



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 87 OF 2013**

**JACKSON ONYANGO ODIEK.....1<sup>ST</sup> PLAINTIFF**

**MARGARET ACHIENG' MASINDE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

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

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

1. The dispute between the parties herein relates to land parcel No. MARACHI/BUMALA/1666 (“disputed land” hereafter), which the two Plaintiffs – **JACKSON ONYANGO ODIEK** (1<sup>st</sup> Plaintiff) and **MARGARET ACHIENG MASINDE** (2<sup>nd</sup> Plaintiff) – claim that the Defendant – **KENYA POWER & LIGHTING CO. LTD** – has encroached onto and put up an electric pole with an electrine line running across over it. The 1<sup>st</sup> Plaintiff is the registered owner of the disputed land and the 2<sup>nd</sup> Plaintiff is the one who allegedly sold it to him. The Defendant is said to own adjoining land – MARACHI/BUMALA/1316 – and has a power facility or sub-station on it. According to the Plaintiffs, what the Defendant has done is without their authority and/or permission, and therefore unlawful. Both of them fault the Defendant for not obtaining consent from them.
2. The Plaintiffs want the Defendant to remove the electric pole and cable and pay mesne profits or, as alternative, pay the Plaintiff the price of the land. Also claimed are costs of the suit.
3. The Defendant denied the Plaintiffs claim vide a defence dated 21/12/2013 filed in court on 23/12/2013.
4. During hearing, both Plaintiffs testified as PW1 and PW2. Both reiterated what the pleading filed by them contains. When the Defendant’s turn to testify came, DW1 – MICAL ODUOL OLUOCH – gave evidence but cross-examination by the Plaintiff’s counsel was deferred to allow the court to visit the site first.
5. The site was visited on 7/2/2017 at or around 3.27pm. The site notes taken at the scene show that the Plaintiffs plot No. 1666 and the Defendant plot No. 1316 border each other. Both land parcels front the Busia/Kisumu tarmac road on the left side at Bumala Town as you approach that town from Busia side. There was an electric pole on Plot No. 1666. Power lines run over and above Plot No. 1666 to another pole outside the plot. The plot itself is rectangular and the cables or lines run over it in a diagonal

manner.

6. At the scene, the Defendant disputed the position of the Plaintiffs plot and promised to avail a map showing that the plot is elsewhere. Evidently, the Defendant felt that the map being used was not the correct one. The court agreed to receive the map during trial and left the site at or around 4.05pm.

7. After leaving the site, DW1 never came to court again. The matter came up in court for hearing on 27/3/2017, 17/7/2017 and 23/10/2017. In all these instances the matter failed to proceed because the defence was not ready. Court records show that the court gave the matter "LAST ADJOURNMENT" twice and declined to give a third one on 23/10/2017. The defence case was then marked closed.

8. Both sides filed written submissions thereafter. There are three sets of submissions on record. The Plaintiff first filed submissions on 2/11/2017. The submissions gave an overview of both the pleadings and evidence before highlighting the applicable law. The defence submissions were filed on 19/12/2017. In the submissions, the position taken is that the Defendant had the requisite consent to do what it did. According to the Defendant, the consent was obtained from the original owners of the land. And the original owners of the land were said to have owned it as parcel No. 286. That happened long before the Plaintiffs became owners.

9. From this position, the Defendant took the legal view that it is not in breach of any law. The Defendant was emphatic that it did not violate the Plaintiffs legal rights.

10. The position taken by the Defendant impelled the Plaintiffs to file more submissions. This is the third set of submissions and was filed on 22/1/2018. These submissions broadly responded to the Defendant's submissions and pointed out the weakness of defence evidence. It was pointed out for instance that DW1 never availed himself for cross-examination and that land parcel Nos MARACHI/BUJUMBA/1897 and MARACHI/BUMALA/1316 mentioned by DW1 in evidence had no relationship with the Plaintiffs land parcel No. 1666. Further, it was said that the defence failed to avail the consent it alleged to have obtained. It was reiterated that the 2<sup>nd</sup> Plaintiff was the previous owner of the disputed land before selling it to 1<sup>st</sup> Plaintiff. She confirmed, it was submitted, that she never gave any consent to the Defendant.

11. I have considered the pleadings, evidence, and rival submissions. This is fairly straightforward matter. The defence was mounted in a lackluster manner. As I write this judgment the evidence of the only defence witness called – DW1 – is incomplete. There was no cross-examination; the evidence was not interrogated. Yet the Plaintiff wanted to cross-examine, but the witness did not avail himself. What this in effect means is that the high premium that such evidence may possess is lowered and reliance on it when it is incomplete becomes unsafe.

12. The thrust of the defence submissions is that the Defendant had the requisite consent and its presence on the disputed land was therefore legal. No consent however was availed. One would have expected that the consent was available or, as alternative, the person who gave the consent should have been availed as a witness. This did not happen. The averment of the defence therefore rings hollow.

13. But that is not all. The defence seemed to be of the view that the disputed land was somewhere else. The court visited the site. The land officials were there to help in identifying the disputed land. They used the very map that the Plaintiff had availed as one of the documents for use in court. The defence however took the view that that was not the correct map. A promise was made at the site by DW1 that the correct map would be availed. This never happened. All this detracts from the position espoused by the defence. Infact, a look at the submissions of the defence reveal some averments made without foundation in pleadings and/or evidence. For instance, the alleged consent given to the Defendant was obtained when the disputed land was parcel No.286 owned by someone else. And that happened long before the Plaintiffs became owners. Question is: where does that appear in the pleading or evidence? The answer is: Nowhere.

14. The site visit to the disputed land was infact a boon to the Plaintiffs case. It became clear that there is

electric pole there. It showed too that electric cables run above the land in a diagonal fashion to a pole outside the land. If the Plaintiffs want to build a one-storey structure for example, that would not happen as the live cables would be an impediment. The Plaintiffs are therefore right to complain.

15. In light of all the foregoing, I make a finding that the Plaintiffs case against the Defendant is well proved on a balance of probabilities and therefore grant the Plaintiffs prayers (a) and (b) in the plaint. The Plaintiff asked for mesne profit at paragraph 12 of the plaint. No evidence was led on this and the court declines to grant the prayer. In the same paragraph, it was suggested that the Defendant could take the Plaintiff's land after compensation or pay at correct market rates. That is left for the parties to explore. END.

**Dated, signed and delivered at Busia this 11<sup>th</sup> day of April, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Plaintiff: .....

2<sup>nd</sup> Plaintiff: .....

Defendant: .....

Counsel of Plaintiffs.....

Counsel of Defendant.....