

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. 208 OF 2021

KENYA ELECTRICITY AND
TRANSMISSION COMPANY LIMITED
PLAINTIFF

VERSUS

MAHMOOD KASSAM 1ST
DEFENDANT

JAFFER KASSAM 2ND
DEFENDANT

ESMAIL KASSAM 3RD
DEFENDANT

MUSA KASSAM 4TH
DEFENDANT

ESSAK KASSAM 5TH
DEFENDANT

JUDGEMENT

1. The plaintiff commenced this suit through the plaint dated 18th October 2021, seeking for the following prayers:

- a) *“A declaration that the defendant’s actions of stopping the Plaintiff, its contractors, agents, workmen, servants and/or employees from accessing Sub-division no. 819 (Original No. 330/2) Section II Mainland North for purposes of re-construction and improvement works of*

the 132kV Rabai - New Bamburi - Kilifi electricity transmission line is illegal null and void as the Plaintiff is carrying out the works within an already existing wayleaves corridor which is a legally acquired right of way and has restricted its works within the said corridor.

b) A permanent injunction restraining the Defendant themselves, their agents, servants and/or employees from stopping and or in any other manner whatsoever from interfering with the re-construction and improvement of the 132kV Rabai - New Bamburi - Kilifi electricity transmission line by the Plaintiff's contractors, agents, workmen, servants and/or employees within the already existing wayleave corridor that traverses Sub-division 819 (Original No. 330/2) Section II Mainland North.

c) Costs of this suit.

d) Interest on (c) above at court rates.

e) Any further or other relief that this Honourable Court may deem just and expedient to grant."

The plaintiff inter alia averred that it is a body corporate, and had entered into an engineering procurement and construction

(EPC) contract with a foreign contractor for purposes of undertaking the construction works of the proposed 132kV Rabai - New Bamburi - Kilifi electricity transmission line, which is being financed by a loan from the Spanish Government, that attracts interest and is payable by the Government of Kenya; that it had sought and obtained consent from Kenya Power & Lighting Company Limited, KPLC, to use its existing wayleave corridor for the project; that it thereafter engaged a contractor who commenced works sometimes on February 2021 but on 19th August 2021, the said contractor, employees/agents and/or workmen were denied access on L.R 819/II/MN, which was registered to the defendants herein, despite the works being within the existing wayleaves corridor; that the wayleave over the suit property was obtained between 1972 and 1995 by KPLC, and an encumbrance was registered in the memorandum section of the title as *'Grant of easement protected by a caveat registered as C.R 1950/28'*.

2. The defendants denied the plaintiff's claim through their statement of defence and counterclaim dated the 26th October 2021, inter alia averring that KPLC did not have any right whatsoever to authorize the Plaintiff to use its existing

wayleave, as if one existed it was between themselves and KPLC and not the plaintiff; that the wayleave in question is currently subject to an ongoing dispute, that is pending ADR, and the plaintiff cannot purport to enjoy any right thereunder; that they had every right to deny the plaintiff's agents entry into their property as the plaintiff is a stranger to them, and there is no agreement allowing them to use the land and that the plaintiffs have no capacity to seek redress from this court as there is no valid easement contract between them.

3. In the counterclaim the defendants reiterated their averments in their defence and further averred that the plaintiff's encroachment, trespass and occupation of their land with the intention to construct pylons to pass voltage transmission cables amounts to a huge burden on them, and shall restrict development/use of or disposal of the suit property. The defendants therefore prays for the following:

a) *"A declaration that the Plaintiff's action to enter the Defendant's suit property Sub-division 819 (Original No. 330/2) Section II Mainland North for purposes of reconstruction and improvement works of the 132KV Rabai*

- New Bamburi - Kilifi electricity transmission line is illegal null and void for lack of a legally acquired right of way.

b) Special damages of Kenya Shillings Four Hundred and Forty-Two Million (Kshs. 442,000,000)

c) General damages of Kenya Shillings Three Hundred and Nine Million (Kshs. 309,000,000)

d) Any other relief which this Honourable Court may deem just and expedient to award the Defendants in the circumstances of this case."

