



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 276 OF 2006

AJIT BHOGAL.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING CO. LTD.....DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

1. By a plaint dated 30th November 2006 the plaintiff instituted this suit against the defendant seeking the following reliefs:

a. General damages

b. Aggravated damages

c. Exemplary damages

d. A permanent injunction restraining the defendant by itself, its directors, officers, shareholders and its servants or agents or any of them or otherwise howsoever from entering, re-entering or remaining upon the SUIT LAND, PLOT 571, SECTION V, M.N. MOMBASA

e. Costs of this suit

f. Such further or other orders as this Honourable Court deems fit so as to ensure inter alia the sanctity of the right title and interest of the plaintiff in the SUIT LAND, PARCEL PLOT 571, SECTION V, MN, MOMBASA

2. The plaintiff's case is that he is the freehold proprietor and owner and is entitled to the possession of the parcel of land known as PLOT NO.571, SECTION V, MAINLAND NORTH, MOMBASA (the suit land) and is so registered in the coast titles Land Registry under the Registered Titles Act (now repealed). The suit land is situate within the Municipality of Mombasa. The plaintiff states that in year 1999-2000 the defendant entered upon the suit land without the licence or consent of the plaintiff and has remained thereon to date, constructing thereof inter alia a 2nd 132 KV Line Carrying electricity from Rabai to Kipevu. The plaintiff contends that the defendant is a trespasser on the suit land. The plaintiff states that as a result he has been subjected to the flagrant disregard of his rights, title and interest in the suit land and suffered loss and damage in the diminution of its value and saleability. That the suit land is further being subjected to the passing and re-passing by persons unauthorized by the plaintiff and to the unauthorized use and re-use and occupation thereof contrary to the law relating to the plaintiff's right title and interest in the suit land. The plaintiff further states that the defendant has carried out works on the suit land for the use and benefit of itself and the plaintiff claims damages. The plaintiff states that despite demand made to cease the said continuing trespass, and with the full knowledge of the plaintiff's rights, title and interest, the defendant has persisted and is persisting in the said trespass.

DEFENDANT'S DEFENCE

3. The defendant filed defence dated 22nd January, 2007 in which it denies the plaintiff's averments in the plaint. The defendant avers that there has always been an existing 132KV line between Rabai and Kipevu. That sometime in the year 2005 the defendant's agents, servants and/or employees realized that the plaintiff had encroached upon the defendant's way leaves trace of 30 metres by extending his wall to the existing 132 KV line. The defendant avers that the 2nd 132 KV line is within the approved wayleaves trace as it is 23 12 metres from the centre line. The defendant denies being a trespasser and reiterates that it is the plaintiff who has encroached on the defendant's wayleaves trace and denies that the plaintiff has suffered loss and damage. The defendant states that the plaintiff is not entitled to damages for trespass

and continuing trespass, aggravated and exemplary damages or any other damages as claimed. The defendant admits that demand was made by the plaintiff but denies that it is liable to the plaintiff.

4. In his reply to defence dated 24th January 2007, the plaintiff denies that he has encroached on the defendant's way leaves trace and states that since he is the proprietor of the land in issue with a registered title deed, he is the only person capable of maintaining a cause of trespass against another person and maintained that the defendant is a trespasser on his suit land.

5. The hearing of this suit commenced before Hon. Justice Tuiyott on 12th June 2012 when the plaintiff testified as PW1 and stated that the defendant has trespassed on the suit land. The plaintiff produced a copy of the certificate of title Number CR. No. 18602, Subdivision Number 571 (Original Number 89/5 Section V Mainland North, Deed Plan, Letter dated 4.4.1999 from the Municipal Council of Mombasa, Letter dated 21.12.1998, letter dated 23.8.1999, Letter dated 26.8.1999, Letter dated 22.5.2001, two Letters dated 22.8.2005, Letter dated 1.9.2005, Letter dated 7.9.2005, Letter dated 26.10.2005, Letter dated 20.3.2006, Letter dated 30.3.2006, Letter dated 7.7.2006 and Letter dated 18.7.2006.

