REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

APPEAL NO. 13 OF 2018

KENYA POWER & LIGHTING COMPANY LIMITED......APPELLANT

VERSUS

EVERLYNE MOGOTU OSUGO..RESPONDENT

(Being an appeal from the Judgment of Hon. M. Nyaga, RM issued in Kisii CMCC No. 235 of 2014 dated on 4th February 2016)

J U D G M E N T

1. This appeal arises from the judgment of Hon. M. Nyaga, resident Magistrate at Kisii dated 4th February 2016 in Kisii CMCC No. 235 of 2014. The appellant Kenya Power & Lighting Co. Ltd was the defendant in the lower court and the respondent, Everlyne Mogutu Osugo was the plaintiff.

2. The plaintiff in the lower court vide a plaint dated 22nd July 2014 averred that she was the registered owner of land parcel **West Kitutu/Bogusero/604**. She claimed that the defendant unlawfully entered into her said land in or about February 2014 and constructed a power line through her land without her consent and in the process damaged 45 eucalyptus trees belonging to the her valued at kshs. 297,512/=. The plaintiff in the suit prayed for compensation for the damaged trees, damages for loss of user and an order for the removal of the power line from her land. The plaintiff amended her plaint on 10th March 2015 and substituted the particulars of her land parcel as **West Kitutu/Bogusero/7531** in place of **West Kitutu/Bogusero/604**.

3. The defendant on 7th August 2014 filed a defence dated 6th August 2014 and denied all the allegations of trespass and damages set out in the plaint against the defendant. The defendant's defence thus was a mere denial of the plaintiff's averments and invited the plaintiff/ respondent to prove all the averments.

4. The learned trial magistrate heard the plaintiff/respondent and one witness in support of the plaintiff's case. The defendant did not offer any evidence at the trial and called no witness. The trial magistrate upheld the claim by the plaintiff/respondent and awarded the plaintiff special damages in the sum of kshs.297,512/= and general for trespass in the sum of kshs. 150,000/= together with interest and costs of the suit.

5. The defendant being aggrieved by the said judgment has appealed to this court and has by its memorandum of appeal set the following grounds of appeal:

> **1. That the learned trial magistrate erred in law and in fact in finding that appellant's employee, servant and/or agents had trespassed on the respondent's parcel of land known as West Kitutu/Bogusero/ 7531. In the month of February 2014 and damaged thereon forty five (45) eucalyptus trees.**
>
> **2. That the learned trial magistrate erred in law and in fact in finding that the respondent was the registered proprietor of all that parcel of land known as West Kitutu/Bogusero/7531 in the month of February 2014 when the alleged trespass was committed.**
>
> **3. That the learned trial magistrate erred in law and fact in finding the appellant liable for damages on the basis of contradictory and insufficient evidence.**
>
> **4. That the learned trial magistrate erred in law and fact by applying the principal of ownership of land prospectively contrary to the interest of evidence.**
>
> **5. That the learned trial magistrate erred in law and fact shifting the burden of proof to the appellants written submissions and the law and authorities.**

6. That the learned trial magistrate erred in law and fact by awarding the respondent kshs. 297,512 special damages and kshs. 150,000/= general damages without any evidence or at all.

The grounds of appeal challenge the findings of the learned trial magistrate on the basis of the evidence adduced at the trial and it is the appellant's assertion that the findings were not justified by the available evidence.

6. This is a first appeal to this court and the court is thus bound to reappraise the evidence tendered and to draw its own inferences of fact except the court has to be cautious in interfering with findings of fact of the trial court and should only do so if it is patently apparent that the trial court materially misdirected itself in regard to the evidence thereby arriving at the wrong conclusion. This principle was enunciated by the Court of Appeal in the case of **Selle & Another -vs- Associated Motor Boat Co. Ltd & Others [1968] E. A 123** where the court stated as follows:-

> **"…This court must be reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."**

7. Our courts have repeatedly adopted the general principle set in the above case. See the Court of Appeal cases **Kenya Ports Authority -vs- Kuston (Kenya) Ltd [2009] 2 E.A 212, PK Kenya Ltd -vs- Oppong [2009] KLR 442** and **Toyota (Kenya Ltd –vs- Express (Kenya) Ltd [2013]eKLR.**