4. The plaintiff filed a reply to the defence and defence to the counterclaim dated the 9th November 2021, inter alia averring that it is a stranger to any dispute or ADR that may exist between the defendants and KPLC; that it has not encroached or trespassed into the defendants' property, as its occupation thereof is with express consent of KPLC to use the existing wayleave corridor for the reconstruction and improvement of the 132Kv Rabai - New Bamburi - Kilifi transmission line; that the defendants have not laid any basis for the special and general damages of Kshs.442,000,000 and 309,000,000 respectively, claimed; that the defendants are therefore not

entitled to the prayers in their counterclaim, and it should be struck out with costs.

5. During the hearing, the plaintiff called Johnson Muthoka, a registered valuer and senior manager of wayleaves acquisition department at the plaintiff, Victor Wanyama, a surveyor with the plaintiff, Wycliffe Okeyo, a registered valuer, and Emmanuel Ochieng, wayleave officer with KPLC, who testified as PW1 to PW4 respectively.
6. PW1 relied on his statement dated 14th October 2021 and the list of documents dated 18th October 2021 that he produced as exhibits 1 to 7. It was his evidence that the government entered into a contract to repair the old wooden poles on the Rabai - Kilifi transmission lines within the existing corridor line of 30 metres wide acquired in 1995. That KPLC granted the plaintiff consent to replace the old wooden poles constructed by the East African Power before KPLC took over. That the wayleave document, exhibit 6, was executed by Hussein Dairy Ltd, who was the original owners of L.R 330/II/MN CR. 1950, the suit property. On cross-examination, PW1 stated that any line of 132kV, and above can only be dealt with by the plaintiff. He testified that KPLC gave the plaintiff consent over the

wayleave in 2021, to work on the Rabai - Kilifi power line. That no house or tree is allowed to go beyond 12 metres in height, or within 30 metres of the wayleave for safety reasons. He admitted that they did not involve the defendants in their agreement with KPLC. He agreed that he did not have any evidence in support his statement that the defendants had declined to discuss a settlement. He added that the suit property is a subdivision of 330/2/MN, and the trace acreage was indicated as 1.525 acres. Although he admitted that East Africa Power did not sign or stamp, the wayleave document, he insisted that it was a valid agreement, as a caveat for grant of easement was registered as CR 1950/28. He agreed he could not confirm whether the wayleave in dispute is the same as that in the one registered as grant of easement. That sometime in 2020/2021 a gazette notice was issued transferring the old power lines of 132kV and above from KPLC to the plaintiff. He stated that the works on the transmission line in dispute has since stopped at 90 per cent, as the contractor had left the site and country by the time the consent herein was complied with in terms of depositing the money agreed.

7. PW2 told the court how he prepared an undated report, exhibit 8, on the suit property that is in the further list of documents dated 15th November 2022. He stated that he prepared the report after the works were stopped, and he discovered that only 8.39 acres of the land would be affected. On cross-examination, he stated that he was in court as an expert witness and that's why he had not filed a statement. He further stated that the wayleave trace is 15 metres from the center and either side and totalled 8.39 acre. He however stated that he did not have any document showing that the original wayleave trace was 1.525 acres.
8. PW3 told the court how he prepared a valuation report dated 4th February 2022 on the suit property, and valued each acre at Kshs.6,000,000.
9. PW4 relied on his statement dated 14th November 2022 and he stated that the Rabai - Bamburi - Kilifi power line was constructed in 1995 after KPLC acquired a wayleave. He added that the plaintiff wanted to change the wooden poles on the transmission line and requested KPLC for permission to use the wayleave, and the consent was granted. He informed the court that the suit property had since been subdivided without

KPLC's being notified. That the wayleave agreement in favour of KPLC was with Hussein Dairy, and was for 120 feet wide for each line. PW4 told the court that during his last visit to the site in dispute, he saw wooden poles were still there. He added that the plaintiff's power line will carry the in and out lines thereby reducing the wayleave trace. He insisted that the wayleave agreement of 12th July 1995, between KPLC and the Hussein Dairy Ltd, is still in force so long as the power lines are still there. That the consideration in that wayleave agreement was Kshs.1/-, and that he was not aware of any disputes concerning the said wayleave agreement. On cross-examination, he testified that the said wayleave agreement provides wayleave trace of 120 feet wide, and comprises of 1.525 acres. He however, could not establish the acreage of the 120 feet wayleave on the suit property. He admitted that the letter dated 3rd December 2020 by the plaintiff requesting for use of the said wayleave corridor, and the reply dated 28th December 2020 giving the consent, were not copied to the defendants. He admitted that the wayleave agreement was not registered in the title of 330/II/MN, and that the grant of easement registered on the title is not related to the current

