



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 125 of 2010

RICHARD BUDDY OKEMWA.....1ST PLAINTIFF

ELIJAH OKEMWA ASIAGO.....2ND PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LTD.....DEFENDANT

JUDGMENT

1. The Plaintiffs are the legal representatives of the estate of **Zephania Okemwa Asiago(deceased)**. The Plaintiffs brought this suit by way of a Plaint dated 3rd May, 2010. The Plaint was amended on 16th June, 2010 and again on 21st December, 2011. In the Further Amended Plaint dated 21st December, 2011, the Plaintiffs claimed from the defendant special damages in the sum of Ksh.567,327.00, general damages for trespassing into parcel of land known as L.R.No. Nyaribari Masaba/Kiamokama/657 (hereinafter referred to as **“the suit property”**) and destroying cash crops thereon, exemplary damages, costs and interest. The Plaintiffs claimed that, on 9th March, 2010, the defendant’s employees entered the suit property and dug four (4) holes for the purposes of installing electricity poles without the consent of the Plaintiffs or other members of the family of the late Zaphania Okemwa Asiago. The Plaintiffs claimed that in the process of digging the said holes, the defendant’s employees aforesaid destroyed cash crops namely, coffee and tea plants, beans and maize which had been grown on the suit property all valued at Ksh.315,780.20. The Plaintiffs claimed further that on 11th October, 2010, the defendant’s agents servants or employees once again trespassed into the suit property and removed the electric poles and cables that they had installed thereon during which operation the defendant’s said agents or employees caused further damage to the Plaintiffs’ crops which was valued at Ksh.251,546.80. The Plaintiffs claimed that the second act of trespass on 11th October, 2010 was carried out in utter contempt of a court order that had been issued restraining the defendant from trespassing on the suit property.

2. The defendant entered appearance and filed a statement of defence to the Plaintiffs’ claim. In its amended statement of defence dated 23rd January, 2012, the defendant denied the Plaintiffs’ claim in its entirety and put the Plaintiffs to strict proof thereof. The defendant denied that it trespassed into the suit property and caused any damage thereon. The defendant also denied special, general and exemplary damages claimed by the Plaintiffs. In the alternative, the defendant averred that if it entered into the suit property which it denied, such entry was with the consent of the Plaintiffs.

3. The suit was fixed for hearing on 10th December, 2012 on which day only the Plaintiffs and their advocate appeared in court. The same could however not be reached on that day. The hearing was adjourned to 21st January, 2013 and the advocate for the Plaintiffs was ordered to serve the advocates for

the defendant with a hearing notice. On 21st January, 2013, once again only the Plaintiffs and their advocate appeared in court. After satisfying myself that the advocates for the defendant were duly served with a hearing notice, I allowed the hearing of the case to proceed in the absence of the defendant. The Plaintiffs gave evidence and called no witness. In his evidence, the 2nd Plaintiff testified as follows; the 1st Plaintiff and the 2nd Plaintiff are sons of one **ZEPHANIA OKEMWA ASIAGO** (deceased). The Plaintiffs and some of their family members are the administrators of the estate of the said ZEPHANIAH OKEMWA ASIAGO (hereinafter referred to as “**the deceased**” where the context so admits). The deceased is the registered proprietor of the suit property. The Plaintiffs brought this suit on behalf of the estate of the deceased. On 9th March, 2010, the 2nd Plaintiff received a call from one of his brothers to the effect that some strangers had entered the suit property and were engaged in some activities thereon. When the 2nd Plaintiff went to the suit property, he confirmed that the persons who had entered the suit property were the employees of the defendant from its Kisii branch. The 2nd Plaintiff found the said employees of the defendant digging holes on the suit property. To give them space for the said holes, the said employees had uprooted tea bushes on the suit property while pruning others. They also caused damage to Napier grass that had been planted on the suit property. A part from the tea bushes and Napier grass aforesaid, the defendant’s employees aforesaid also damaged coffee, maize and millet plants that had been grown on the suit property. The defendant’s invasion of the suit property and the damage aforesaid was reported by the 2nd Plaintiff to the area chief who recommended that the matter be reported to the area agricultural officer. The 2nd Plaintiff reported the incident to the agricultural officer Kiamokama Division who visited the suit property and assessed the damage caused by the defendant’s said employees. In a report dated 5th November, 2010, the said officer assessed the said damage at Ksh. 315,780.20. The Plaintiffs brought this suit to stop further trespass by the defendant on the suit property and in that regard the Plaintiffs obtained a temporary injunction on 14th June, 2010 restraining the defendant from carrying out any further acts of trespass on the suit property. While this order was subsisting, the defendant brought electric poles and proceeded to erect the same on the holes that they had dug. They also brought electric cables and installed the same on the said poles. The Plaintiffs then moved the court to cite the defendant for contempt. While the application for contempt was pending hearing, the defendant’s employees trespassed on the suit property once again on 11th October, 2010 for the purposes of removing the said poles and cables. This move was meant to purge the contempt that the Plaintiffs had complained about. In the process of that operation however, the defendant’s employees caused further damage on the suit property. The operation was carried out by between 25 to 30 employees of the defendant and it involved disengaging the cables, digging and taking out the poles and pulling both out of the suit property. The Plaintiffs once again reported the matter to agricultural officer at Kiamokama division who came and assessed this second round of damage at Ksh.251,546.80. The defendant did not seek the Plaintiffs consent before entering the suit property. An attempt was made at reaching an out of court settlement of this matter and although the defendant admitted liability to the Plaintiffs, the defendant did not co-operate in finalizing the matter out of court. The Plaintiffs are claiming a total sum of Ksh. 567,327.00 as special damages. They are also claiming general and exemplary damages. Exemplary damages are sought on account of the defendant’s failure to remedy the violation of the Plaintiffs’ rights even after a letter of demand was served upon the defendant by the Plaintiffs’ advocates. The 2nd Plaintiff produced as exhibits, Letters of administration ad litem issued on 19th April, 2010(P.exh.1), a demand letter to the defendant dated 25th March, 2010 by the firm of Omwoyo Masese & Co. Advocates(P.exh.2), Title Deed for the suit property(P.exh.3), letters by Divisional Agricultural Extension Officer, Kiamokama Division dated 5th November, 2010 and 2nd December, 2010(P.exhs. 4 and 5 respectively), a letter dated 1st September, 2010 addressed to Wasuna & Co. Advocates by Minda & Co. Advocates(P.exh.6B), and a letter dated 4th July, 2011 together with an attachment addressed to Minda & Co. Advocates by Wasuna & Co. Advocates(P.exh.7). The 1st Plaintiff who is a younger brother to the 2nd Plaintiff in his testimony merely confirmed the evidence of the 2nd Plaintiff.

4. The Plaintiff’s advocate Mr.Minda filed written submissions on 12th February, 2013. In his submissions, the Plaintiffs’ advocate submitted that the Plaintiffs had proved that the defendant had trespassed into the suit property and caused damage to the crops and grass that were growing thereon. Counsel submitted that the defendant’s conduct was not only in breach of the Plaintiffs’ proprietary rights

under the Land Registration Act, No. 3 of 2012 but also their constitutional rights under Article 40 of the Constitution of Kenya. Counsel submitted that the Plaintiffs are entitled to a sum of Ksh. 567, 327.00 as special damages on account of the damaged crops and an award of general damages to compensate them for the defendant's injurious acts of trespass that violated their ownership rights over the suit property. Counsel submitted that the Plaintiffs were temporarily deprived of the use of their land by the defendant which caused them irreparable loss for which they need compensation by way of general damages. On this head of claims, counsel submitted that an award of Ksh. 7 Million would be fair and reasonable compensation. The Plaintiff's advocate submitted that the defendant's conduct was contemptuous both of the court and the Plaintiffs. The defendant continued with illegal conduct even after being warned in writing to cease and being served with a court order. This kind of conduct according to counsel, justify an award of exemplary damages. Under this head of claim, counsel submitted that a sum of Ksh. 2million would be reasonable compensation. Counsel did not cite any case law in support his submissions.

5. I have considered the Plaintiffs' case as pleaded and the evidence tendered in support thereof. The Plaintiffs' claim against the defendant is based on the tort of trespass. In the book, **Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01**, trespass to land is defined as consisting of **"any unjustifiable intrusion by one person upon land in the possession of another."** In the same book, it is stated that trespass is actionable at the suit of the person in possession of the land (paragraph 18-10) and that proof of ownership is a prima facie proof of possession (paragraph 18-110). In this case therefore, the Plaintiffs were under a duty to prove that the defendant had unjustifiably entered the suit property which was in their possession. A victim of trespass is entitled to damages which are meant to compensate him for losses, specific and general suffered as a result of the act of trespass. In some cases exemplary damages may also be awarded. Like all claims, damages must be proved. The Plaintiffs' therefore had to prove in addition to trespass, the fact that, as a result of the defendant's said act of trespass, the Plaintiffs suffered special, general and exemplary damages claimed herein. I am satisfied from the Plaintiffs' testimony and the documents produced by the Plaintiffs in evidence that the Plaintiffs have proved on a balance of probability that the defendant committed an act of trespass on the suit property. The Plaintiffs proved that the suit property is owned by the deceased. They have also proved that they are the administrators of the estate of the deceased. The Plaintiffs produced in evidence a title deed for the suit property in the name of the deceased and a letter of administration ad litem with respect to the estate of the deceased who died 16th March, 2008 in which the Plaintiffs are indicated as two (2) of the ten (10) administrators of the estate of the deceased. The Plaintiff testified that the defendants entered the suit property without their permission, dug holes thereon, erected electric poles on the said holes and then mounted electric cables on the said poles. The defendant for the second time without the permission of the Plaintiffs entered the suit property, pulled out the said electric poles, dismantled the electric cables and pulled both out of the suit property. In their defence, the defendant denied all these activities attributed to the defendant. The defendant did not however adduce any evidence at the trial to disprove these allegations. The Plaintiffs testimony was therefore not controverted. It is my finding therefore that the Plaintiffs have proved that the deceased was the registered proprietor of the suit property and that the defendant trespassed thereon. On damages, as I have already mentioned herein above, he same is supposed to

be compensatory. It is supposed to put the Plaintiffs in the same position in which they were prior to the trespass complained of. The Plaintiffs have claimed general and special damages. They have also claimed exemplary damages. In the present case, the Plaintiffs main complaint concerned, damage caused to their crops by the defendant's employees when they trespassed into the suit property. The measure of damages which should be payable to the Plaintiffs in the circumstances in my view should be the value of the damaged crops. This has been claimed by the Plaintiffs under special damages in the sum of Ksh. 567,327.00. In their submissions, the Plaintiffs have submitted that they should also be awarded a sum of Ksh. 7 Million as general damages. Since damages save for exemplary damages are supposed to be compensatory, it was up to the Plaintiffs to demonstrate that as a result of the defendant's aforesaid acts of trespass, they did suffer non pecuniary loss over and above the special damages which entitles them to general damages. In their submission, the Plaintiffs sought general damages **"to compensate them for the defendants injurious acts of trespass that violated the Plaintiffs' rights and interfered with their ownership rights over the suit property."** I am in agreement with the Plaintiffs that in addition to the destruction of their crops, the defendant's actions complained of also interfered with their ownership rights as they could not exercise proprietary rights conferred upon them by law during that period when

the trespass subsisted. This no doubt caused the Plaintiffs loss which justifies compensation. It should be appreciated however that the trespass by the defendant lasted for only seven (7) months. Apart from farming activities, there was no evidence placed before the court that the Plaintiffs were using the suit property for any other activity. The Plaintiffs have already claimed a sum of Ksh. 567,327.00 for the damaged crops. I see no justification for a further sum of Ksh. 7 Million as damages on account of violation of proprietary rights of the Plaintiffs. In recognition of the fact that the Plaintiff's proprietary rights were violated by the defendant, I would award the Plaintiffs a nominal sum of Ksh. 20,000.00 as general damages. On special damages, the law is now settled. As was stated in the court of appeal case of **William Kiplangat Maritim & Another-Vs-Benson Owenga Anjere, Court of Appeal at Nairobi, Civil Appeal No. 180 of 1993 (unreported)**, special damages must be pleaded and specifically proved. In this case, the Plaintiffs pleaded that on 9th March, 2010, the defendant's employees unlawfully entered the suit property and destroyed crops valued at Ksh. 315,780.20. Again on 11th October, 2010, the defendant's said employees unlawfully entered the suit property for the 2nd time and caused further damage to the Plaintiffs' crops thereon valued at Ksh. 251,546.80. These are the amounts that the Plaintiffs are claiming as special damages. In proof of these claims, the Plaintiffs produced in evidence crop damage assessment reports dated 5th November, 2010 and 2nd December, 2010 prepared by Kiamokama Division Agricultural Extension Officer who had visited the suit property on the two occasions when the defendant's employees are said to have caused the said damage. In the assessment of the said officer, the Plaintiffs' loss arising from damage caused to the crops that were on the suit property when the defendant unlawfully entered the suit property is Ksh. 567,327.00. These assessment reports were produced in evidence without any objection and I have no reason to doubt the contents thereof. In the circumstances, it is my finding that the Plaintiffs have proved their special damages claim of Ksh. 567,327.00. I accordingly allow the same. This leaves me with the claim for exemplary damages. In **Clerk & Lindsell on Torts, 18th Edition (supra)**, the authors have stated at paragraph 29-123, that, unless expressly authorized by statute, exemplary damages should be awarded only in two cases, first, in a case of oppressive, arbitrary or unconstitutional action by the servants of government and secondly, in cases where the defendant's conduct has been calculated by him to make a profit for himself which may as well exceed the compensation payable to the plaintiff. I am in agreement with the Plaintiffs submission that the defendant's actions complained of were unconstitutional and arbitrary. The defendant's employees who trespassed into the suit property were however not servants or agents of the government. The defendant is a private limited liability company and does not enjoy the government's coercive powers. Again, it has not been shown and I am not satisfied that the defendant's entry into the suit property was intended to generate for the defendant profit over and above what I may award to the plaintiffs herein. I take judicial notice of the fact that the defendant is an electricity transmission company and the entry by its employees into the suit property may have been in the course of such business albeit this time round the business was being carried out in unlawful manner. Due to the foregoing, I am of the view that the Plaintiffs have not shown the ingredients of the causes of action that would entitle them to exemplary damages. That claim is therefore disallowed.

6. In conclusion, it is my finding that the Plaintiffs have proved their case against the defendant on a balance of probability. I hold the defendant liable to the Plaintiffs for trespass and hereby proceed to enter judgment for the plaintiffs against the defendant as follows;

- i. **Special damages, Ksh. 567, 327.00 together with interest at court rates from the date of filing suit until payment in full;**
- ii. **General damages, Ksh. 20,000.00 together with interest at court rates from the date of this judgment until the date of payment in full;**
- iii. **The Plaintiffs shall have the costs of this suit.**

Signed, dated and delivered at KISII this 10th day of May, 2013

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Sagwe holding brief for Minda for the Plaintiff

No appearance for the Defendant
Mobisa Court Clerk.

S. OKONG'O,

JUDGE.