



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 151 OF 2013**

**SAMUEL MWANGI MBURU.....PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT**

**JUDGEMENT**

1. Samuel Mwangi Mburu sued Kenya Power & Lighting Company Limited vide his plaint dated 23.7.2013 asking the Court to grant him the following reliefs:

- a) **A permanent injunction do issue restraining the defendant its servants, agents, workmen and any other person whomsoever and whatsoever from interfering in any way with the plaintiff's plot No KWALE/UKUNDA/50.**
- b) **A declaration that the defendant has contravened the plaintiff's right to property with breach of Article 40 (1) and (3) of the Constitution.**
- c) **An order do issue compelling the defendant to remove the power line illegally installed in the plaintiff's parcel of land known as Kwale/Ukunda/50.**
- d) **It is declared that the defendant has committed acts of trespass.**
- e) **Damages for trespass on land.**
- f) **Costs of and incidentals in this suit.**

2. The defendant entered appearance on 5<sup>th</sup> August 2013 and filed a defence on 13<sup>th</sup> August 2013 denying the plaintiff's claim pleading that the low voltage lines were constructed on plot No Kwale/Ukunda/47 which is adjacent to the plaintiff's land Kwale/Ukunda/50. That if the lines were constructed on the plaintiff's land, then the same was done by a honest mistake and can be rectified by way of payment of way leaves so as to compensate the plaintiff.

3. At the close of pleadings, the suit was set down for hearing. The plaintiff called 2 witnesses while the defendant called 4 witnesses. Herbert Mboya Ndolo who is the District Surveyor, Kwale testified as PW 1. He stated that they were asked to identify parcel No Kwale/Ukunda/50 on the ground. He produced the instruction letter as Pex 1 (a) & payment receipt as Pex 1 (b). PW 1 testified that they visited the ground, carried out the measurements and prepared a report dated 20.8.2014. That according to their finding, the power lines are almost in the middle of the suit plot. The witness produced the report and map as Pex 2 (a) & (b). It is his evidence that the power line traverses the plaintiff's plot.

4. On cross – examination, PW 1 said the size on the title and the map should be the same. That they did not summon any person from Kenya power during their survey exercise. That when they visited the ground, there was a dispute with owner of a neighbouring plot on boundary which dispute has been determined. That the neighbouring plots are Nos 46, 47, 2743 & 48 and the power line passes through them all.

5. The plaintiff testified as PW 2. He stated that he is the registered owner of plot No Kwale/Ukunda/50 measuring 0.1 ha and was issued with a title on 21.6.2002 which copy he produced as Pex 3. That upon the defendant erecting the power lines, he wrote and complained on 21.4.2008 but he received no response. Later on 24.1.2012, the defendant wrote to him that they are taking up the matter. Nothing was done necessitating PW 2's advocate to issue the demand letter dated 1.2.13, produced as Pex 4 and the other letters produced as a bundle as Pex 5.

6. PW 2 continued that he engaged a surveyor Mr Kuguru who confirmed that the power line passes through his plot. PW 2 stated that he has a foundation which he cannot build since 2010 because of the existence of the power line. He asked the Court to order the defendant to remove it.

7. On cross – examination, PW 2 stated that he was not present when the power line was erected. PW 2 was unaware that his neighbour Ali Abdalla had given the defendant consent. That the letter dated 14.2.13 states the power line is running through plot No 47 not 50. PW 2 admitted that he had a dispute with the owner of plot No Kwale/Ukunda/47 but the boundary dispute was resolved. In re – examination, the witness said the defendant never sought his consent. This marked the close of the plaintiff’s case.

8. Before the defendant opened their evidence, this Court made a site visit to confirm the location of the power lines in the presence of parties. The same was done but no solution was reached hence the defence presented their case.

9. Mr Simon Kihara Wangari testified as DW 1 on 31.8.2016. He is a land survey assistant and he prepared the report dated 30.8.2016. He confirmed the report produced by the plaintiff was prepared by Mr Ndolo who is his colleague. That the two reports differ because the reference point used by Mr Kamande was wrong. That the map produced is the official map for Diani. The size of the suit plot according to their records is 0.1 ha, but on the ground the plot is occupying around twice its size. That as per the title deed, the power line does not affect the plaintiff’s land. DW 1 continued that plot No 47 extends with a braze. According to his evidence, the plaintiff has taken a small portion of plot No 47. That the first report has placed the pole in a different place from his report.

10. Richard Ouya Ottaro testified as DW 2. He adopted his statement dated 13.8.2013. He gave the process followed in connecting a customer to a power line. That once owners of land to be used are identified, they seek their consent. That the line in dispute passes through plot Nos 47 & 48 whose owners they have not received any complaints. DW 2 was aware plot No 50 neighbours plot Nos 47 & 48.

11. Ali Abdalla testified as DW 3. He is the owner of plot No 47. He confirmed signing way leaves for the defendant to supply his neighbour with electricity. According to DW 3, the power line is not on the plaintiff’s plot. DW 3 stated that the plaintiff’s plot is fenced. That they have been sued in a case in Court over the boundary dispute with the plaintiff. In cross – examination, DW 3 said they have been neighbours with the plaintiff from when he was young.

