



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1122 OF 2016

(FORMERLY HCC NO. 155 OF 2001)

SAMWEL MOTARI NYAMBATI.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY.....DEFENDANT

J U D G M E N T

1. The plaintiff initiated the present suit by way of a plaint dated 27th September 2001 filed in court on the same date. The plaintiff claimed to be the registered owner of land parcel **Bassi/Boitangare/792** (suit land) where he has a homestead and carries on subsistence farming thereon. The plaintiff's claim was that the defendant has since September 1994 been in continuous trespass onto his said parcel of land as the defendant without justification and/or reasonable cause or authority constructed a power transmission line through the plaintiff's land parcel **Bassi/Boitangare/792** and thereby destroyed the plaintiff's arable land and rendered it unusable for agricultural purposes.

2. The plaintiff prays for judgment against the defendant for:-

(a) General damages for loss of user.

(b) General damages for trespass.

(c) Costs of the suit.

(d) Interest on (a), (b) and (c) above.

(e) Any other or further relief as the court may deem fit to grant.

The defendant filed a defence dated 15th October 2001 where the defendant contended that the plaintiff's suit was time barred and further that the erection of the electricity transmission line would constitute an overriding interest under the provisions of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). The defendant further stated that the plaintiff was not entitled to the reliefs sought and further averred that the plaintiff's suit was an abuse of the court process as the plaintiff had instituted 2 previous suits on the same cause of action vide HCCC No. 94 of 1999 and HCCC No. 860 of 1995.

3. Since the filing of the defence the suit has gone through turns and twists. The suit was part heard in 2002 before Commissioner of Assize, P.K Birech. An application by the defendant to strike out the suit on the ground that it was an abuse of the court process filed in 2005 was dismissed for want of

prosecution on 14th November 2006. The suit itself was dismissed for want of prosecution on 21st May 2009 for non attendance by the parties. An application to reinstate the suit dated 1st December 2009 was allowed on 7th June 2010. The defendant further filed an application dated 2nd August 2012 seeking the dismissal of the plaintiff's suit for want of prosecution. This application was dismissed on 18th April 2013 with costs to the plaintiff/respondent.

4. The plaintiff having testified before P. K Birech Commissioner of Assize and directions having been taken before Gacheche, J. on 14th March 2007 that the suit proceeds from where he had left, the suit was fixed before me for further hearing on 12th November 2015 when one Rael Otundo (valuer) testified as PW2 on behalf of the plaintiff and the plaintiff's case was closed. The suit was fixed for defence hearing on 3rd March 2016 when one, Walter Akell Mboro testified on behalf of the defendant.

5. The Evidence;

The plaintiff testified that he was the owner of the land parcel **Bassi/Boitangare/792** measuring about 20 acres. He stated that the defendant sometime in 1994 without his permission or consent entered into his said land parcel and erected electric poles with the objective of passing electricity through his said parcel of land. He stated he queried why they were doing so and the defendant informed him he would be paid compensation for the affected area. The plaintiff estimated the area that was affected by the power line to be about 5.6 acres. The plaintiff produced a valuation report and a sketch plan. The valuation report indicated the value of the affected land to be about kshs.1,000,000/=. The sketch showed the layout of the power line through the plaintiff's parcel of land. The plaintiff stated he could not construct buildings on the portion through which the power line was constructed and in that regard he claimed his right of use of his land was restricted. The plaintiff however stated that he continues to plant maize and other seasonal crops like wimbi. It was the plaintiff's further evidence that when the defendant's were erecting the power line, they damaged his food crops but they paid him compensation of kshs. 42,000/= vide HCCC No. 860 of 1995 after he had sued them. He stated the compensation paid was for the damaged crops but not for the land that he is not able to fully utilize.

6. PW2, Rael Otundo a valuer inspected the suit premises for valuation purposes. He confirmed the land below the power lines was under maize cultivation at the time of inspection. He stated the affected area was approximately 4 acres and he placed the value for compensation purposes at kshs. 1,000,000/= as at the time. The valuer affirmed that the land affected could only be utilized for subsistence farming as no buildings could be constructed under the power lines.

7. DW1, Walter Akell Mboro testified that he worked for the defendant as a wayleaves officer and had worked with the defendant for the last 36 years. In 1994 he stated he was stationed at Kisumu and that the plaintiff's suit land fell within the Western region which was covered by the defendant's Kisumu Regional Office. The witness testified that the defendant was at the time implementing the Rural Electrification Project which was intended to give the local populace access to electricity. He stated that the persons through whose land the power lines passed were compensated. The plaintiff being one such person was paid compensation. The witness further stated that the defendant was then paying compensation for trees and crops and that the plaintiff was paid kshs. 42,200/= through his advocates after he filed suit Kisii CMCC No. 860 of 1995 following an agreement that resulted in the settlement of the suit. As per the copy of the plaint produced in evidence as **"DEx.1"** the plaintiff in the suit had claimed general damages for trespass in addition to kshs. 42,283/20 being the value of the plaintiff's damaged crops.

