



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 178 OF 2010

KENYA POWER & LIGHTING CO. LTD.....PLAINTIFF

-VERSUS-

KIPEVU INLAND CONTAINER EPZ LTD.....DEFENDANT

JUDGEMENT

1 . By a plaint dated 10th June 2010 the plaintiff' instituted this it was suit against the defendant seeking the following reliefs:

a) The defendants by themselves, their servants, agent and or otherwise be restrained permanently from further excavating, developing, constructing and in any manner whatsoever interfering and/or dealing with the land forming the way leave trace measuring Twenty (20) metres from the Pylons of KV 132 and KV 33 running across Plot No. MN/VI/3842/2.

b) The defendants by themselves, their servants, agents and/or otherwise be compelled by a mandatory order to restore the land forming the way leave trace measuring Twenty (20) Metres from the Pylons of KV 132 and KV 33 running across Plot No. MN/VI/3842/2 in the compact state it was prior to the illegal excavations complained of.

c) Costs of the suit.

2 . The plaintiff's case is that at all material times to this it was suit the sole distributor of electricity power in Kenya and by extension within the coast region. The plaintiff states that after applying and obtaining necessary approvals, in 1998 it erected nine (9) power lines at both 33KV and 132KV which run across the property known as Plot No. MN/VI/3842/2 (the suit property) which the defendant alleges to have leased from the Export processing Zone Authority. That the power lines serve strategic customers within the island of Mombasa as well as parts of North Coast such as Kenya Petroleum Refineries and Kenya Pipeline Pumping stations. It is the plaintiff's case that for high voltage wires like the 33KV and 132KV the law demands that developments should not be carried on anywhere within twenty (20) Metres from the pylon.

3 . The plaintiff further states that it has made it clear to the defendant through numerous correspondences that it is not possible to relocate any of the nine (9) lines because of the sensitivity of the loads being supplied as it would imply switching off power for a period of more than one month to all the customers connected to and being served by those lines and the non-availability of alternative passage for the lines.

4 . The plaintiff states that in the month of April 2010, it noticed some excavation activity taking place within the suit property but away from the way leave. However at around the last week of May 2010, the defendant had moved closer to the way leave and upon inquiry was informed that the defendant had obtained development approvals from the necessary government and local authority organs to develop the entire suit property which includes the plaintiff's way leave. The plaintiff states that it protested and demanded that the development stops but that the defendant has been moving closer and closer to the pylons such that the pylons are now left standing on small islands of loose soil which can easily collapse on pressure and or as result of strong winds.

5 . It is the plaintiff's position that the defendant has been recklessly and illegally carrying out excavations and or interfering with the plaintiff's lawful mandate and or statutory rights and further endangering the lives of the persons near or around the said power lines. Further, that as a result of the excavation, the defendant has left the said power lines standing in a very hazardous manner likely to cause extreme loss and that the defendant's actions are an affront to the rights of the other users and or customers should the said power lines be disconnected as the same shall cause immense damage and or harm and or suffering to the areas under which the said power lines supply electricity leading to further loss and damage to hospitals, households and all other persons who contracted the plaintiff to supply them with electricity, leading to huge energy crisis should the excavations persist. The plaintiff is apprehensive that the said power lines which pose a great danger to man could easily lead to a catastrophe and could easily cause irreparable loss and damage as a large part of the economy is dependent on it, unless the court intervenes.

6 . The defendant was duly served with the summons to enter appearance. Although the defendant entered appearance, they did not file defence within the time stipulated by law or at all. Pursuant to a request for judgment, interlocutory judgement was entered for the plaintiff against the defendant on 8th September 2014. The suit proceeded for formal proof on 12th October 2017 when the plaintiff called one witness.

7 . PW1, Richard Ottaro who is an assistant way leave officer with the plaintiff company, relied on his statement dated 13th September 2016 in which he reiterates the contents of the plaint. He produced the plaintiff's list of documents dated 24th October 2016 and filed on 27th October 2016 as P. Exhibits 1 to 13.

8 . PW1 was put to cross examination by Mr Omollo advocate for the defendant. He answered that he did not know the owner of Plot No. MN/VI/3842/2 but stated that the plaintiff had approvals for the power lines to be constructed through the suit property and that the pylons are still there to date, though they keep on checking and reinforcing them. He stated that though the defendant informed the plaintiff that it was going to excavate on the suit property, the plaintiff responded by stating that no development would be allowed under power lines or within wayleave trace. He conceded that there are no developments under the power lines.

9 . The parties advocates filed written submissions. The plaintiff through M/s Munyiya, Mutugi, Umara & Muzna Co. Advocates opened their submissions by giving a summary of the facts of their case. The plaintiff further submitted that the suit remains uncontroverted on either point of law or fact. Based on the evidence adduced, the plaintiff submits that it has proven its claim on a balance of probabilities. To support its submission, the plaintiff quoted the case of *Charter House Bank Ltd -vs- Frank N. Kamau [2016] eKLR* on burden of proof under Section 107 and 109 of the evidence Act. The plaintiff submits that it has adduced credible plus reasonable evidence of the existence of an easement in form of wayleave trace on the suit property in its favour and a breach of the easement by the defendant in its actions of construction on the wayleave trace and that attempts to stop the breach have gone without compliance. The plaintiff further submits that it has adduced credible evidence of possible harm to the plaintiff's infrastructure and harm to the general public if the defendant is not restrained.

9 . The plaintiff also submits that the defendant has failed to rebut the claim on any point of law or fact and that it is entitled to judgment against the defendant as prayed. The plaintiff contends that it followed due process of law to create its overriding interest in the suit property which should be enforced against the defendant.

