



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 187 OF 2016

FARID MOHAMED AL-MAARY.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTNING CO. LTD.....DEFENDANT

JUDGMENT

1. The Plaintiff has filed this suit against the Defendant seeking;

- a) A declaration that the Defendant is bound to pay and must pay for the use of the suit of this suit property, the shop occupied by the Defendant's transformer on Plot Number Mombasa/Block XX/83 & 84 since 26th June 2002.
- b) An assessment of the mesne profit payable for the shop occupied by the Defendant as in (a) above.
- c) An order of payment of the mesne profit as assessed in (b) above and in the future.
- d) Interest in the mesne profit assessed in (b) above.
- e) Costs of this suit.

2. By a statement of defence dated 24/3/2010 the Defendant denies all the allegations in the plaint. In paragraph 4 of the statement of defence the Defendant states;

- i. "There exists a valid and legal contract between the previous owners of the suit property and the Defendant wherein the Defendant is excluded from making any payments inform of rent and mesne profits or otherwise.**
- ii. The contract existing as in (i) above gave the Defendant exclusive right of use of the suit premises without any conditions.**
- iii. The contract set out in (i) above has become an overriding interest in favour of the Defendant and which bonds all proprietors of the suit property.**
- iv. Alternatively, the Defendant avers that the law allows it to take certain properties which are considered strategic for installation of transformers or other sensitive cables."**

3. P.W.1 Farid Mohammed Al Maary the Plaintiff, told the court that he bought the premises on 26/6/2002 which are erected on Mombasa/Block XX/83 & 84, in Mombasa Island.

The premises comprise of a three storeyed building. The Defendant has a transformer No. 6130 installed within the premises and which occupies one shop on the ground floor.

4. The Defendant does not pay rent for the exclusive use of the shop occupied by the transformer. The rent has been assessed at KShs.40,000/= per month. He further stated that there is no lease, tenancy, licence or any authority from him to the Defendant for the retention of the transformer in the premises. The transformer exposes the building to huge risk hence he has been forced to pay a high insurance premium for the premises.

He continues to lose mesne profits at the rate of KShs.45,000/= per month in account of the suit premises occupied by the transformer.

5. The Plaintiff produced copies of title deeds for Mombasa/Block XX/83 & 84 Mombasa Island as exhibits P1 and P2 respectively. Copies of receipts for rates for Plot Numbers 83 & 84 as exhibits P3-P6.

Photographs of the mounted transformer as exhibits P7 & P8.

Valuation report as exhibit P9.

6. P.W.2, Maina Chege, a land valuer told the court he was instructed by the Plaintiff to assess the value of the room where the transformer is situated in Mombasa/Block XX/83 & 84. He did the assessment and came up with Kshs.40,000/= per month. The valuation report was produced as exhibit P9.

7. The Defence called one witness, D.W.1 Richard Ouyo Ottaro told the court, he is employed by the Defendant as an assistant way leaves officer. He told the court he was employed in 1989. He told the court that Pan Africa Insurance Company who were the previous owners of the premises applied for power in 1978. When they applied, the assessment was done. It was realized that they needed a ground mounted transformer to serve the building. They agreed to provide the Defendant with a room. The said room was in respect and certified to be fit.

8. A way leaves agreement was signed. He produced exhibit D1. Pan Africa Insurance Company acknowledged receipt through a letter dated 19/6/1978. The letter was produced as exhibit D2. He told the court that the agreement was binding on subsequent owners. The said way leaves agreement was also irrevocable.

9. At the close of the Plaintiff's case and the defence case the parties put in written submissions.

I have considered the pleadings, evidence on record, the submissions by the counsel and the authorities cited.

The issues for determination are;

i) Whether there exists a consent between the Defendant and the previous proprietor of the suit premises.

ii) Whether the consent binds subsequent owners of the premises.

iii) Whether the consent is irrevocable.

iv) Whether the Defendant has an obligation to pay rent and/or mesne profits.

v) Who should bear costs of this suit.

10. It is not in doubt that the Plaintiff is the proprietor of Mombasa/Block XX/83 & 84, Mombasa Island. He confirmed that he purchased the same from Pan Africa Insurance Company on 28/6/2002. When cross examined by Mrs. Umara for the Defendant the Plaintiff admitted that the property was sold as it is.

11. The Plaintiff told the court that he was not aware of any agreement between the previous owners and the Defendant. I find that he was required to do due diligence before purchasing the property. He ought to have done thorough inspection of the premises before purchasing the same. I also find that he must have known the source of supply of power to the building.

12. Under Section 2 of the Land Act, 2012 as easement means,

“a non possessory interest in another's land that allows the holder to use the land to a particular extent, to require the proprietor to undertake an act relating to the land or to restrict the proprietors use to a particular extent , and shall not include a profit.”

I disagree with the Plaintiffs submissions that the way leaves agreement herein contain the characteristics of a restrictive agreement. Whose definition is

“... an agreement by one owner of land restricting the building on, on the use or other enjoyment of land for the benefit of the owner under a land or neighboring land and includes are restrictive covenant.”

I find that the way leaves agreement executed between the Defendant and the previous owner of the suit premises an easement.

13. Section 28 of the Land Registration Act 2012 states;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without their being noted on the register:-

a)

b)

c)

d)

e)

f)

g)

h)

i) Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected constructed or laid in pursuance or by virtue of any power conferred by any written law. and,

j) Any other rights provided under any written law.”

Further section 29 of the Land Registration Act states;

“Every proprietor at the time of acquiring any land lease or charge shall be deemed to have had notice of every entry in the Register relating to the land, lease or charge and subsisting at the time of the acquisition.”

I am of the view that the Plaintiff was under an obligation to look out for any entries registered against the title before purchase.

14. I have looked at the copies of the title deeds for Mombasa/Block XX/83 & 84 produced as exhibits P1 and P2. In the copy of title for Mombasa/Block XX/83 & under part c, the encumbrances section the entries start from No. 61 upto 81.

Likewise for Mombasa/Block XX/ 84 the entries are from No. 61 to 82. There is no explanation for the other missing entries. What does the Plaintiff gain by concealing these entries? I agree with the defence submissions that the omitted entries contain the way leaves agreement registered against the titles.

The way leaves agreement was produced as exhibit D1. It is dated 15/3/1978. The same was duly registered. I find that the said agreement is irrevocable.

15. It is DW1's evidence that the transformer only serves the said premises. Infact the transformer was mounted to supply electricity to the said premises only. It has been there for years. The Plaintiff has failed to demonstrate the court that the said transformer has ever exploded and caused a fire. He has also failed to produce before court any evidence that he is paying huge insurance premiums owing to the risk the transformer poses.

16. The Plaintiff's submissions that the way leaves agreement does not bind future or other proprietors is misleading. I find that the way leaves agreement registered against the title binds the Plaintiff.

17. All in all I find that the Plaintiff has failed to prove his case on a balance of probabilities as against the Defendant. I hereby dismiss the suit with costs to the Defendant.

It is so ordered.

Dated, signed and delivered at Mombasa on the 13th day of February 2018.

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L. KOMINGOI

JUDGE

13/2/2018

Mr. Nyama: We pray for certified copies of proceedings and Judgment.

L. KOMINGOI

JUDGE

13/2/2018

Court: To issue upon payment.

L. KOMINGOI

JUDGE

13/2/2018