8. It was the defendant's further evidence that the plaintiff had agreed to give a way leave to the defendant and in this respect made reference to the plaintiff's advocates letter dated 7th June 1996 (**"DEx.3"**) where in the lead up to the settlement of the suit CMCC No. 860 of 1995 the advocate wrote:-

"My client will accept kshs. 42,283.20 together with costs of this suit as per the scale.

My client is ready and willing to grant way leave so long as your clients realign the power line

so as to least affect his only means of livelihood - the small shamba.”.

DW1 in his evidence further stated thus:

“At the time the power lines were constructed on the plaintiff’s land there was only maize and beans. The power lines do not hinder the use of the land for cultivation. When effecting compensation we consider the value of trees and crops. In the case of the plaintiff he was paid general damages as he complained. The power lines passing the plaintiff’s land were domestic power lines. The plaintiff was paid adequate compensation.”

9. In cross examination the witness maintained that the defendant does not pay compensation for the land in the case of domestic power lines unlike in the case of high voltage transmission power lines where the land is paid for. DW1 further affirmed that ordinarily the power lines are laid on the edges of the land. Upon being shown **“PEx2”** he stated that the power line layout was skewed to one side but further observed that given the layout of the plaintiff’s parcel of land the power line could not be right at the edge.

10. The court having observed that PEx.2 appeared to show that the power line was passing right in the middle of the plaintiff’s land directed that the defendant revisits the plaintiffs land parcel 792 and ascertain the layout and positioning of the power line. If it was found that the power line was passing in the middle of the land as shown in **“PEx2”** the defendant was to consider the possibility of relocating the line to run along the edge of the land. The report was to be filed in court within 60 days of 3rd March 2016 when DW1 testified and he was to attend court for further hearing on 11th May 2016 to wind up his evidence and to present the report.

11. On 11th May 2016 the report was not ready and the suit was adjourned for further hearing on 19th July 2016. On 19th July 2016 DW1 stated that they had visited the site and further that the defendant had retrieved the consent signed by the plaintiff dated 25th July 1996 where the plaintiff allowed the defendant to place the power lines in the position where they presently are located and therefore, there would be no basis to move them. This assertion by the defendant prompted the court to give the following directions/orders *suo moto* in the wider interest of doing substantive justice:-

“Notwithstanding the plaintiff may have given consent for the laying of the power lines through his parcel 792 the court directs the defendant to revisit the site and consider how best they can realign the power line such that they do not pass through the middle of the plaintiff’s land and the same are as much as possible aligned to the edge of the land parcel to enable the plaintiff have optimum use of his parcel of land which he cannot now have when the power lines run virtually in the middle of his land. The defendant is directed to cause a resurvey of the power lines to be undertaken with a view of correcting any anomaly that may have been occasioned...”

12. On 25th July 2017 the defendant filed a report dated 18th July 2017 which interalia stated as follows:-

“I, Mr. Walter Akello (DW1) and Mr. Denis Obiero (Designer) did visit the piece of land on 17th February 2017 and confirmed that it was possible to re-route the line as there was enough space along the boundary, we tabulated the cost of re-routing the line, came up with a quotation of kshs. 994,708.90”

In the report the defendant indicated they would be in a position to undertake the re-routing of the power line provided the plaintiff paid the cost for doing so assessed at kshs. 994,708.90. The defendant’s argument was that the plaintiff having given the consent for the way leave when it was constructed any re-routing would have to be at his cost.

13. Following the filing of the report by the defendant, the parties filed their final written submissions as directed by the court. Having reviewed the pleadings, the evidence and the submissions by the parties,

the issues for determination are as follows:-

- (i) Whether the defendant has trespassed onto the plaintiff's land parcel Bassi/Botangare/792 and if so whether any damages for trespass and/or loss of user are payable?**
- (ii) Whether the plaintiff's suit against the defendant is statute barred by reason of being time barred?**
- (iii) Whether the plaintiff's suit is an abuse of the court process as the plaintiff has instituted two previous suits CMCC No. 860 of 1995 and HCCC No. 94 of 1999 arising out of the same cause of action?**
- (iv) Should the court order a re-routing of the power line running over land parcel 792 and if so at whose cost?**

14. There is no dispute over the ownership of land parcel **Bassi/ Boitangare/792**. The plaintiff is the registered proprietor. There is also no dispute that the defendant has constructed a power line over the subject parcel of land. The issue that does arise is whether the defendant had the authority and/or the consent of the plaintiff to construct the power line over the land parcel. DW1 testified that before the defendant constructs power lines it engages members of the public through barazas to sensitize them of the benefits of the electrification project and further that those persons where the power line passes through their land are compensated for the trees and crops damaged during the exercise. DW1 filed a report dated 18th July 2017 following an order of the court vide which he annexed a copy of the consent dated 25th July 1996 signed by the plaintiff whereby the plaintiff gave consent for the power line to be constructed through his land parcel 792. The content of the consent was as follows:-