power line, which is the subject matter of the suit. On re-examination, he informed the court that by the time the current defendants became the registered owners of the suit property, the power lines were already on the land, and no suit has ever been filed by the defendants or the previous owners against KPLC, since the agreement came into force. He also stated that the wayleave agreement has a signature by KPLC.

10. The defendants/counterclaimants, called Mahmood Kassam, the 1st defendant, and Thomas Mukwana, a registered valuer, who testified as DW1 and DW2 respectively.

11. DW1 relied on his statement dated 26th October 2011 and the list of documents dated 9th February 2022, which he produced as exhibits 1 to 6. He testified that he was aware that Hussein Dairy Ltd and KPLC entered into a wayleave agreement. That the said Hussein Dairy Ltd belonged to his father before it was transferred in 1997 to him and his brothers who are the other defendants. He stated that he had written to KPLC in one of the letters he produced requesting compensation for the power lines over the suit property. He lamented that the power lines are causing noise and the land cannot be put to any other use. He admitted that he was the

one that stopped the plaintiff from constructing power lines over the land. In cross-examination, he stated that he was aware that KPLC constructed two parallel power line sometime in 1995/1996 and that his father signed the wayleave agreement with KPLC. He testified that the counterclaim is against the plaintiff even though he has never filed a suit against KPLC for failure to pay compensation. He stated that the existing power lines had taken about 20 acres of the land, but the ones being erected would take around 9 acres according to the plaintiffs. He added that the wayleave agreement specifies that 1.525 acres was to be used for the wayleave. He further stated that after he stopped the plaintiffs from carrying on the works on the suit property, he received a warning letter from the plaintiffs. That the letter warned him of being in contempt of court orders, and he allowed the works to continue to completion, and if the works are not complete, then he is not to be blamed. He blamed his father's illiteracy for signing a wayleave agreement where the consideration is Kshs.1/-. He changed his statement and stated that he is the one who signed the wayleave agreement as his father passed away in 1988. He added that he was never paid the one

shilling under the wayleave agreement. He claimed that he thought that KPLC would construct a single power line. That he had found a buyer for the land in 2010, but he could not sell it because of the huge power lines overlying it. On re-examination, he elaborated that he was a director of Hussein Dairy Ltd, when he was signing the said wayleave agreement with KPLC. That he has not sued KPLC because of the ongoing discussions and that the plaintiffs came onto the suit property when the discussions were going on. That the National Land Commission was also involved in the discussions.

12. DW2, a valuation officer working under Value Consorts Limited and an expert witness produced a valuation report by one Maina Chege, a deceased valuer. He explained that the late Maina Chege had started ailing when he received instructions to prepare the said valuation report and he had given him assignments to compile data on the same. He confirmed that he was the one who worked on compilation of data in the said report, dated 16th December 2021. On cross-examination, he testified that he is the one who collected the comparable data although the deceased was the one who visited the suit property. That the comparable data that he

compiled was however not captured in the said report. He agreed that it is the deceased who came up with a value of Kshs.18,000,000 per acre. atDW2 agreed that there are squatters on parts of the suit property which also has a tarmacked road abutting it. He stated that that value was comparable to that of one acre of land in Kiembeni area. When he was shown the comparable in PW3's report, he stated that they were on the lower part of the suit property which is uninhabited, unlike the ones they had used which were on the upper part that is habited and more expensive. He agreed that the report by Maina, the deceased, has not detailed the comparable relied on, while that by PW3 report has given those details, which the court can see. He added that the difference in the value between the two reports is not normal. That in the profession a difference in valuation that is about fifteen per cent is normal. On re-examination, DW2 stated that capturing of details of properties used in comparing with the property subject matter of valuation in valuation reports is not mandatory. He added that though the suit land is vast, what was being valued was the wayleave trace along the tarmacked road.