6. In the letter 3rd December, 1998, the Defendant asked to be granted wayleave by the Plaintiff over the suit land while the letter dated 4th April 1999 from the Municipal Council of Mombasa granted the defendant approval as long as they kept the project within its wayleaves. The other letters were mainly requests by the defendant seeking permission and promising to use less space but the plaintiff wrote back rejecting that offer. Other correspondences were basically complaints raised by the plaintiff and his tenant and the responses thereto. The plaintiff testified that the defendant asked for wayleaves which he refused and the dispute has not been resolved and that there is still trespass and continues to suffer. He prayed for the orders in the plaint.

7. In cross-examination, the plaintiff stated that he acquired the suit property in the early 1980s and the first power line was already in existence and that his complaint is about the second line as there was an existing line. He stated that when he bought the plot he wanted to set up a pre-fabricated panels workshop. He stated that he built a warehouse which was to house the workshop but the same needed extension which was curtailed by the restriction. He stated that the 1st line divided the subject property into 80:20 and the 2nd line was passing near the warehouse which occupied a portion measuring 80% making the works for cranes impossible. He further stated that the 2nd line was not within the 1st line wayleave trace and consequently, it has rendered a large portion of the suit property unusable. That the 2nd line was occupying about 60000 square feet (1.5 acres) which is not being put to use because of the overhead line. That he used to use it for consignment but when the line interferes with the cranes, he stopped. He stated that he now uses it for storing lorries and cargo. The plaintiff further stated that 1.5 acres is open and he cannot use it but a small portion is built for cargo which includes tea and cereals. He added that the open area is used for parking of lorries and accessing the warehouse. He admitted that the plot is under some use but he cannot develop it further because of the wires. The plaintiff estimated the compensation that he stated he was entitled to for the market value of the 1.5 acres to be about Kshs.50 million, plus interest based on his experience in dealing with properties. The plaintiff insisted that the 2nd line does not fall within the wayleave trace and asked the court to visit the site. PW1 stated that he did not disagree with the defendant using the existing wayleave for the 2nd line, adding that he refused to grant permission twice. According to him the expected profit was kshs.15 million monthly subject to tax.

8. The court (Tuyoit J) visited the site on 21st September, 2012 where the plaintiff showed the court the lines. The old line lies on the eastern side of the plot. The plaintiff stated that he cannot use that part of the plot which is about 1 acre. Regarding the 2nd line, he stated that he could not use 30 feet on each side. That he could not utilize about 3.5 acres. That the whole land including the godown is 4.7 acres. He stated that he wanted to put up a factory. He added that the lines were parallel.

9. At the site, Walter Okello Mbogo, a wayleave officer with the defendant stated that the old line is at the centre of the wayleave trace. That the trace is 30 metres on each side. That the new line was about 20 metres from the old line and so was within the trace. That from the centre of the new line one can develop 15 metres out.

10. When the matter came up before me, the parties agreed to have the matter proceeds from where it had reached and directions were given to that effect on 20.6.17.

DEFENDANT'S CASE

11. The defendant filed a defence dated 22nd January, 2007 in which it denied the plaintiff's claim. The defendant averred that there has always been an existing 132 KV line between Rabai and Kipevu. That sometime in 2005, the defendant's agents, servants and/or employees realized that the plaintiff herein had encroached upon the defendant's wayleaves trace of 30 metres by extending his wall to the existing 132 KV line. The defendant averred that the 2nd 132 KV line is within the approved wayleaves trace as it is 2812 metres from the centre line. The defendant reiterated that it is the plaintiff who has encroached on the defendant's wayleaves trace and as such denied that the defendant was a trespasser. The defendant denied that the plaintiff has suffered loss and damage and stated that the plaintiff is not entitled to the prayers sought in the plaint.