11 KV OVERHEAD SUPPLY TO NYAMAGWA SECONDARY SCHOOL – KISII

I/WE Samuel Motari Nyambati ...of Bassi/Boitangare/792 in Kenya being the proprietor of the land comprised in Title No. Bassi/Boitangare/792 registered under the Registered Land Act, in consideration of the first and final payment to me of the sum of one shilling (receipt acknowledged) hereby consent to Kenya Power and Lighting Company Limited laying or erecting an electric supply line on my said piece of land and from time to time entering upon and having access to my said piece of land for the purpose of constructing, laying, maintaining, using and replacing the electric supply line substantially on the alignments shown by a red line on the site plan. I undertake not to interfere or permit any interference with the electric supply line nor to construct buildings, plant trees or dump waste material beneath the electric supply line.

I undertake that this consent shall be irrevocable.

Dated this 25th day of July 1996

Signed Signed

Witness Proprietor

15. The plaintiff filed the initial suit Kisii CMCC No. 860 of 1995 on 7th July 1995 where he alleged the defendant had entered onto his land without justification and/or excuse and pulled and rolled electric posts thereon thereby damaging his crops. He claimed the value of the damaged crops and general damages for trespass. The assessment of the value of the damaged crops was quantified by the Divisional Agricultural Extension officer as per the report dated 8th May 1995. The complaint by the plaintiff as per the report was **“that his crops were damaged by East Africa Power and Lighting Company when they were laying and placing posts for wires.”** It does appear that the defendant entered onto the plaintiff's land without his sanction which precipitated the suit (CMCC No. 860 of 1995) prompting the

negotiations that resulted in the settlement of the suit. In the letter dated 7th June 1996 (**DEx3**), the plaintiff through his advocate agreed to accept the sum of kshs. 42,283/20 claimed in the suit and to grant a way leave subject to the power line being aligned. It was after this the plaintiff signed the consent on 25th July 1996. On 26th November 1996 the plaintiff's advocates and the defendant's advocates signed a consent letter to mark Kisii CMCC No. 860 of 1995 as settled. This letter was duly filed in court. On the basis of the evidence on record, I am satisfied and I find and hold that the plaintiff indeed gave consent for the power line to be passed through his parcel of land.

16. Having made a finding that the plaintiff did consent to the power line being constructed and erected on his parcel of land **972** by the defendant, it follows that the defendant could not have trespassed onto the plaintiff's parcel of land. Even if the initial entry by the defendant onto the plaintiff's land may have amounted to trespass, it is my view that the plaintiff subsequently ratified the act and the trespass ceased. It therefore follows no damages for trespass would be payable by the defendant. I consequently answer the first issue in the negative.

17. To the extent that the act of alleged trespass complained of by the plaintiff against the defendant occurred in 1994 and was continuing as at 2001 when the plaintiff instituted the present action, the plaintiff's suit would not be time barred as alleged by the defendant. The plaintiff in my view would be entitled to bring an action for recovery of his land before the expiry of 12 years from when the cause of action arose. It is noteworthy, however, that the plaintiff did not seek an order for the removal of the power line from his land parcel **972** raising the issue whether or not his suit was purely predicated on the tort of trespass and on the initial act of entry in September 1994 which would constitute the date of the cause of action. If that was to be accepted as the basis of the claim, then the suit would be deemed to be statute barred by limitation as a cause of action based on an act of trespass would require to have been brought before the expiry of three years from the date the cause of action arose. The defendant was however still on site and if there was an act of trespass, the same was continuing and the plaintiff would in the circumstances be entitled to institute an action founded on trespass. The answer therefore in regard to the second issue would be in the negative.

18. The defendant has argued that the plaintiff's instant suit is an abuse of the court process as the plaintiff had brought two previous suits namely Kisii CMCC No. 860 of 1995 and HCC No. 94 of 1996 (Kisii). No evidence was led to demonstrate the status of the latter suit but there is clear evidence that Kisii CMCC No. 860 of 1995 arose out of the same transaction and indeed the subject matter was virtually the same as in the present matter. In the suit the plaintiff claimed damages for his damaged trees and crops and the suit was settled by consent of the parties. The issue of damages was a specific issue in the suit. In the present suit the plaintiff claims damages for loss of user and general damages for trespass. In the earlier suit CMCC No. 860 of 1995 the plaintiff claimed general damages for trespass. In my view, the issues relating to damages were issues that were directly in issue in the previous suit and/or ought to have been raised in that previous suit. A party is under an obligation to plead his entire claim when he initiates a suit and a party cannot choose to file suit in instalments. Order 3 rule 4 of the Civil Procedure Rules is clear that the suit should include the whole claim.

Order 3 Rule 4 provides:-

4(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.

(2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

19. My view is that the plaintiff in the present suit is attempting to make claims and seek reliefs which he ought to have made and/or sought in the previous suit and in that respect the suit offends the provisions of

order 3(4) of the Civil Procedure Rules referred to above. I therefore hold and find that the issue of damages having been raised and settled in the previous suit is *res judicata* and cannot be properly raised and/or pleaded in the present suit pursuant to the provisions of Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides:-

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

20. Having disposed of the third issue, the issue that remains is whether I should order the re-routing of the power line as it is an issue that cannot be said to have been directly in issue in the previous suit. As I observed earlier in the judgment the plaintiff had through his advocates raised the issue in his letter dated 7th June 1996 to the defendant's advocates in the course of the settlement negotiations of the previous suit. The evidence on record suggests that the defendant had constructed the electricity supply line on the plaintiff's land before the plaintiff had given his consent. The plaintiff filed CMCC No. 860 of 1995 on 7th July 1995 yet he gave consent for the way leave on 25th July 1996. The plaintiff may in fact have signed the consent on the understanding that the defendant would realign the power supply line.

21. As per the plaintiff's exhibit 2 ("PEX.2") it is apparent the power line runs through the middle of his land and not along the boundary (hedge) as is the norm. The report presented by DW1 confirmed the power line can be moved to run along the boundary of the plaintiff's land. The plaintiff's claim for damages for loss of user was founded on the plaintiff's assertion that the user of his land was restricted by the presence of the power line in the middle of his land. The evidence tendered by both the plaintiff and the defendant was that the land was under subsistence cultivation. There is no evidence that the plaintiff ceased to utilize the land for subsistence farming by reason of the power line having been laid overhead. Indeed it was DW1's evidence that the presence of the power line would not have affected the use the land was being put save that no buildings could be put under the path of the power line. Although I have already held the claim for damages for loss of user would be unsustainable, I further hold that even if the claim would have been entertained, no basis or evidence has been laid for award of such damages and the claim would be denied.

22. The report by DW1 confirmed that indeed the power line could be re-routed to run along the boundary as there was enough space but he said such an exercise would cost kshs. 994,708/90 which the defendant could undertake if the plaintiff meets the cost. The defendant did not explain why in the first place the power line was placed in the position it lies today which to some extent impedes and limits the plaintiff's use of his land. The defendant had a duty and obligation to lay and erect the power line in such a way and manner that the plaintiff's use of his land was least compromised and/or affected. The defendant did not do that and chose the easier option of running the power line through the middle of the plaintiff's land. The plaintiff may then have been using the land for subsistence farming but he could also have chosen and/or his children may have opted to put up buildings on the portion along where the power line runs. There is increasing pressure on land availability and every usable portion is treasured. The continued presence of the defendant's power line on the middle of the plaintiff's land means he will continue to have restricted user of the affected land. The consent that the plaintiff signed to approve the way leave does not show the layout of the power line and/or how it runs and hence the defendant cannot rely on the same to argue that the plaintiff consented to have the power line erected where it stands and if he wants the same to be re-routed he should bear the cost.

23. My view is that the defendant acted without due care and diligence when they erected the power line running through the middle of the plaintiff's land parcel and they ought to bear the cost of having the power line re-routed to run along the boundary of the plaintiff's land parcel **Bassi/Boitangare/792**.

24. Although I have disallowed the plaintiff's claim for damages for trespass and loss of user, I am

constrained to award the plaintiff the costs of the suit. Had the defendant honoured the plaintiff's demand for the re-routing of the power line communicated vide the letter dated 7th June 1996 by the plaintiff's advocate, this suit would perhaps not have been filed and/or necessary. The consent relied upon by the defendant was signed after this letter by the plaintiff's advocate. The plaintiff has been successful to the extent that the court has held that the power line ought to be re-routed at the defendant's cost.

25. In conclusion, I make the following orders in disposition of the present suit:-

(i) That the plaintiff's claims for general damages and for loss of user is disallowed.

(ii) That I direct and order the defendant to within sixty (60) days of this judgment re-route the power line running through the plaintiff's land parcel Bassi/Boitangare/972 from its current position so that the same runs as close as possible to the boundary and/or hedges of the said parcel of land.

(iii) That the cost of re-routing and realigning the power line along the boundary of land parcel Bassi/Boitangare/972 to be borne by the defendant.

(iv) The costs of the suit are awarded to the plaintiff.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 26TH DAY of JANUARY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Nyawencha for Omariba for the plaintiff

N/A for the defendant

Ruth court assistant

J. M. MUTUNGI

JUDGE