10. The plaintiff also submits that the Energy Act (2006) provide for assent of property owners to establishment of power lines on private and public land and that the requisite consents were given and since the establishment of the wayleave it had a right to maintain and safeguard the power lines on site. The plaintiff submits that following issuance of Title to the defendant from the state, the easement was still in effect binding on the defendant. The plaintiff cited Section 23(1) Registration of Titles Act, Cap 281 (repealed), Section 28(a) of the Registered Land Act, Cap 300 (repealed) and Section 26 of the Land Registration Act, 2012.

11. The plaintiff also relied on the case of *Kamau -vs- Kamau (1984)I KLR (E&L)* as well as Section 30 of Cap 300 (repealed), the wayleaves Act, Cap 292 and the Electric Power Act, No. 1997 (both repealed) and also Section 136 and 141(2) of the Land Act and Section 99 of the Land Registration Act, 2012.

12. The plaintiff also cited the case of *Kenya Power & Lighting Co. Ltd -vs- Mosiara Trading Company Ltd [2016] eKLR; Edward Saya Malovi Juma -vs- Kenya Electricity Transmission Co. Ltd [2015] eKLR and Edith Wangari Gitata -vs- Athi Water Service Board [2012] eKLR*, and submits that it is in public good to have the claim allowed.

13. Kamoti Omollo & Company Advocates for the defendant submits that the interlocutory judgment entered herein is a nullity and be set aside together with the formal proof submissions. The defendant further submits that the plaintiff has not made out a case for the grant of a mandatory injunction and relied on paragraphs 947 and 948 of Halbury's Law of England 4th Edition Volume 24. That it has not been proved that the excavation that the plaintiff complained of is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done. The defendant urged the court to decline to grant the order of mandatory injunction and instead to set aside ex debito justitiae the interlocutory judgment entered herein by the Deputy Registrar of the court.

14. I have carefully considered the pleadings the evidence adduced and the submissions by the parties. The main issue for determination is whether the plaintiff should be granted the reliefs sought. Even though the defendant did not file defence and never called any witness, the burden on the plaintiff to prove its case remains the same and that burden of proof is in no way lessened because the case was heard by way of formal proof. (*see karugi & Another -vs-Kabiya & 3 Others (1987) KLR 347 and Charterhouse Bank Limited (Under Statutory Management) -vs- Frank N. Kamau [2016] eKLR*).

15. Whereas the rights and interests of a registered owner of a property are protected by Section 25(1) of the Land Registration Act, such interests will be subject to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register. Section 28 of the Land Registration Act Provides as follows:

28. 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:-

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;

16. Similarly Section 173 (1) of the Land Act provides for creation of public right of way and Section 143(2) provides as follows:

A public right of way may be;-

a) A right of way created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organisations, authorities and bodies to carry out their functions referred to in this Act as a wayleave; or

b) A right of way created for the benefit of the public, referred to in Section 145 of this Act as a communal right of way.

17. It is therefore clear that the rights of a proprietor can be defeated by operation of the law.

18. There is no doubt that the defendant herein are the lessees of the property known as PLOT NO. MN/VI/3842/2 as is evident from the documents produced as P. Exhibit 12 and 13. It is also evident that the plaintiff applied for a public way leave and the same was granted. The plaintiff has a wayleave trace for both 33KV and 132KV lines which run across the suit property and have been there since 1998 or thereabouts.

19. It is also evident that the defendant carried out some excavation within the suit property. The plaintiff has alleged that the defendant has encroached on the plaintiff's wayleaves while undertaking the excavations and that the excavations are so close to the pylons that the pylons are now left standing isolated in small islands of loose soil. The plaintiff has produced photographs (P. Exhibits 9 and 10) showing the extend and depth of excavations by the defendant and the exposed and isolated pylons.

20. The defendant has not denied the plaintiff's allegations. Indeed vide its letter to the plaintiff dated 1st July 2009 (P. Exhibit 12), the defendant sought for permission from the plaintiff to reinforce and secure the electrical pylons and cut and level the wayleaves. However, the plaintiff in its response (P. Exhibit 13), pointed out that no development is allowed under power lines or within the wayleave trace as the purpose of acquiring the wayleave trace is to enable the plaintiff to have free access to the lines for maintenance purposes.

21. From the material placed before me, I am satisfied that the plaintiff has adduced credible evidence of the existence of an easement in form of a wayleave trace on the suit property in its favour. There is also evidence that there is a breach of the easement by the defendant in its actions of construction or excavation on the wayleave trace and that attempts to stop the breach have not been complied with.

22. PW1 explained the importance of the power lines and the danger the defendant's actions pose to both the plaintiff and the general public at large, including the adverse effect those actions will have to key and sensitive institutions within the area and even outside the country. The plaintiff's evidence remains uncontroverted. The defendant has submitted that the plaintiff has not made out a case for the grant of a mandatory injunction since there has been no damage to the pylons in the last 17 years despite the excavations by the defendant. In my view, and as rightly submitted by the plaintiff, that the lines have not collapsed should be seen as a cause of grace and not an endorsement of the defendant's actions. The fact that the pylons have not collapsed does not mean action should not be taken to prevent such a danger from occurring. The defendant's possession and use of the suit property is subject to the public right of way or wayleave. The defendant has duty to safeguard that wayleave.

23. The upshot of this is that this court is satisfied that the plaintiff has proved its case against the defendant on a balance of probabilities. Judgment is entered for the plaintiff against the defendant as prayed in the plaint.

Delivered signed and dated at Mombasa this 7th day of May 2018.

C. YANO

JUDGE