13. At the close of the parties cases on 3rd November 2025, the court directed that the plaintiff to file submissions before 13th November 2025 and defendants to do so before 23rd November 2025. As I embark to prepare this judgement today the 24th November 2025, the only submissions filed is by the learned counsel for the defendants dated 19th November 2025, that was filed on 21st November 2025, which the court has considered.

14. The following are issues arising in both the main suit and counterclaim for the court's determinations:

- a. *Whether there exists a wayleave agreement/easement over the suit property, and if yes, between which parties.*
- b. *Whether the plaintiff has permission/consent to use the said wayleave agreement/easement.*
- c. *Whether the plaintiff trespassed into the suit property.*
- d. *Whether the plaintiff is liable to pay the defendants general and special damages, and if so, how much.*
- e. *Who bears the costs?*

15. The court has meticulously considered the pleadings, oral and documentary testimonies by PW1 to PW4, DW1 & DW2,

submissions by the learned counsel and come to the following determinations:

- a. It should be appreciated that the main dispute between the parties is one of wayleaves, which is an overriding interest in both the Registration of Titles Act Chapter 281 of the Laws of Kenya, repealed, under whose legal regime the title was registered, and the current Land Registration Act Chapter 300 of Laws of Kenya. It has not been disputed that the plaintiff commenced construction works of the proposed 132kV Rabai - New Bamburi - Kilifi electricity transmission line under a consent given by Kenya Power & Lighting Company, KPLC, which is the successor of East Africa Power & Lighting Company Limited, E.A.P. & L. Company Ltd, were the party that entered into a wayleave agreement with Hussein Dairy on 13th July 1995. It is this agreement that the plaintiff was using to enter onto the suit property to do the works, until it was stopped by the defendants, who alleges that consideration was never paid, and that the dispute is currently under some ADR process. That stoppage of works was lifted pursuant to the consent dated the 24th

November 2021 that was adopted by the court on 1st December 2021.

b. From the testimony given by PW4, who was the only witness from KPLC, it is not certain whether the wayleave/easement agreement referred to in (a) above is the subject matter of the caveat registered as CR 1950/28 related to the wayleave corridor that the plaintiffs wanted to utilize. From the court's perspective, a wayleave agreement is just like any other contract, and it is subject to the Law of Contract Act Chapter 23 of the Laws of Kenya. *Section 3* of the said Act provides as follows:

"No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

Section 4 thereof provides for an exception to the above section and states as follows:

“Subsection (3) shall not apply to a contract made in the course of a public auction nor shall anything in that subsection affect the creation or operation of a resulting, implied or a constructive trust.”

- c. A perusal of the what the parties called the wayleave agreement that was produced as exhibit 6, clearly show that it did not have a space for KPLC to execute/sign, which is would then mean without their signature, the agreement would be a contravention to *section 3* of the Act. The court has perused other relevant Acts in force at the time, including the Electric Power Act Chapter 314 of the Laws of Kenya, repealed, the State Corporations Act chapter 446 of the Laws of Kenya, the repealed

Companies Act, and so forth, and nowhere was KPLC expressly exempted from executing wayleave agreements.

d. However, in the case of Royal British Bank versus Turquand [1856] 6 E. & B. 327 the court held as follows:

“While persons dealing with a company are assumed to have read the public documents of the company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings - what Lord Hatherley called “the indoor management” and may assume that all is being done regularly....”

Gower’s Principles of Modern Company Law has summarized the rule in Turquand’s case [supra] as follows:

“This rule was manifestly based on business convenience, for business could not be carried out if everybody who had dealings with a company had meticulously to examine its internal machinery in order to ensure that the officers with whom he dealt

with had actual authority. Not only is it convenient, it is also just.....”

With the above in mind, and considering DW1, confirmed willingly signing the wayleave agreement on behalf of Hussein Dairy Ltd as his father had by then passed on, the court will not dwell on the lack of execution or seal of KPLC, on the wayleave agreement. The court will take it the way DW1 took it then, that it may have been the standard form, at that material time.