12. The defendant called one witness, Richard Ottaro (DW1) who is an Assistant Wayleave Officer with the defendant. He adopted his witness statement dated 18th February, 2019 and filed in court on 19th February, 2019. DW1 testified that the defendant requested the plaintiff for a wayleave but the plaintiff declined and did not sign any wayleave agreement. He stated that the construction of the power lines was done on the existing wayleave line for 132 KV. That the old line was also 132 KV between Rabai and Kipevu. DW1 insisted that when the plaintiff declined to grant a new wayleave, the defendant resorted to the earlier wayleave line. He denied that the defendant had trespassed on the suit property as alleged by the plaintiff.

13. When cross-examined by Mr. Amadi learned counsel for the plaintiff, DW1 stated that he had worked for the defendant company for 30 years but did not undertake the exercise in dispute. He admitted that the plaintiff was the registered owner of the suit property. DW1 stated that the defendant seeks consent from registered landowners and in this case, the consent was sought but the plaintiff declined on grounds

that his plot would be sterile. That the plaintiff asked the defendant to use the existing wayleaves. DW1 stated that he was not aware if a complaint was made to the Electricity Regulatory Board. He maintained that the second line was put up within the existing wayleave.

SUBMISONS

14. In their submissions dated 9th July 2019 and filed on 10th July, 2019, M/s Kadima & Co. Advocates for the plaintiff submitted inter alia that the plaintiff had stated that his business plans was to generate an income of Kshs.15,000,000/= per year had it not been interfered with. That during the site visit, the plaintiff identified where the 2nd 132 KV line was laid and showed clearly the same was not within the wayleaves of the 1st 132 KV line hence a trespass. Counsel further submitted that the defendant's witness in his testimony failed to raise a plausible defence as he acknowledged the subject property belonged to the plaintiff; he conceded that there was a laid down procedure when requesting/acquiring wayleave and conceded that the procedure was not followed; he conceded that the consent of the plaintiff was not obtained; he conceded that there were avenues to be followed where consent was not forthcoming but the same was not exploited; he conceded that there were mechanisms for compensation for the plaintiff but had not been applied in the instant case.

15. The plaintiff's counsel further submitted that a joint survey was conducted by order of this court on the suit property on 15th March 2018 where the plaintiff's surveyor, Mr. PM Mwendwa and Mr. Amunga representing the defendant were present and prepared a report dated 19th March 2018. That it is evident and quite clear from the aforesaid report that the defendant in laying the 2nd 132 KV line trespassed onto the plaintiff's property as the same was not within or even close to the 1st 132KV line wayleave and that the report was and is still uncontroverted.

16. The plaintiff's counsel relied on the case of **Narok County Council –v- TransMara Council & Another, CA No.25 of 2000** where the court stated “where *the law provides for a procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a court of law as the court would have no jurisdiction to entertain the dispute.*” It was further submitted that the procedure of laying electric supply lines is found in Section 46 of the Energy Act, Cap 314 Laws of Kenya. It was counsel's submission that from the above provisions, the consent of the plaintiff was mandatory which consent was not obtained. That the defendant despite being denied permission on numerous occasions, without lawful authority entered into the plaintiff's property and has continued and persisted in trespassing onto and occupation of the plaintiff's aforesaid parcel of land whereby it has constructed the 2nd 132 KV line thereon without the plaintiff's consent and permission thereby denying the plaintiff's right of use and occupation of his land. The plaintiff's counsel submitted that the plaintiff is entitled to compensation and cited Sections 42 and 52 of the Energy Act.

17. On the issue of general damages for trespass the plaintiff's counsel submitted that it is trite law that trespass to land is actionable per se and relied on the case of **Park Towers Ltd –v- John Mithamo Njika & 7 Others (2014)eKLR** and **Paul Audi Ochuodho –v- Joshua Ombura Orwa (2014)eKLR**. On whether the plaintiff is entitled to an award of exemplary damages as a result of the defendant's actions, the plaintiff's counsel urged the court to be guided by the decision in the case of **Titus Njau – v- Municipal Council of Eldoret (2015)eKLR**. It was further submitted that in awarding aggravated damages, the court should take into account the defendant's motive, conduct and manner of committing the tort. That the court has to consider whether the defendant acted with malevolence or spite or behaved in a high handed manner, and that aggravated damages are compensatory in nature as was noted in the case of **Abdullhamad Ephraim Ahmed –v- Municipal Council of Mombasa (2004)eKLR**.