12. Evans Amuya testified as DW 4. He is a land surveyor in the employment of the defendant. He was aware of the dispute before Court and had prepared the report dated 13.8.2013. That when the plaintiffs walked him through the boundaries of his plot, the pole fell within the boundaries he was shown. That during the exercise, he was taking coordinates which when he interpreted, he found that the plot was bigger than what was shown on the R.I.M map as it went into the boundaries of plot Nos 46, 47 and 2743. According to his report the poles are on plots Nos 47 & 48. He produced his report as Dex 2.

13. In cross – examination, DW 4 said the report of 30.8.2016 shows the poles are on plot No 50. That the report dated 4.10.2016 is not conclusive. That plot 50 is indicated as hatched in his report. From his opinion, the power line does not traverse plot No 50. This marked the close of the defendant’s case.

14. Parties then took time to file written submissions which they did. From the pleadings and evidence adduced, it is not in dispute that the plaintiff is the registered owner of plot No Kwale/Ukunda/50. The said plot neighbours plot No 47 owned by Ali Abdalla (DW 3). Ali Abdalla who testified for the benefit of the defendant confirmed that he is the one who signed the way leaves for the construction of the power lines in dispute. It is also conceded that the defendant does not own any land in that area and relies on the good will of the public to sign way leaves for supply of electricity to their customers.

15. The question for this Court to determine is whether the power lines as constructed falls on the plaintiff’s land and therefore has made him not able to complete his development that stalled at the foundation level. This is a matter that ought not to have been brought to Court. This Court noted that even after I made a visit and gave the government surveyors as well as the defendants’ surveyor to determine the boundaries of plot Nos 50 & 47, no report could be agreed on. The surveyors on the ground passed on the button to the Director of Surveys Kenya to resolve the dispute. The director never took up the baton.

16. During my visit, I observed that the plaintiff’s plot No 50 was fenced. There is constructed a foundation under the power line hence the reason he came to Court to order the defendant to re-route after his pleas made to the defendant fell on deaf ears. The defendant on their part were adamant that the power lines were constructed on plot No Kwale/Ukunda/47. That the owner of plot No 47 in his evidence stated that the defendant approached him in 2002 and asked him to sign the consent to supply his neighbour. He was paid Kshs 2000= . Mr Ali Abdalla inherited this land from his father and they have been neighbours with the plaintiff since 1986. Mr Ali also said the plaintiff’s plot is fenced while theirs they have coconut trees as boundaries. He denied lying to Kenya Power.

17. The evidence of Mr Ali is key to this case. It is the defendant who approached him to sign the way leave forms. This Court was not told what formed basis of the decision of the defendant to conclude that where they were to erect the power line belonged to portion of plot No 47 yet on the ground the area was fenced by the plaintiff. The survey report dated 12.8.2013 of Mr Evans Amunga was prepared after the plaintiff had lodged a complaint against the defendant and two years after the lines were built.

18. Further Mr Amunga confirmed that the poles fall within the plaintiff’s land according to the boundaries shown to him by the plaintiff when he visited the grounds. Ali Abdalla and his brothers who own plot No 47 has not sued the plaintiff that the plaintiff’s fence is encroaching on their land. Instead in a recent case filed in 2017, it is the plaintiff who sued DW 3 & his brothers for digging trenches along the boundaries of the two plots thus blocking his entry into plot No 50. Mr Ali Abdalla’s evidence that the power lines were not on the plaintiff’s land is therefore not supported by any evidence.

19. Under section 18 of the Land Registration Act, it is not the function of the defendant to determine boundaries of people’s plots. When the defendant’s employees (DW 4) visited the grounds on 12.8.2013, he was not in the company of any government land registrar or surveyor. He was therefore in error to reach the findings he made inter alia that the plaintiffs development has encroached on plot Nos 46, 47

& 2743 or that the development has blocked the access road to plot No 183. His conclusion in paragraph 4 that the power line as per the ground is clearly on plot No 47 & 48 also contradicts his evidence in chief that on the ground the power line is falling on plot 50 but having taken co-ordinates which he interpreted showed the power lines were on plot No 47 & 48.

20. PW 1 who was the District Surveyor Kwale produced a map where he marked the power line in red showing they are on plot No 50. The map does show plot 47 extends across the road (by brace) yet the power line is not lying on plot 47 beyond the road (as per PW 1). This Court having visited the site and observed that the power line traverses directly above the foundation constructed by the plaintiff, I find the marking done by PW 1 to be credible. This is authenticated further by the fact that the owners of plot No 47 or 48 have not filed any claim for an order declaring the foundation put up by the plaintiff is on their land.

21. Consequently the defendant having not obtained the consent of the plaintiff to put up the power line where they are, I find them guilty of trespass. I am therefore satisfied that the plaintiff has proved his case. I enter judgment for him as prayed in (a) – (d) of his plaint. Under the heading of general damages, I find that the defendant is liable to compensate him having engaged him in a back & forth game instead of rerouting the line and leaving the owners of the land to resolve their disputes if any. I award him Kshs 300,000= as reasonable compensation having taken into account the inflation rates from the time this case was lodged. I also award the plaintiff costs of the suit.

**Dated & signed at Mombasa this 21<sup>st</sup> September 2018**

**A. OMOLLO**

**B.**

**JUDGE**

**Delivered by Justice M. Thande on 21<sup>st</sup> September 2018**

**M. THANDE**

**JUDGE**