- e. The dispute herein is traceable to the wayleave agreement entered between KPLC and Hussein Dairy on 13th July 1995. The said agreement confirms it was with regard to L.R 330/II/MN CR 1950 and the wayleave trace corridor was estimated to be 120 feet wide, totalling 1.525 acres. From the letter dated 9th February 2017 produced by DW1, it can refer to wayleave agreement dated 25th August 1972 over plot 330/2/II/MN owned by Hussein Dairy. The agreement of 25th August 1972 for a power line 33kV, was however not produced in court as exhibit.

f. In this suit, the suit property is described as L.R 819/II/MN CR 30412 (Original L.R 330/2/II/MN CR. 1950/35). The question that begs to be answered is which of the two leave agreements established/created the wayleave corridor on the suit property herein. The only wayleave agreement between KPLC and Hussein Dairy that was produced in court is the one dated 13th July 1995, over L.R 330/II/MN CR. 1950, which parcel is different from L.R 819/II/MN CR. 30412 (Original L.R 330/2/II/MN CR. 1950/35), that is the suit property herein. It follows that the wayleave agreement produced as exhibit 6 cannot be the basis or foundation of a claim of wayleave/easement over the suit property herein. Probably, the wayleave agreement mentioned in the letter dated 9th February 2017 that was produced by DW1, as exhibit could be the one that created the wayleave/easement over the suit property herein. That letter referred to a wayleave agreement dated 25th August 1972 over plot 330/2/II/MN owned by Hussein Dairy, and was for a 33Kv power line, but it was not produced in court as exhibit. It was probably what was registered as caveat number CR.

1950/28. The fact that the letter dated 9th February 2017 referred to that wayleave agreement can only be construed, to mean it exists, which conclusion is confirmed by the letter of the former Chairman of National Land Commission, NLC, dated 20th February 2017. The foregoing conclusion can only mean the wayleave agreement produced as exhibit 6 was for a second power line of 132 kV, whose details the court has already addressed above.

g. Having come to the finding that exhibit 6 was not in respect of CR 1950/28 then, it is logical to conclude that the wayleave agreement dated 13th July 1995, exhibit 6, was never registered. The burden of proving that the wayleave agreement of 13th July 1995 was registered lay on the plaintiff, by for example, producing CR. 1950/28, if it wanted the court to come to a different conclusion. The rule of the thumb has always been that he who alleges must prove. The plaintiff has failed to prove its case against the defendants and its claim is for dismissal. Similarly, as the certificate of search dated 30th September 2021, has confirmed that the suit property as

described no longer exists due to the confirmed subdivisions thereof, and due the failure by the defendants to plead on what subdivision(s) the alleged trespass and damages caused by the plaintiff occurred, the counterclaim also fails, and is equally for dismissal.

h. Having established that the wayleave agreement produced as exhibit 6 was never registered, it is imperative upon the plaintiff and or KPLC to engage the defendants, who apparently owned the suit property, to register the said wayleave against the new subdivisions, as the certificate of search dated 30th September 2021 indicates the suit property has since been subdivided into several plots. The government/parastatals are not excused from the results of indolence, and in view of the provisions of *section 7* of the Limitation of Actions Act, chapter 22 of Laws of Kenya, KPLC may no longer register the said wayleave agreement against the suit property that apparently does not legally exist after subdivision. This leaves the plaintiff with the option of engaging the defendants afresh, to come up with wayleave arrangements over the suit property or subdivisions

thereof, where the wayleaves trace is located, and or offer appropriate compensations.

i. It is trite that parties are bound by their pleadings, and that the courts only grants what has been pleaded and proved. For clarity's sake, this decision should not be construed to mean that the court has ordered for the removal of the developments/structures already in place, where the wayleave trace is located.

j. Under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where there is good reason to order differently. Considering that the plaintiff and defendants have both failed to prove their claims against each other, I find it fair, just and prudent that each party to bear their own costs in the main suit and counterclaim.

16. From the foregoing determinations on both the main suit and counterclaim, the parties have failed to establish their claims against the other to the standard required by the law, and the court finds and orders as follows:

a. That the plaintiff's suit is dismissed.

b. That the defendants' counterclaim is dismissed.

c. Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF
DECEMBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : Mr. Kiarie Kariuki

DEFENDANTS : Mr Kihiko and Mr Mutugi

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA.