

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC NO 1 OF 2014**

**SAMUEL LARINGO NAMENGE THOMAS MUHOKHO ..**

**PLAINTIFF**

**= VERSUS =**

**KENYA POWER & LIGHTING CO. LTD .....**

**DEFENDANT**

**J U D G M E N T**

1. **SAMUEL LARINGO NAMENGE THOMAS MUHOKHO** (the Plaintiff) first approached this Court vide his plaint dated 29<sup>th</sup> November 2013 and later amended on 26<sup>th</sup> October 2016. He impleaded the **KENYA POWER AND LIGHTING COMPANY LTD** (the Defendant) claiming that the land parcel **NO BUKHAYO/KISOKO/4173** (the suit land) is registered in the name of his wife **FLORENCE CHEPTAI NAMEMGE** who had donated a Power of Attorney to him to enable him file this suit.
2. That in or about March 2013 and without his consent, the Defendant encroached onto the suit land and erected

electricity poles for service lines and in doing so, damaged the Plaintiff's crops and trees. The particulars and value of damage are listed as follows:

a) 11 Eucalyptus trees - valued at Kshs.243,975.90.

b) Maize - Kshs.3,290.

The electricity poles and service lines have also interfered with the Plaintiff's use of the suit land and if the same is not rectified, this will permanently deny him the use of the same for which he seeks mesne profits from the date of installation of the electricity poles until rectification.

3. That although he has made several demands to the Defendant's Busia Office and also the Nairobi Office seeking compensation, the Defendant has not done so.
4. The Plaintiff therefore seeks judgment against the Defendant in the following terms:

**1) Kshs.247,650.00**

**2) Mesne profits**

**3) Interest**

**4) An order directing the Defendants to remedy the trespass and/or re-align the poles and service lines.**

**5) Costs of this suit and interest thereon.**

**6) Any such other relief as this Court may deem appropriate.**

5. Together with the plaint, the Plaintiff filed his statement and those of his witnesses. He called **GILBERT N. NADEMA (PW2), KENNEDY MASIBO (PW3), JENNIFER LUTOMIA (PW4) and WINSTONE NAMENGE (PW5)** as his witnesses.
6. **GILBERT N. NADEMA (PW2)** works with the Kenya Forest service. He did not record any statement but produced a report prepared by his colleague **MR J. M. KYAMBO** on 10<sup>th</sup> July 2013. It shows that the damaged trees were worth Kshs.243,975.40.
7. **KENNEDY MASIBO (PW3)** is a land Surveyor in Busia. He too did not record any statement but told the Court that he visited the suit land on 25<sup>th</sup> April 2023 following a complaint by the Plaintiff that the Defendant had erected electric poles on his land. He prepared a report dated 5<sup>th</sup> May 2023 and confirmed that the Defendant had indeed erected an electric pole some 4 metres inside the suit land and there were

power lines covering 71 metres. He produced the report as part of the Plaintiff's documentary evidence.

8. **JENIFER LUTOMIA (PW4)** is the sub-County Agricultural Office in Nambale. She too produced a report by her colleague one **GEOFFREY SUNGUTI** who was incapacitated following a road accident. The report dated 19<sup>th</sup> July 2013 and shows that when the Defendant cut down trees on the suit land, they damaged 80% of the Plaintiff's crop of maize.
9. **WINSTON NAMENGE (PW5)** is the Plaintiff's son. He recorded an un-dated statement but filed on 27<sup>th</sup> January 2015 in which he states that in or about March 2013, men from the Defendant company came with equipment for setting up power lines on the suit land. They cut down trees and destroyed the maize crop which prompted the witness to question them. Their response was that they had been awarded a contract by the Defendant. He therefore informed his father the Plaintiff who made several trips to the Defendant's Busia Office to resolve the issue but to no avail. The Plaintiff therefore decided to file this case.

10. The Plaintiff also filed two lists of documents. The first list is dated 17<sup>th</sup> December 2014 and contains the following documents:

- 1) Copy of a Crop Damage Assessment Report by the District Agricultural Office Nambale dated 19<sup>th</sup> July 2013.
- 2) Copy of Evaluation Report dated 11<sup>th</sup> July 2013 from the Kenya Forest Service.
- 3) Letter by Ministry of Agriculture.
- 4) Letter dated 4<sup>th</sup> July 2013 from the Plaintiff.
- 5) Special Power of Attorney dated 20<sup>th</sup> February 2013 donated to the Plaintiff by **FLORENCE CHEPTAI NAMENGE.**

By a supplementary affidavit dated 5<sup>th</sup> January 2018, the Plaintiff filed the following documents:

- 1) Title deed for the land parcel **NO BUKHAYO/KISOKO/4173.**
- 2) Power of Attorney dated 5<sup>th</sup> January 2018 donated to the Plaintiff by **FLORENCE CHEPTAI NAMENGE** and registered on the same day.

By a further list of documents dated 13<sup>th</sup> November 2023, the Plaintiff filed the Report from the County Survey office dated 5<sup>th</sup> May 2023.

11. By its defence dated 11<sup>th</sup> December 2017, the Defendant denies all the contents of paragraphs 3, 4, 5, 5A, 6 and 7 of the amended plaint and puts the Plaintiff to strict proof thereof.
12. The Defendant also filed the statement of its witness **DENNIS NAMISI KHWATENGE (DW1)** who did not state his position in the said Company. He denied that the Defendant had transmitted electric poles through the Plaintiff's land as alleged. He added that he visited the suit land and confirmed that the power connection had not been authorized by the Defendant. The witness further added that the Plaintiff should report the incident to the relevant investigative and prosecutorial agencies pursuant to the provisions of **Section 168** of the **Energy Act**. He stated that a Preliminary Objection would be taken to the effect that this Court lacks the jurisdiction to hear and determine this case and the same should be struck out.

13. The hearing commenced before **KANIARU J** on 12<sup>th</sup> November 2018 who heard the Plaintiff's testimony. I thereafter took over the case from 9<sup>th</sup> November 2023 and heard the evidence of the Plaintiff's witnesses and that of the Defendant.
14. Submissions were thereafter filed both by **MR OTANGA** instructed by the firm of **BOGONKO OTANGA & COMPANY ADVOCATES** for the Plaintiff and by **MR ALUSA** instructed by the firm of **WAMAASA, MASESE, NYAMWANGE & COMPANY ADVOCATES**.
15. I have considered the evidence by the parties and the submissions by counsel.
16. The Plaintiff's case is that the Defendant encroached the suit land on or about March 2013 and while in the process of erecting power poles thereon, damaged his trees valued at Kshs.243,975.90 and maize valued at Kshs.3,290.00. The Defendant has denied responsibility and added that in fact, the jurisdiction to determine this dispute lies with other agencies and not this Court. And although that issue was pleaded, it was not canvassed. I think that should be the starting point in this judgment because, as is now well

settled since the decision of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" -V- CALTEX OIL (KENYA) LTD C.A. CIVIL APPEAL NO 50 of 1989 [1989 KECA 48 KLR]**, a question of jurisdiction once raised by a party or by the Court on its own motion must be decided forthwith on the evidence before the Court. Jurisdiction is everything and the Court must down it's tools the moment it holds the opinion that it has no jurisdiction.

17. This dispute is essentially between a private individual complaining of trespass on his land by the Defendant. The Plaintiff has pleaded that in or about March 2013, the Defendant trespassed onto the suit land to erect power lines poles and in the process destroyed his maize crop and trees. It is clear to me that the **Energy Act 2006** was the applicable law when this suit was first filed on 29<sup>th</sup> November 2013 and thereafter amended on 26<sup>th</sup> October 2016 prior to the commencement of the **Energy Act 2019. Sections 46, 47 and 48** of the **2006 Act** sets out in details the procedure to be adopted where electricity supply lines are to be erected through private property. In this case, there is no doubt that the suit land is private property registered in the

name of **FLORENCE CHEPTAI NAMENGE**. And although the Defendant has denied being responsible for erecting the power lines, it is a matter of public knowledge that only the Defendant has the monopoly in this country to do so. Indeed, when he was cross-examined on 28<sup>th</sup> July 2025, the Defendant's witness **DENNIS NAMISI KHWATENGA (DW1)** confirmed as much when he said:

**“It is true that there is a power line passing through the said land. It is not true that we have another company which fix power lines. But the Defendant is the only company which supplies power in the country.”**

**Section 4** of the **2006 Act** establishes the Energy Regulatory Commission whose powers as set out under **Section 6(1)** include to:

**“Investigate complaints or disputes between parties with grievances over any matter required to be regulated under this act.”**

It is clear that under **Section 46** of the **Act**, permission of the land owner is required before any power supply lines are erected on his land. The permission shall be sought by way

of a notice and under **Section 47**, the land owner may assent in writing to the construction of power supply lines on his land upon being paid the agreed compensation. Any dispute arising therefrom shall, under **Section 48** of the **Act**, be referred to the Energy Regulatory Commission set out under Section 4. Section 26 of the Act provides that:

**“A person aggrieved by a decision of the Commission may appeal to the Tribunal within thirty days of the decision ...”**

It is clear to me that the dispute herein ought to have been referred to the Commission established under **Section 4** of the **Energy Act**. Indeed, that was the route which I took in the case of **ALICE MWERU NGAI -V- KENYA POWER & LIGHTING COMPANY LTD 2015 eKLR** where, faced with a dispute such as this one, I stated as follows:

**“In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the Plaintiff has not approached as a first point of call, it would be an un-warranted intrusion into the jurisdiction of another organ if this Court**

were to purport to handle this dispute. It is in the interest of the proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their Statutory responsibilities. That is why those procedures were formulated and such organs established.”

I must follow the same path in this case and find that the Plaintiff has improperly invoked the jurisdiction of this Court when there is another more efficacious forum which he should approach. In so doing, I am also guided by the case of **SPEAKER OF NATIONAL ASSEMBLY -V- KARUME 1992 KLR 21** where the Court of Appeal said the oft - repeated words:

**“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”**

Similarly, in the case of **GEOFFREY MUTHIGA KABIRU & 2 OTHERS -V- SAMUEL MUGNA HENRY & OTHERS 2015 eKLR**, the same Court said:

**“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.”**

The **SUPREME COURT** on it's part addressed the same issue in the case of **ALBERT CHAUREMBO MUMBO & 7 OTHERS -V- MAURICE MUNYAO & 148 OTHERS S.C. PETITION NO 3 of 2016 [2019 eKLR]** and held:

**“... even where superior Courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi - judicial authorities and organs to deal with the dispute provided for in the relevant parent statute.”**

The above precedents clearly epitomize the doctrine of exhaustion which basically requires that a party aggrieved

by the decision of an agency which has other administrative agencies set out to redress any dispute should ideally invoke such dispute resolution mechanisms before approaching the Court. And Courts must encourage it because Article 159 of the Constitution provides as such.

18. In my view, this suit is for striking out.
19. I shall, however, if I am wrong on the above exposition, consider the Plaintiff's claim on the merit of the evidence.
20. The suit land is not registered in the name of the Plaintiff. It is registered in the name of his wife **FRLORENCE CHEPTAI NAMENGE** who has donated two Powers of Attorney to him for purposes of filing this suit. The first Power of Attorney is dated 20<sup>th</sup> February 2013 and was filed on 17<sup>th</sup> December 2014. It was not registered and there is no evidence that Stamp Duty was paid. The Plaintiff's counsel, appreciating that lapse, filed a second Power of Attorney dated 5<sup>th</sup> January 2018 and filed on the same day. This one is duly registered and Stamp Duty was paid. Unfortunately, for the Plaintiff, however, none of those Powers of Attorney is capable of donating to him the power to institute this suit. That is because, in respect to the first Power of attorney dated 20<sup>th</sup>

February 2013, no Stamp Duty was paid. **Section 19(1)** of the **Stamp Duty Act** provides that:

**1: “Subject to the provisions of sub-section (3) of this Section and to the provisions of Sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except -**

- (a) in criminal proceedings; and**
- (b) in civil proceedings by a collector to recover stamp duty, unless it is duly stamped.”**

Under **Section 19(3)** of the same **Act** there is provision for stamping the document out of time, which means that an instrument for which the law requires Stamp Duty to be paid is not necessarily in-admissible in Court and may be admitted provided the Stamp Duty is assessed and paid together with any penalty arising therefrom. However, in the circumstances of this case, **Section 19(3)** of the **Stamp Duty Act** cannot aid the Plaintiff because he has already paid Stamp Duty on the second Power of Attorney dated 5<sup>th</sup> January 2018.

21. Unfortunately, again for the Plaintiff, the second Power of Attorney dated 5<sup>th</sup> January 2018 cannot also aid his case because it was dated and filed some five (5) years after this suit had been filed. It cannot save the Plaintiff because it cannot apply retrospectively. This issue was addressed by the Court of Appeal in the case of **ESHA SAID SALIM -V- SALIM KIBWANA HAMISI and MARGARET ADEA ORERO C.A. CIVIL APPEAL NO 178 of 2007 [2012 eKLR]** where the Court at page 4 stated thus:

**“We have re-evaluated and considered this evidence afresh. Having done so, we are of the considered view that the pivotal and most important point for decision is whether the ‘Power of Attorney’ in question was a document that was capable of donating to Mohamed Kenny the power to dispose of the property in question to any third party. It is conceded that the so called ‘Power of Attorney’ was not registered; no stamp duty had been paid on it and further that it had not been signed by all the listed donors (it is noted that one Omar Kibwana Khamis did not**

**sign). We have considered carefully the contents of the 'Power of Attorney'. We have observed that indeed the same is dated 14<sup>th</sup> March 1994. Even assuming that it was a legally compliant and valid document, it could only be effective from 14<sup>th</sup> March 1994 and not before as it cannot operate retrospectively."**

The Plaintiff herein finds himself in the same predicament. The Power of Attorney dated 5<sup>th</sup> January 2018 though duly signed and Stamp Duty paid, was filed long after the plaint had been filed in 2013 and amended in 2016. It cannot act retrospectively to clothe the Plaintiff with the power to prosecute this suit.

22. The up-shot of all the above is that having considered the evidence by the parties, I issue the following disposal orders:

- 1) The suit is dismissed.**
- 2) Costs to the Defendant.**

**BOAZ N. OLAO**

**JUDGE**

**27<sup>TH</sup> FEBRUARY 2026**

**Ruling dated, signed and delivered by way of electronic mail on this 27<sup>th</sup> day of February 2026 with notice to the parties.**

**Right of appeal.**

**BOAZ N. OLAO**

**JUDGE**

**27<sup>TH</sup> FEBRUARY 2026**

Explanatory notes:

This judgment was due for delivery on 25<sup>th</sup> November 2025. However, due to my transfer to Iten Court w.e.f 15<sup>th</sup> January 2026, I had to prioritize my part heard cases. This has contributed to the delay in delivery this judgment. The same is registered.

**BOAZ N. OLAO**

**JUDGE**

**27<sup>TH</sup> FEBRUARY 2026**