8. In the present case, the respondent who was the plaintiff in the lower court led evidence to show that she was the registered owner of land parcel **West Kitutu/Bogusero/604** before it was subdivided. A copy of the title deed was exhibited in the plaintiff's bundle of documents as **"PEx.5"** and shows the respondent was registered as the owner of the subject land on 10th January 2012. The respondent in her evidence stated that land parcel **West Kitutu/Bogusero/604** was subdivided to create land parcels **West Kitutu/Bogusero/7531** and **7532**. She stated that she sold and transferred land parcel **7532** to a third party. She stated the trees that the defendant damaged were growing in the original land parcel **West Kitutu/Bogusero/604** before it was subdivided. The respondent following the subdivision of land parcel **604** sought leave of the court to amend the plaint to substitute land parcel **7531** which was the resultant subdivision where the damaged trees were located. Leave was granted and the plaint appropriately amended. The respondent produced a copy of title in respect of land parcel **West Kitutu/ Bogusero/7513** as **"PEx.1"**. The subdivided title **West Kitutu/Bogusero/ 7531** was registered in the name of the respondent on 19th September 2014. The proprietorship section **"Part B"** of the title shows that the respondent was registered as owner under entry No. 1 on 19th September 2014 and that title was issued to her on the same date as per entry No. 2. The title further shows it was a subdivision from land parcel **604**.

9. The evidence before the trial magistrate in my view established that the respondent was indeed the registered owner of land parcel **West Kitutu/Bogusero/604** before it was subdivided to create land parcels **West Kitutu/Bogusero/7531** and **7532**. Land parcel **West Kitutu/ Bogusero/7531** was registered in the respondent's name in September 2014 after the suit had been instituted in the lower court. The respondent testified that the trees that were cut were on her part of the land parcel **7531**. The respondent testified that she had the damage assessed by the forestry department and that she paid the sum of kshs. 14,170/= for the service. The respondent further stated the appellant erected the power lines on her land parcel **604** in 2013 after she had purchased the land in 2012.

10. The respondent's witness Julius Wanyonyi Kisa who testified as PW2 testified that on 20th February 2014 he carried out an assessment on damage that had been caused to trees that were growing land parcel **West Kitutu/Bogusero/604**. He stated that 45 trees had been damaged. He produced an assessment report dated 10th April 2014 **("PEx.4")**. He valued the damaged trees at the rate of kshs. 60/= each and stated they were each less than 10cm in diameter and affirmed that the trees were less than a year old and explained that the trees would have taken 5 to 10 years to mature. He placed a projected value of kshs. 280,645/= on the basis that the trees would have been harvested and sold as transmission posts.

11. The appellant did not offer any evidence at the trial even though their counsel cross examined the respondent and her witness.

12. The appeal was argued by way of written submissions. Both the appellant and the respondent filed their initial submissions and further submissions. The appellant in its submissions contends that the respondent had not proved the alleged damaged trees were on her land parcel **West Kitutu/Bogusero/7531** stating that the original plaint stated that the trees were growing on land parcel **West Kitutu/ Bogusero/604** and that even the report produced by PW2 showed the trees were on land parcel **604** and not **7531**. The respondent however had explained that land parcel **604** was owned by her and she subdivided the land in September 2014 to create land parcels **7531** and **7532**. It was her evidence that after the subdivision the trees fell in her land portion **7531**. The initial land parcel **604** measured 0.23Ha as per **"PEx.2"** while land parcel **7531** measured 0.18Ha and hence land parcel **7532** measured only 0.05Ha. Thus even though land parcel **West Kitutu/Bogusero/604** was subdivided the bulk of the land went to the creation of land parcel **West Kitutu/Bogusero/7531** which was registered in the respondent's name. The respondent testified that the trees were on the portion that she retained and the trial magistrate agreed with her. I find no basis to interfere with the finding of the trial magistrate that the trees damaged by the defendant were growing on the respondent's portion of the land parcel **7531**. The learned magistrate did not err in making this finding as the evidence adduced justified the finding. The appellant offered no evidence at the trial and clearly the respondent's evidence remained unchallenged notwithstanding the cross examination by counsel for the appellant.

13. The appellant did not tender any evidence to show that they never entered land parcel **West Kitutu/Bogusero/604** in February 2014 as claimed by the respondent. The appellant appeared to have taken the view that since the land particulars had changed, the respondent could not prove that the trees damaged were on parcel **7531**. Subdivision of land parcel **604** into parcels **7531** and **7532** could not mean the trees shifted from where they were growing. They were on the portion of land parcel **604** that became land parcel **7531** after subdivision. The respondent amended her plaint to capture this change. The fact that PW2 assessment report indicated the damaged trees were on land parcel **604** does not alter the position since the report was prepared before the land was subdivided and cannot therefore be a basis to say there was a

variance in the evidence as to where the damaged trees were growing. The learned trial magistrate therefore properly admitted the assessment report prepared by PW2 in evidence in proof of damages suffered by the respondent.

14. The respondent's evidence that the defendant entered her land without her consent or permission was not rebutted by the appellant. Section 46 of the Energy Act, Cap 314 of the Laws of Kenya provides that the permission of the land owner is required before the land can be surveyed for purposes of laying or connecting electricity supply line. It provides as follows:-

> **46. Permission to survey and use land to lay electric supply 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 carry out a survey of the land for purposes of paragraph (a), except with the prior permission of the owner of the 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.**

15. The appellant's defence dated 6th August 2014 constituted a mere denial of the respondent's claim and following the testimony of the respondent and PW2 there was no evidence from the appellant that could have contradicted the evidence adduced by the respondent. The respondent proved that she was the owner of land parcel **West Kitutu/Bogusero/604** before it was subdivided and after subdivision she retained land parcel **West Kitutu/Bogusero/7531** and transferred parcel **7532** out. Her evidence was that her trees were growing on the portion that became **7531** in regard to which she was the registered owner. This evidence was not contraverted by any evidence and the learned trial magistrate was justified in accepting it. Without any evidence that the appellant had permission and/or had given notice of entry into the respondent's land parcel **604** in February 2014 the entry of the appellant to lay electric power lines constituted trespass for which the appellant was liable in damages.

16. Though the appellant has not laid any ground of appeal on quantum of the damages awarded, the appellant has in the further submissions filed on 10th July 2018 submitted on quantum. The appellant has submitted that the respondent's land was not rendered totally unusable as she could still farm subsistence crops underneath the power lines. Further, the appellant has submitted the learned trial magistrate fell in error in awarding damages/compensation on basis of mature trees when infact the trees were under one year. The appellant submitted the award was speculative. Besides, the appellant submitted there was no guarantee the trees would have gown to maturity.

17. The respondent's intention in cultivating blue gum trees on her parcel of land rather than doing subsistence farming must have been that she intended it to be a commercial venture. That is what she explained to PW2 who did the assessment. Since it was not possible for the trees to grow to maturity owing to the laying of the electric power line overhead, in my view it was appropriate for PW2 to carry out the assessment on the basis of the projected loss/damage. There was no evidence to suggest the trees could not grow to maturity.

18. On the award of kshs. 150,000/= damages for trespass/loss of user, I am not persuaded the award was so inordinately high as to invite the intervention of this court. See, **Kiwanjani Hardware Ltd & Another -vs- Nicholas Mule Mutinda [2008] eKLR.** It is a fact that for as long as the power lines traversed through the respondent's land she would remain restricted as to the use she could put the section of the land lying below the power lines. She cannot for instance build a house under the power lines and/or plant trees below the power lines. I therefore find no basis upon which I can interfere with the award of general damages made by the learned trial magistrate.

19. Upon reevaluation of the evidence adduced before the lower court, I find that the learned trial magistrate was justified to arrive at the findings and decision that he did. There is no merit in the appeal and the same is ordered dismissed with costs to the respondent.

20. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

N/A for the Appellant

Ms. Moguche for the Respondent

Ruth Court Assistant

J. M. MUTUNGI

JUDGE