18. The plaintiff's counsel submitted that the plaintiff has proved his case to warrant the orders sought and prayed for judgment to be entered for the plaintiff as prayed in the plaint. On the amount of compensation, the plaintiff's counsel urged the court to find in the amount of Kshs.300,000,000/- calculated at Kshs,15,000,000/- per year for 20 years (since the ongoing trespass started in the year 1999) together with exemplary and aggravated damages and costs of the suit.

19. M/s Kiarie Kariuki & Co. Advocates for the defendant filed their submissions dated 19th March 2019 in which they submitted inter alia, that the defendant did not enter the suit property without the consent of the plaintiff as the plaintiff had in his letter dated 21st December 1998 (P.Exhib 6) concluded by stating the “you already have one wayleave and you should pass your 132KV line through it or consider other alternatives.” It was therefore counsel's submission that since the defendant constructed the 2nd 132KV line within the wayleave trace for the first 132 KV line, there was no entry into the plaintiff's property without the consent as alleged by the plaintiff. Counsel submitted that the defendant is not a trespasser on the suit property.

20. Counsel for the defendant further submitted that the plaintiff has failed to discharge the burden of proof that is on him to prove as required by the provisions of Section 107 of the Evidence Act to prove that the Second 132 KV electric line was constructed out of the approved wayleave trace that exists for the first 132KV electric line. Counsel pointed out that pursuant to the court's direction, a joint survey was conducted on the suit property on 15th March 2018 between Mr. Amunga a surveyor who was representing the defendant and Mr. P. M. Mwendwa, a surveyor who was representing the plaintiff. Counsel urged the court to note that whereas the survey was jointly done on 15th March 2018, the report was prepared and signed by Mr. P. M. Mwendwa for and on behalf of Edward Kiguru Land Surveyors. That the said report was neither sent to Mr. Amunga nor executed by him as he was representing the defendant herein. That the report was signed by the plaintiff's surveyor alone and filed by the plaintiff's advocate. The court was also asked to note that the report refers to KETRACO (Kenya Electricity Transmission Company) line which is a totally different institution from the defendant herein and is also engaged in the business of constructing electric power lines. It was the defendant's submission that the plaintiff has failed to prove his case as against the defendant to the required standard.

21. Regarding damages, the defendant's counsel submitted that the plaintiff did not plead any malice on the part of the defendant or prove the same in evidence and as such there is no justification for an award of exemplary and aggravated damages in favour of the plaintiff. That the court should not award any exemplary and aggravated damages to the plaintiff. They relied on the case of **Gitathuri Kariobangi Company Limited –v- James Gacheru Muriu & 9 Others (2014)eKLR**; **Obongo & Another –v- Municipal Council of Kisumu (1971)EA 91**; **Rookes –v- Bernard (1964)AC 1129 at 1228**. It was further submitted that there is no justification whatsoever or at all for an award of the sum of Kshs.50,000,000/- or any other award under general damages as there is no trespass on the suit property by the defendant. Further, that the plaintiff is not entitled to a permanent injunction restraining the defendant by itself, its equipment, lines, cables, poles, material, its

directors, officers, shareholders and its servants or agents or any of them or otherwise howsoever from entering, re-entering or remaining upon the SUIT LAND, PLOT 571 SECTION V, M.N. MOMBASA. It is submitted that this is based on the fact that the defendant did not trespass on the plaintiff's land and that the second 132 KV electric power line also supplies power to several customers and any injunction granted will be highly prejudicial to the defendant's customers. It was further submitted that since the plaintiff has failed to prove his case as against the defendant on a balance of probability, the suit should be dismissed with costs to the defendant.

ANALYSIS AND DETERMINATION

22. The court has considered the pleadings and evidence on record as well as the submissions made. The main issues for determination are:

- a. whether the defendant has trespassed on the plaintiff's land;**
- b. Whether the plaintiff is entitled to general damages for trespass, and if so, the quantum payable.**
- c. Whether the plaintiff is entitled to exemplary and aggravated damages.**
- d. Whether a permanent injunction can be issued restraining the defendant from entering, re-entering or remaining upon the suit land.**
- e. Who bears costs of the suit?**

23. From the material placed before me, there is no dispute that the plaintiff is the registered owner of PLOT NO.571, SECTION V M.N.MOMBASA as evidenced by a copy of the Certificate of title produced as p.exhit 1 and the deed plan produced as p.exhii. 2. It is also common ground that there are two 132KV lines put up by the defendant on the suit property. It is also apparent that the dispute is not over first 132KV electric power line. It is clear that the dispute herein is over the second 132 KV line carrying electricity from Rabai to Kipevu.

24. The plaintiff testified that by a letter dated 3rd December, 1998, the defendant requested the consent of the plaintiff for the wayleave for the second 132KV line to cross through the suit property. The plaintiff also produced a letter dated 4th April, 1998 from the Municipal Council of Mombasa to the defendant which stated in part: "we hereby grant you our approval as long as you keep the project within your wayleaves."

25. By dint of the letter dated 21st December, 1998, the plaintiff wrote back to the defendant expressly refusing to grant the wayleave. By a letter dated 23rd August 1999 the defendant again contacted the plaintiff seeking permission and stating that they would use less space but the plaintiff wrote back on 26th August, 1999 rejecting the defendant's request. The plaintiff stated that he was unable to grant the defendant the wayleave unless he was suitably compensated. Despite the plaintiff's refusal to grant the wayleave requested to by the defendant, the defendant nonetheless went ahead and started laying overhead lines through the suit property.

26. In his evidence, the plaintiff stated and produced documentary evidence that on 22nd May, 2001, he wrote a letter of complaint to the defendant notifying them that they had trespassed on his property and demanded that they stop. That on 22nd August, 2005, the plaintiff's tenants also wrote to the plaintiff complaining of interference by the defendant. The plaintiff stated that he again wrote to the defendant complaining of their interference and demanded that they desist from their trespass. Since the defendant failed to comply, the plaintiff filed this suit.

27. DW1 testified that the defendant wrote to the plaintiff vide their letter dated 3rd December, 1998 forwarding a wayleave agreement for execution by the plaintiff but the plaintiff wrote back stating the he was unable to agree to the defendant's demand for a wayleave. The defendant wrote another letter dated 23rd August, 1999 stating that it was to reduce the wayleave trace to 20 metres and forwarded another wayleave agreement for execution by the plaintiff. The plaintiff wrote back to the defendant vide his letter dated 26th August, 1999 in which he stated that he was unable to grant wayleaves unless he was suitably compensated. It is clear that the defendant sought the consent of the plaintiff prior to the construction of the second 132KV electricity supply line running from Rabai to Kipevu and the plaintiff categorically declined unless suitably compensated. It was the evidence of DW1 that the defendant proceeded to construct the said line within the wayleave trace that already existed and within which the first 132 KV line had been constructed.

28. In this case, a joint survey was conducted by order of the court on 15th March 2018 where the plaintiff's surveyor, Mr. P.M. Mwendwa was present together with Mr. Amunga representing the defendant. A report dated 19th March 2019 was prepared and forms part of the record. The defendant has challenged the said report because it was neither sent to Mr. Amunga nor executed by him as the representative of the defendant. Further, that the report referred to a different entity known as Ketraco. The court was however not told why Mr. Amunga did not sign the report if at all he did not. Mr. Amunga also failed to file any other report on the joint survey that was done. The court will take the report on record as representing the joint position found by the surveyors representing the parties herein. The objection on the reference to Ketraco line instead of Kenya power & Lighting Co. Ltd is to me an error that does not go to the substance of the report. Moreover, the report was done on the suit property, and not any other property.

29. Looking at the facts of this case, what emerges is that the case herein is one of trespass to land as it involves entry by the defendant into the plaintiff's land albeit pursuant to statutory authority, and subject to payment of compensation. The statutory authority in this case was at the material time found in the Electric Power Act, No. 11 of 1997 and the wayleaves Act, Cap 292 Laws of Kenya (since repealed). The current applicable law is the Energy Act, Cap 314 Laws of Kenya, the Land Act, 2012 and the Land Registration Act, 2012.

30. Section 46 of the Electric Power Act, No.11 of 1997 provided as follows:

“(1) An owner shall be deemed to have assented to a proposal to lay an electric supply line on his land if he fails to notify the person desiring to lay an electric supply line in writing of his dissent therefrom within sixty days after the service on him of the notice required by this section; and in the event of dissent the court, on the application of the licensee, shall decide:

a) What injury, if any, the proposed electric supply line will cause to the owner, or to the occupier or other person interested in the land; and

b) Whether any injury that will be caused is capable of being fully compensated for by money, unless the owner requires those questions to be decided by arbitration.

(2) The result of a decision under subsection (1) shall be as follows:

a. If the decision is that injury shall be caused to the owner, occupier or other party interested in the land, but that the injury is of a nature capable of being fully compensated by money, the court or arbitrator shall proceed to assess the compensation and to apportion it amongst the owner, occupier and other parties in his or their judgment entitled thereto, and on payment of the sum so assessed the licensee may proceed to lay the proposed electric supply line....”

The wayleaves Act (since repealed) also provided for compensation to be paid to landowners.

31. The procedure of laying electric supply lines is now found in the Energy Act, Cap 314 Law of Kenya. Section 46 of that Act provides as follows:

“46. Permission to survey and use land to lay electric lines.

(1) No person shall enter upon any land, other than his own-

a. To lay or connect an electric supply line; or

b. To carryout a survey of the land for the purposes of paragraph (a) except with the prior permission of the owner of such land.

(2) The permission sought in subsection (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry.”

32. Sections 47 and 52 of the Energy Act provides as follows:

“47. Assent to proposal

(1) An owner, after the notice and statement of particulars under Section 46, may assent in writing to the construction of the electric supply line being paid such compensation as may be agreed and any assent 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 assent to the application except under this Act, shall be paid to the legal representative of the owner;

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 construction of the electric supply line, so long as the claim is made within three months after the construction of the electric supply line.

52. Liability of licensee to make compensation for damage. The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss of damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.”

33. It will be seen that under the law, permission of the landowner is required before entering such land and laying electric supply lines. Moreover, a notice is required to be given, which notice should be accompanied by a statement giving the particulars of entry. After the notice, an owner may give assent and is entitled to compensation to be agreed.

34. In this case, there is no dispute that the plaintiff is the legal owner of the suit land. It is also clear that the defendant on several occasions attempted to obtain permission to enter the plaintiff's land and lay the electric supply lines. Further it is clear that the plaintiff declined to grant permission unless he was suitably compensated. However the defendant despite being denied permission on numerous occasions, without lawful authority entered into the plaintiff's land whereby it constructed the second 132 KV line thereon. From the aforementioned provisions of the law, it is explicit that the consent of the plaintiff was mandatory in this case which consent was not obtained. The defendant also failed to compensate the plaintiff as required. No doubt the defendant's actions amount to trespass and the trespass is continuing.

35. A wayleave is an analogous right governed under part X of the Land Act, 2012, Section 143-149 of the said Act. The Act provides the manner in which wayleaves and other rights of way should be created and maintained Section 148 of the Land Act provides for compensation for right of way such as wayleaves. There was no evidence presented to the court showing that the defendant obtained consent of the plaintiff to erect the second 132 KV line through the plaintiff's land. It is therefore my finding and I so hold that the defendant trespassed onto the plaintiff's suit land and the trespass is continuing. The next issue to consider is whether the defendant should pay compensation to the plaintiff and to what extent.

