



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 869 OF 2017

EUNICE NKIROTE RINGERA.....PLAINTIFF

VERSUS

THE KENYA POWER AND LIGHTING COMPANY...DEFENDANT

JUDGEMENT

By way of a Plaint dated 26th September, 2017 the Plaintiff prays for judgment against the Defendant and seeks the following reliefs;

- a) A declaration that the Defendant has trespassed on the suit property without the Plaintiff's consent and caused permanent and irreparable damage 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 property;
- c) General damages;
- d) Compensatory damages;
- e) Costs of the suit;
- f) Interest on [c], [d], and [e]

In response to the claim, the Defendant entered appearance and filed its Defence on 16th October 2017 where it denied interfering with the Plaintiff's possession and enjoyment of the suit land. It contended that it did not enter the suit land, cut down trees, dig up holes or erect concrete poles with heavy duty electric cables without the Plaintiff's consent thereby occasioning permanent and irreparable damage on it. The Defendant also denied being served with demand or notice of intention to sue, and it prayed for this suit to be dismissed with costs.

Evidence of the Plaintiff

The Plaintiff as PW1 testified that she is the owner of Ngong/Ngong/15676 hereinafter referred to as the 'suit land'. She explained that around the year 2013, the Defendant entered the suit land without her permission, cut down trees, dug deep holes, erected high concrete poles including putting high voltage wires thereon. She claimed to have incurred irreparable damages as she cannot use the land because of the high voltage wires thereon. It was her testimony that she could not sell the land or build on it but could only plant maize thereon.

On cross examination she testified that the Defendant trespassed on her land while she was away. She was emphatic that it is the Defendant that erected the poles as it is mandated to provide electricity. She did not know of another company that supplied high voltage electricity. She explained that around 7 up to 10 poles had been erected on her land. She testified that she had produced evidence in court on the type of trees that were cut including their value. She confirmed not residing on the suit land nor having built any structures thereon. She produced her Certificate of Title and Official Search; Photographs; Demand Letter and Certified Copy of the Valuation Report as her exhibits.

Evidence of the Defendant

The Defendant never tendered any evidence.

Plaintiff's Submissions

The Plaintiff in her submissions raised two issues for determination which are: Whether the Defendant had trespassed on her land and if she

was entitled to the orders sought in the Plaintiff.

On the issue of whether the Defendant trespassed on her land, she submitted that she was the owner of the said land as evident in the Certificate of title.

On the issue of trespass, she contended that the Defendant never issued her with any notice requesting her permission to enter upon the suit land but instead proceeded to intentionally, willfully, knowingly and voluntarily enter thereon and cut down trees, dig up holes, erect concrete poles with heavy duty electric cables without her knowledge, consent, or any legal justification thus occasioning her permanent including irreparable damage. To buttress this assertion she relied on section 46 of the Energy Act, 2006 which provides as follows, “ **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.** She further relied on the case of **John Kiragu Kimani vs Rural Electrification Authority (2018) eKLR.**

On the issue of whether she is entitled to the orders sought in the Plaintiff. She submitted that she had discharged the burden of proof on a balance of probability. She contended that once trespass to land is established, it is actionable per se and proof of general damages is unnecessary. To support her arguments, she relied on the decision of: **Duncan Nderitu Ndegwa vs. Kenya Pipeline Company Limited & Another (2013) eKLR.**

She further submitted that the court should compel the Defendant to cease trespass and remove the concrete poles and heavy-duty electric cables from the suit land otherwise the said acts will persist and render her with the unnecessary burden of a continuing trespass and unlawful acquisition including alienation of her land. To buttress her averments, she relied on the decision of **Samwel Motari Nyambati vs KPLC (2018) eKLR.**

As regards compensatory damages, she submitted that the Defendant’s actions have occasioned her an injury that needs compensation. She contended that she had demonstrated that the Defendant unlawfully entered her land and interfered with her use and occupation on it. To support her arguments, she relied on the decision of **Kenya Tourist Development Corporation vs. Sundowner Lodge Limited (2018) eKLR.**

On mesne profits, she submitted that the Defendant has been in unlawful occupation of the suit properties since 2013. For that reason, she has been denied income which she would have made from the use of her land and sought for mesne profits at the rate of Kshs. 100, 000 per month from 2013 until the Defendant vacates the suit land.

Defendant’s submissions

The Defendant in its submissions raised two issues for determination to wit; whether the Plaintiff sufficiently proved that it was the Defendant that installed the electricity line and if the Plaintiff is entitled to damages. On the issue of whether the Plaintiff sufficiently proved that it was the Defendant that installed the electricity lines, it submitted that the Plaintiff was absent at the time when the electricity poles were erected. The Plaintiff failed to adduce documentation and illustrate that she engaged the Defendant on the matter at the time the poles were erected. It further submitted that it is not the only entity tasked with the laying of electricity lines. Further, the Plaintiff had not proved her case to a reasonable degree that it trespassed and placed the poles on the suit land.

On the issue of compensatory and general damages, it submitted that compensation for the felling of trees is a specific damage and ought to have been proved during the hearing. Further, that no documentation such as a Certificate of Costs from the Kenya Forest Service was produced to illustrate the number of trees felled and their value. The Defendant urged the Court to award General Damages to the sum of Kshs. 100,000 and relied on the case of **Obadiah k. Macharia vs. Kenya Power and Lighting Company Ltd (2016) eKLR** where Justice L.N. Waithaka proceeded to award Kshs. 100,000 as general damages for trespass.

Analysis and Determination

Upon consideration of the Plaintiff, Defence, Witness Testimony, Exhibits and Submissions, the following are the issues for determination:

- Whether the Defendant trespassed onto the Plaintiff’s land parcel no. Ngong/Ngong/15676.
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.

As to whether the Defendant trespassed onto the Plaintiff’s land parcel no. Ngong/Ngong/15676.

It is not in dispute that the Plaintiff is the registered proprietor of land parcel number Ngong/ Ngong/ 15676 and that high voltage power lines have been constructed thereon. What is in dispute is whether the Plaintiff’s consent was obtained prior to the erection of the said high voltage power lines on the suit land. The Defendant denied carrying out any activities on the suit land and contended that the Plaintiff was absent when the said electricity poles and power lines were erected thereon. The Plaintiff as PW1 was however emphatic that it is the Defendant who constructed the Power lines thereon. It is trite that construction of a wayleave on private land requires consent of its owner. In this instance, the Defendant never adduced any evidence to confirm that the Plaintiff’s consent was obtained before the high voltage power lines were erected thereon and the alternative government institution that did so.

Since the Defendant never offered evidence to the contrary, and the burden of proof was upon it to do so, I find that it overlooked procedural regulations in the construction of high voltage power lines on the suit land 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 states thus; (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.”

Section 3 of the Trespass Act further provides that, “(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.”

From the evidence before Court while relying on the legal provisions cited above, I opine that the Defendant’s aforementioned actions amount to an illegal entry into private property and can be deemed as trespass. The Plaintiff contended that if the Defendant is not directed to remove the said high voltage power lines from the suit land, the trespass will be continuous. 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** etc no. 121 of 2017 “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.”

Further in the case of **John Kiragu Kimani vs. Rural Electrification Authority (2018) eKLR** the Court held that: “ Following that evidence, it is clear from the record that no consent, authority or permission of the Plaintiff was ever sought and/or obtained. No notice was given to him of the impending project as contemplated by section 46 of the Energy Act. The irresistible conclusion is that the Defendant is guilty of trespass.”

The Defendant constructed high voltage power lines which have remained on the suit land since 2013 to todote as evident by the photographs produced as an exhibit and it is immaterial whether the Plaintiff was absent when the said powerlines were being constructed. Further, I concur with the Plaintiff and find that its actions indeed amount to continuous trespass.

As to whether the Plaintiff is entitled to the orders sought in the Plaintiff

The Plaintiff sought for General and Compensatory damages as against the Defendant. She filed a schedule of loss and damages on 16th August 2017 with particulars as follows; Unlawful trespass onto the suit properties in violation of the Plaintiff’s property rights – Kshs. 5,000,000, 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 Plaintiff’s access, possession and enjoyment of the suit property - Kshs.7,500,000, and Preventing future developments on the suit properties- Kshs. 2,500,000, total amount is 16,750,000.

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 proceeded to further state that, “ 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 Plaintiff testified that she suffered damages in respect to the old trees that were cut as well as the existence of the electricity posts and high voltage cables on the suit land because she was unable to develop it. With respect to general damages, the Defendant had conceded that the Plaintiff 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 that: -

“...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 Plaintiff did not provide evidence on the loss she had incurred due the Defendant's acts of trespass but in associating myself with the decisions cited above and noting that the Defendant has been on the suit land from 2013 to date which is 7 years, I find that she is indeed entitled to Kshs. 2 million as general damages for the continuous trespass.

On compensatory damages, the Plaintiff particularized the loss and damages to an aggregate of Kshs.16, 750,000/=.

In the case of **Capital Fish Kenya Limited Vs The Kenya Power & Lighting Company Limited [2016] eKLR**, the Court of Appeal held 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.'

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 associating myself with the decisions cited above and applying them to the current circumstances, I opine that the burden of proof was upon the Plaintiff to prove how she had arrived at the aforementioned proposed figures. The Plaintiff filed a schedule of loss and damages dated the 16th August, 2017 which she produced as an exhibit in Court but failed to tender evidence to support the itemized claims therein. She further failed to support her claim for mesne profits as indicated in her submissions. I note the Plaintiff only produced a Valuation Report which indicated the value of the suit land but the Defendant did not offer any evidence to the contrary. In the circumstances, I will proceed to base my quantum on the Valuation Report prepared by Icon Valuers dated the 12th March, 2018 where they had remarked that: **'At the time of our inspection, we noted that concrete electricity transmission line poles had been erected on the subject property. Two parallel power line traverses the property approximately splitting the property in the middle and impacting negatively on the use within which the property is to be used. The line has adversely affected the sale of this property either in open market or on forced sale situations.'**

Based on the facts as presented, I will proceed to assess the compensatory award by considering the undisputed value of the suit land which is Kshs. 12 million per acre which amounts to Kshs. 24 million. I note the Plaintiff is only utilizing the suit land for growing maize as the power lines have split the said land in the middle. With that in mind, I believe an award for the use of one acre would suffice and will proceed to award the Plaintiff Kshs. 12 million for the loss of use of one-acre of land. The Plaintiff has sought for an injunction but since I have already compensated her for the portion utilized by the Defendant, I will decline to restrain the Defendant from using the said portion. I further opine that it would be pertinent if the Plaintiff and Defendant had a structured Wayleave Agreement.

It is against the foregoing that I find the Plaintiff has established her 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 property without the Plaintiff's consent and caused permanent and irreparable damages thereto;
- ii. General damages for the continuous trespass be and is hereby awarded at Kshs. 2 million.
- iii. Compensatory damages be and is hereby awarded at Kshs. 12 million
- iv. Costs of the suit is awarded to the Plaintiff.
- 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