



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 701 OF 2017

ALEX WAIGERA MWAURA.....PLAINTIFF

VERSUS

CHANIA POWER COMPANY LIMITED.....1ST DEFENDANT

MATAARA TEA FACTORY COMPANY LIMITED.....2ND DEFENDANT

JUDGMENT

By an Amended Plaint dated **12th September 2017**, the Plaintiff herein filed this suit against the Defendants seeking for orders that;

- 1. A declaration that the Defendants actions amounts to illegal trespass onto the Plaintiffs suit land.**
- 2. An order directing the restoration of the Plaintiffs suit land in its prior status as existing prior to erection of the electricity high voltage power lines through the suit land.**
- 3. A permanent injunction against the Defendants restraining it either by itself , its agents, officers , employees, servants or anybody or authority from interfering in any way with the Plaintiffs quiet user, occupation and possession of the suit land.**
- 4. Special Damages for the costs of the destroyed tea plants and lost incomes and destroyed portions of the suit and as enumerated in paragraph 12 above.**
- 5. General Damages for trespass, psychological harm and mesne profits**
- 6. Costs of the suit**
- 7. Any other relief that this Court may deem fit to grant.**

In his statement of claim, the Plaintiff averred that he is the Administrator

of the Estate of the late **Jane Muthoni Mwaura**, and the registered proprietor of **L.R Chania/ Mataara/300**. That the Plaintiff and his entire family depends and lives on the suit property which is largely occupied by a tea plantation. It was the Plaintiff's contention that without any lawful excuse, the Defendants trespassed and encroached onto the suit property without his consent and erected electricity high voltage power lines across the suit land.

The Plaintiff particularised trespass by the Defendants as; entering upon the suit property without his consent and/or notice, destroying and wasting the tea plants along the wire lines on the suit property, causing the erection of electricity high voltage power lines across the suit land without any formal wayleave easement , dissenting the Plaintiff from any meaningful utility of the suit property due to the said electricity high voltage power lines across it, not seeking any wayleave permit to utilize the suit property for purposes of electricity supply.

It was further contended that the Power lines run across the suit property, rendering it unproductive. Further that it poses a great danger to the occupants of the homesteads in the suit property. The Plaintiff further averred that the Defendants have not compensated him for either the destroyed crops and lost earnings in the region of **Kshs. 60,000/=** prior and after erection of the high voltage power lines across the suit property . The Plaintiff further contended that he has lost incomes from the tea plantation as a result of which he has incurred both special and general damages. He particularized Special Damages as; Cost of Valuation and Valuation report at **Kshs. 62,420**, Loss of land utility as enumerated in the Valuation report dated **8th September 2017**. The Plaintiff contended that the Defendants actions have caused him pain, irreparable harm, damage and psychological torture.

The suit is contested and the Defendants filed an Amended Defence dated **3rd October 2017**, and denied all the allegations contained in the Plaintiff. It was their contention that they did not erect the said cables without a colour of right as discussions and negotiations were ongoing between the parties. It was further contended that soon after the demand letter, negotiations between the Defendants and the Plaintiff commenced but that the Plaintiff rushed to Court without notice.

After close of pleadings the matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called one more witness and the Defendant called only one Witness.

PLAINTIFF'S CASE

PW1 Alexander Waigera Mwaura adopted his witness statement as part of his evidence. He further produced his list of documents as Exhibit 1. He denied that there was any discussion before the power line were inserted. He further denied giving his consent before the power lines were erected. He testified that the suit property is family land as it belongs to their late mother and that it has been distributed to various people. Further that the family approached the Defendants, but the Defendants declined to compensate them and also denied that they declined any proposal for compensation. It was his testimony that the wire lines passes on their land, but that there are no pillion on the suit property and the crops have not been damaged. It was his testimony that the land is on a hilly area. He further testified that they want compensation as they are not able to utilize the land fully. That they are not able to harvest the tea because of the overhead wirelines. That the harvested tea leaves is taken to Mataara Tea Factory and that the grant for the wayleave has never been issued.

It was his testimony that the Defendants had not approached anyone for the compensation and that the tea bushes had not been harvested because the harvesters were afraid of the overhead wires.

PW2 Michael Mbugua Kinyanjui, a registered Valuer working with **Index Africa Limited**, testified that he made a Valuation Report on **2nd August 2017** for the suit property. It was his testimony that when he visited the suit property in **2017**, it was under mature tea bushes, Power lines had traversed the suit land and that the said power lines were owned by **Chania Lighting Company Limited**, which had a relationship with **Mataara Tea Factory**. Further that for such a traverse, it ought to have been registered as a wayleave on the title and that no such registration was done. It was his further testimony that actual damage was quantifiable and that their estimate was that each acre of land was selling at **Kshs. 3,000,000/= per acre**. Further that about 405 per square metre was the damages that was incurred coming to about **Kshs. 300,000/=**. He further testified that from Kenya Power, the wayleave was generating about **66K/watts** of power. He further testified that **KTDA** gave them the estimate. It was his testimony that the area underutilized was **3360 square metre** and that from their initial analysis since each square metre was **741** and by **3360 square metre**, it was coming to **kshs. 2,490,000**. He produced the valuation report as Exhibit No. 3. He further testified that he was paid **Kshs 62,420** for the report and he produced the receipt as Exhibit 4. That he was paid **Kshs.10,000/=** for his Court appearance.

He told the Court that the land is fenced on the side that borders **Mataara Tea Factory** and a river on the southern boundary. He further testified that there were two poles on the suit property and that the Plaintiff could not construct below the power line. Further that the suit property is on a slope and that it can allow several land uses. He further testified that he obtained the title information from the client and official search. Further that there were homesteads on the suit property and that the land can be used for other purposes.

DEFENDANT'S CASE

DW1 Peter Gicheru Wachira, testified that he was an employee of **KTDA** and **Manager Chania Power**. He adopted his witness statement dated **31st January 2019** as his evidence. It was his testimony that in his statement, the Plaintiff stated that he had a discussion with the Defendants over the issue of the wayleave because within the suit property nothing was damaged. He further testified that there was no pole on the suit property as there was a valley and that the suit property is between **L.R No. 297** and tea factory. It was his testimony that during the construction of the line, the poles were in **L.R No. 297** and not the Plaintiffs land. Further that the wires are overlying the suit property and that his land has trees which cannot reach the power lines. He denied that there was damage on the suit property. It was his further testimony that the project is owned by tea farmers wherein the Plaintiff is one of them.

He further testified that the suit property was going through **Succession Cause** and they had negotiated with one of the family members. He told the Court that **Chania Company** had not refused to compensate the Plaintiff as when they prepared the cheque, they could not find the Plaintiff. He produced the list of documents as Exhibit 1 and NEMA license as Exhibit2. He acknowledged that he did not obtain unequivocal consent in writing. That they created a right over the Plaintiffs parcel of land. He further testified that all other farmers had wayleaves but that there was none for the Plaintiff. He further testified that they did not intend to vacate the power line. He further testified that there is no certification that the land underneath is still habitable. He acknowledged that the photographs produced as exhibits cannot be connected with the Plaintiffs land. Further that there are no details on the power line in the **E.I.A Report**. That there are no poles on the Plaintiffs land but that there are power lines overlying the land and that the negotiations were in writing.

After close of viva voce evidence, parties filed written submissions which the Court has now carefully read and considered. That the issues for determination are;

- 1. Whether there was trespass***
- 2. Whether the Plaintiff is entitled to the orders sought***
- 3. Who should bear the costs of the suit***

1. Whether there was trespass

It is the Plaintiff's contention that the Defendants trespassed upon his ancestral land and erected poles and wirelines without the family's permission and that the family has since suffered loss and damage as they are not able to fully utilize the said property. The Defendants have not denied entering upon the Plaintiff's suit property. However, it is their contention that there were negotiations ongoing and that the Plaintiff had ample time to oppose the erection, but they waited until the 11th hour to take advantage of the situation.

It is trite that whoever alleges must prove. In this instant suit the Defendants have alleged that they had negotiations over the use of the suit property, but that the Plaintiff took off when negotiations were not going according to their liking.

The Court has not seen any iota of evidence that any such negotiations took place or was ongoing. Without any such evidence, the Court is not satisfied that there was any negotiations over the use of the suit property by the Defendants or that the Defendants had permission to use the suit property.

Section 3 (1) of the Trespass Act, Cap 294 provides that:

"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."

Further trespass has been defined by **Clerk and Lindsel on Torts, 18th edition at Pg.23** as;

"any unjustifiable intrusion by one person upon the land in possession."

There is no doubt that trespass is an **intrusion** by a person into the land of another, who is in possession and ownership. It is evident that the Plaintiff is the registered proprietor of the suit property and also the Administrator of the Estate of **Lucy Muthoni**, who was the initial owner of the suit property before it was transmitted to the Plaintiff. The Court is thus satisfied that the Plaintiff is the registered owner of the suit property. The Plaintiff having accused the Defendants of entering upon his suit property which he is in possession of, without his permission, and the Defendants having no valid explanation why they erected the said barbed wire, it is the Court's considered view that the same amounts to intrusion on the Plaintiff's land and thus trespass.

Taking into account the above analysis of the evidence on record, the Court finds and holds that the Defendants indeed trespassed on the Plaintiff's suit land.

2. Whether the Plaintiff Is entitled to the orders sought

In his Amended Pleint the Plaintiff sought for a declaration that the Defendants actions amounts to illegal trespass onto the Plaintiffs suit land. Having held that indeed that there was trespass, the Court finds this prayer merited. Further it is only fair then that the Defendants restore the Plaintiffs suit land in its prior status as existing prior to erection of the electricity high voltage power lines through the suit land.

The Plaintiff also sought for permanent injunction against the Defendants . It is not in doubt that the Plaintiff is the registered owner over the suit property and is consequently the **indefeasible** and **absolute** owner. Therefore, he is entitled to all the rights and privileges appertaining to it as provided by **Sections 24 and 25 of the Land Registration Act**. In this regard, the Plaintiff therefore is entitled to the quiet use of his land and the Court finds and holds that the Plaintiff's entitled to the orders sought.

The Plaintiff also sought for Special Damages for the costs of the destroyed tea plants, lost incomes and destroyed portions of the suit. It is trite that Special Damages must be specifically pleaded and proved. In his Amended Pleint at paragraph 12, the Plaintiff pleaded for **Kshs.62,420/=** which has been pleaded and proved by production of a receipt by PW2. The Plaintiff also pleaded for loss of land utility as enumerated in the Valuation Report dated **8th September 2017**. Though the Valuation Report has indicated that indeed there was loss of land utility, having perused the said report, the Court has not seen any figure placed on it. Special damages must be specifically pleaded, the Court therefore finds and holds that the said special damage is not merited and it is not allowed.

As for **General Damages** for trespass, psychological harm the Court is persuaded by the case of **Park Towers Ltd...Vs... John Mithamo Njika et al (2014) eKLR**, where the Court held that:-

"I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages, The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case."

Further In the case of **Philip Aluchio...Vs...Crispinus Ngayo [2014]eKLR**, the Court held as follows:-

"..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff's property immediately after the trespass or the costs of restoration, whichever is less"

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass...."

As the Plaintiff has already proved that there was trespass, the measure of damages would therefore be what amount. The Plaintiff vide the

Valuation Report has been able to adduce evidence with regards to the state of his property after the alleged trespass. Further the Plaintiff has also indicated the value of the suit property as **Kshs. 13,800,000/=** after the alleged trespass. Without any other valuation of the land before the alleged trespass, the Court has nothing to adequately assess the General damages. The Court is therefore inclined to grant general damages of **Kshs.3,000,000/=**. See the case of **Nakuru Industries Limited ...Vs... S S Mehta & Sons [2016] eKLR** where the court held that ;

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.”

The Plaintiff had sought for mesne profit .Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved. However, where a party claims for both mesne profits and damages for trespass, the Court can only grant one. In this instant as the Court has already granted General Damages, this prayer for mesne profit is declined. See the case of **Maina Kabuchwa...Vs...Gachuma Gacheru (2018)eKLR**, where the Court held that:-

“Where a party claims for both mesne profits and damages for trespass, the Court can only grant one.”

It is trite that costs follow the events and the Plaintiff being the successful party is therefore entitled to the cost of the suit.

Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

For the above reasons the Court enters Judgment for the Plaintiff against the Defendants in terms of ***prayer Nos. 1, 2 and 3 of the Amended Plaintiff dated 12th September 2017.***

In terms of ***prayer No.4 seeking for Special Damages the Court grants Special Damages of Kshs. 62,420 only.***

In terms of prayer No. 5 seeking for General damages the Court grants Kshs. 3,000,000. No award is granted for mesne profits.

On costs of the suit, since the Plaintiff is the successful litigant, and he is awarded costs of the suit and interest thereon from the date of filing the suit to the date of this Judgment.

It is so ordered.

Dated, signed and Delivered at Thika this 8th day of October 2020

L. GACHERU

JUDGE

8/10/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Tumu for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

L. GACHERU

JUDGE

8/10/2020