36. It is trite law that where trespass is proved, a party need not prove that he/she 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. In this case, the plaintiff has stated that he has been unable to develop and or commercialize his property owing to the actions of the defendant. The plaintiff in his submission claims an award of Kshs.300,000,000/- as compensation calculated at the rate of Kshs.15,000,000/- per year for 20 years since 1999. This amount to claims for special damages which the plaintiff neither pleaded nor proved. No evidence was brought as to how the plaintiff had arrived at a figure of Kshs.15,000,000/- per year, nor of the damage or loss caused to the suit property by the defendant. This court can therefore in the circumstances only grant nominal damages as provided by law.

37. The evidence on record indicate that the second 132 KV electric line has denied the plaintiff the use of about 1.5 acres of the suit land since 1999. As already stated, the said second 132KV line was constructed without the plaintiff's consent and permission thereby denying the plaintiff's right of his property. The plaintiff admitted that the land is under some use but he cannot develop it due to the power lines. In the circumstances of this case, this court grants the sum of Kshs.20,000,000/- as general damages for trespass.

38. The plaintiff has also asked for award of exemplary and aggravated damages. In the case of **Rookes –v- Barnard (1964) 1 ALL ER 367** cited by Munyao J in the case of **Titus Gatitu Njau –v- Municipal Council of Eldoret (2015)eKLR**, it was held that exemplary damages may be awarded in two classes of cases; first where there is oppressive, arbitrary or unconstitutional action by the servants of the government, and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial at the expense of the plaintiff. That English case received approval of the East African Court of Appeal in the case **Obongo & Another –v- Municipal Council of Kisumu (1971) EA 91** and has been applied in various decisions. The basis of awarding exemplary damages is to punish the defendant for his conduct. At the same time, punitive damages should not be awarded to enrich the plaintiff. The court in awarding such damages or not should look at the circumstances of each case.

39. In the case of **Obongo and Another –v- Municipal Council of Kisumu (supra)**, the Court of Appeal stated:

“Exemplary and punitive damages are appropriate in two classes of cases; oppressive, arbitrary, or unconstitutional action by the servants of the government and conduct by a defendant calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff....

It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of are regarded as still being essentially compensatory in nature. ”

40. In this case, the defendant was already enjoying a wayleave for the first 132KV electric power line. With a view of reinforcing the power output within the coastal region, the defendant proposed a second 132KV line running from Rabai to Kipevu. The defendant needed another wayleave trace through the plaintiff's property. The evidence on record shows that the defendant wrote to the plaintiff severally. Although the plaintiff declined to defendant's request, the defendant nonetheless went ahead and constructed the second 132KV line because it was extremely necessary to do so. In my view, the defendant cannot be said to have acted maliciously or arrogantly. I say so because the defendant pleaded to the plaintiff over a period of time for grant of the wayleave. The defendant even went ahead and forwarded their standard wayleave agreement documents for execution. By doing so, the defendant did not exhibit a party who was acting with malice and arrogance. It is my view therefore that this is not a fit case for award of exemplary and aggravated damages.

41. The other issue to consider is whether an order of permanent injunction should issue as sought by the plaintiff. In this case, there is no dispute that the second 132 KV electric lines are in place. Evidence has been led that the power lines supplies power from Rabai to Kipevu and serves the coastal region. In my view, it would be impractical at this stage to grant the injunction order sought as that would mean the removal of the power line on the section and doing so will incapacitate the whole line and cause untold suffering to the populace and the public facilities along the line. In my view, the justice of the case is that the defendant be given time to negotiate appropriate wayleave agreement/rights of way with the plaintiff as provided for by the law. Indeed that is what the defendant attempted to do by writing to the plaintiff previously before unilaterally laying the electric power line without first obtaining the consent and /or permission of the plaintiff. The court shall make a pronouncement on this at a later stage.

42. In conclusion, I enter judgment for the plaintiff against the defendant as follows:

a. General damages in the sum of Kshs.20,000,000/- for trespass.

b. The defendant is directed to negotiate proper wayleave agreement/right of way with the plaintiff as per the provisions of Section 148 of the Land Act 2012 and such enabling provisions of the law. This should be done within 120 days from the date of this judgment.

c. Either party has liberty to apply.

d. Costs of the suit to be borne by the defendant

43.Ordersaccordingly

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 23rd day of November 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE