in its Defence denied carrying out any activities on the Plaintiffs' parcels of

land. It contended that the Plaintiffs failed to prove that it is the one that erected the said electricity poles and constructed power lines thereon.

The Plaintiffs' in their evidence claimed that the Defendant trespassed on their land and should have sought for their consent to use it as electricity wayleaves. From the Court Records, the Defendant except for filing a Defence failed to present any evidence to controvert the Plaintiffs' averments. From the photographs which were produced as exhibits, it is evident that there are indeed high voltage power lines traversing the suit properties. Even though the Defendant in its Defence denied putting up the said power lines, it never presented any evidence to the contrary that a different entity did so. It further emerged that the Defendant never sought the Plaintiffs' consent before using their parcels of land as electricity wayleaves. To my mind, I opine that the Defendant chose to overlook procedural regulations in respect to construction of the said power lines as set out in sections 171 and 173 of the Energy Act Cap 1 of 2019 which provides that; **"171 (1) A person who wishes to enter upon any land, other than his own to—(a) undertake exploratory activities relating to exploitation of energy resources and development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, or drilling exploratory wells; (b) carry out a survey of the land for the purposes of paragraph (a); shall seek the prior consent of the owner of such land, which consent shall not be unreasonably withheld. Provided that where the owner cannot be traced, the applicant shall give fifteen days' notice, through appropriate mechanisms including public advertisement in at least two newspapers of nationwide circulation and an announcement in a radio station of local coverage for a period of two weeks."**

While section 173 of the Energy Act provides that; **(1) An owner, after receipt of a request for consent under section 171 may consent in writing to the development of energy infrastructure, upon agreement being reached with the applicant as to the amount of compensation payable, if any, and any consent 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 consent to the application except under this Act, shall be paid to the legal representative of the owner; and (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 development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, drilling geothermal wells or coal long as the claim is made within three months after the development."**

Further, section 3 of the Trespass Act stipulates thus: **"(1) 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. (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him."**

Based on the facts before the Court and in relying on the above cited legal provisions, I find that the Defendant's actions were in contravention of the law as stipulated above. I hold that illegal entry to the Plaintiffs' suit properties and the subsequent construction of power lines thereon indeed amounted to trespass. The Plaintiffs contend that the Defendant's actions further amounted to continuous trespass. Continuous trespass is defined in the Black's Law Dictionary 8th edition as, **"A trespass in the nature of a permanent invasion on another's property."**

In the case of **Eliud Njoroge Gachiri vs. Stephen Kamau Nganga elc no. 121 of 2017**, It was held that **"However in a case of continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm."**

From the evidence placed before the Court, I find that the Defendant's unauthorized entry and continued invasion of the Plaintiffs' suit properties by constructing power lines and remaining in occupation thereon from 2013 to date as evidenced by the photographs produced as an exhibit amounts to continuous trespass which has interfered with their rights to occupation and enjoyment of the suit properties.

As to whether the Plaintiffs are entitled to the Orders Sought in the Plaintiff.

The Plaintiffs sought for various reliefs including permanent injunction, general as well as compensatory damages and costs as against the Defendant. The Plaintiffs further filed a Schedule of Loss and Damages dated the 16th August 2017 wherein they particularized loss and damages as follows; Unlawful trespass onto the suit properties in violation of the Plaintiffs' property rights – Kshs. 10,000,000, Cutting down of trees- Kshs.1,000,000, Digging up holes and erecting concrete poles affixed with heavy duty electric cables-Kshs.750,000, Restricting the Plaintiffs' access, possession and enjoyment of the suit properties- Kshs.15,000,000, and Preventing future developments on the suit properties- Kshs. 25,000,000.

In the case of **Fleetwood Enterprises Ltd v Kenya Power & Lighting Co. Ltd [2015] eKLR** Justice Angote while dealing with an issue of quantum of damages in trespass held that, **"The award of damages for trespass is discretionary in nature. The discretion by the court should however be exercised judiciously and all relevant factors should be considered. The value of land is a determinant factor where parties consent that the power line should not be moved. In this case the Plaintiff wanted the power lines removed. He went on to state, "it is trite law that the value of land keeps on appreciating, and had the plaintiff developed the 16 parcels of land 5 years ago, they would have generated income from them. In the circumstances of this case, I would agree with the Plaintiff's advocate submissions that had the 16 plots been developed were it not for the connected electric line. The plaintiff would have earned at least Ksh. 5000 per month. However, due to the vagaries that come with such developments, I will reduce the said figure to an amount of Kshs. 4,000 per plot per month. The total payable damages to the defendant's acts of trespass over the 16 plots for a period of 5 years will therefore be Kshs 4,000*12*5*16= Kshs. 3,840,000."**

The Court of Appeal upheld the above decision, and dismissed the Appeal in **Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR** and stated that, **"Trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case."**

The 1st Plaintiff as PW1 testified that he suffered damages in respect to the trees that were cut. He also tried to sell his parcel of land without

success due to the electricity posts and high voltage cables. The 2nd Plaintiff testified that she also tried to put up houses for sale but was unable to do so due to the electric posts and high voltage cables. Further, that they were only using a portion of land to grow maize.

With respect to general damages, the Defendant conceded and submitted that the Plaintiffs should be awarded Kshs.100, 000.00. In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR P. Nyamweya J. held: -**

“...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass”

In so far as the Plaintiffs did not provide evidence on the loss they had incurred due the Defendant’s acts of trespass but in associating myself with the decisions cited above and noting that the Defendant have been on the suit properties from 2013 to date which is 7 years, I find that they are entitled to Kshs. 4 million as general damages for the continuous trespass.

On compensatory damages, the Plaintiffs particularized the loss and damages to an aggregate of Kshs.51, 750,000. They further submitted that they were entitled to mesne profits of Kshs. 250,000/= per month.

In the case of **Capital Fish Kenya Limited Vs The Kenya Power & Lighting Company Limited [2016] eKLR**, the Court of Appeal stated that: **‘No evidence whatsoever was led by the appellant on this aspect. This, as we already stated elsewhere, was an abstract figure which was thrown to the court with a mere statement that “this is the loss the appellant has suffered. Please award it to the appellant.” In the case of *Ryce Motors Ltd & Another vs Muchoki (1995-98) 2 E. A 363 (CAK) commenting on statements of accounts presented without more as in this case stated, this Court observed;***

“... The pieces of paper produced as evidence of income could not be accepted as correct accounting practice. They did not constitute proof of special damages.”

For all the foregoing reasons, we are satisfied that although the trial court correctly found that the special damages had been specifically pleaded, there was no credible evidence whatsoever that proved the pleaded special damages. The trial court’s finding on that score can thus not be faulted.’

In applying the principles in this case to the circumstances at hand, I opine that the burden of proof was upon the Plaintiffs to prove how they had arrived at these figures. The Plaintiffs filed a schedule of loss and damages dated the 16th August, 2017 which they produced as an exhibit in Court but failed to tender evidence to support the itemized claims therein. Except for the Valuation Report, they never tendered any further evidence to prove the special damages claimed including the mesne profits. Be that as it may, I note the Plaintiff produced the Valuation Report which indicated the value of the land as well as the developments thereon. The Defendant never offered any contrary Valuation Report nor evidence to confirm that the High Voltage Power Lines did not belong to it and that the value of the land as well as the houses were different. In the circumstances, I will base my quantum on the Valuation Report prepared by Icon Valuers dated the 12th March, 2018 where they remarked as follows: **‘ In arriving at the current market value of the property, for the stated purpose, it is worth noting that the construction of the power lines prohibits the current owners from utilizing the property under its highest and best use (HBU). Indeed, this is evidenced by the fact that the current property cannot attract any demand for either rental/ sale purposes because of the real danger posed by the over flying power line. ‘**

Further in the case of ***SJ vs. Francesco Di Nello & Another [2015] eKLR*** the Court of Appeal held that: **“Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.”**

In the circumstances and relying on the decision cited above, I will proceed to assess the compensatory award by considering the undisputed value of the suit properties which is Kshs. 12 million per acre. Noting that the suit properties is four acres, the value of the whole land is Kshs. 48 million. However, from the evidence before Court, the Plaintiffs admitted using a portion of the land to grow maize. Further, from the photographs, it is not indicative that the power lines have traversed the whole four acres. With that in mind, I believe an award for the use of two acres would suffice and will proceed to award the Plaintiffs Kshs. 24 million for loss of use of the said two acres of land.

Since the Plaintiffs confirmed their inability to utilize the houses constructed on the suit land which were indicated in the Valuation report, I will proceed to award the Plaintiffs the value of the houses which is Kshs. 12 million. The Plaintiffs have sought for an injunction but admit that the power lines supply power to Magadi Soda Company. Further, since I have already compensated them for the portion utilized by the Defendant, I will decline to restrain the said Defendant from using the said portion. I further opine that it would be pertinent if the Plaintiffs and Defendant had a structured Wayleave Agreement for the two acres already compensated for.

It is against the foregoing that I find the Plaintiffs have established their case on a balance of probability and will proceed to make the following final orders:

- i. A declaration be and is hereby issued that the Defendant has trespassed on the suit properties without the Plaintiffs’ consent and caused permanent and irreparable damages thereto;
- ii. General damages for continuous trespass is awarded at Kshs. 4 million
- iii. Compensatory damages is awarded at Kshs. 36 million

iv. Costs of the suit is awarded to the Plaintiffs

v. Interest on (ii), (iii) and (iv) above until payment in full.

Dated Signed and Delivered via email this 27th Day of July 2020.

CHRISTINE OCHIENG

JUDGE