



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 24 OF 2017**

**JOHN KIRAGU KIMANI.....PLAINTIFF**

**VS**

**RURAL ELECTRIFICATION AUTHORITY.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff sued the Defendant seeking orders for;

- a) Special damages in the sum of Kshs. 981,939.00.
- b) An order for permanent injunction to restrain the Defendant from trespassing on the Plaintiff's land.
- c) An order of mandatory injunction ordering the Defendant to remove the high voltage line from the Plaintiff's land.
- d) General damages.
- e) Costs and interest at Court rates.
- f) Interest on (a), (b) and (c) above at Court rates.

2. It is his case that at all material times to the suit he occupied the suit land (LOC.9/KIRURI/519) where he farmed Eucalyptus trees for commercial purposes. That in July 2009 the Defendant unlawfully entered into the suit land without consent and cut off 300 mature trees valued at Kshs. 981,939/=. The Defendant also installed a high voltage power line traversing the said Plaintiff's land and with instructions that nothing should be grown on the portion of land underneath the high voltage line. The Plaintiff has suffered loss and damage, which has been stated above, he stated.

3. The Defendant denied the Plaintiff's claims in a Statement of Defence filed on 22/11/13. It denied that 300 trees were felled without permission nor it unlawfully installed a high voltage power line traversing the land. Further, it denied that no growth underneath the said high voltage was disallowed. In the alternative, the Defendant averred that it sought and was granted way leave consent by the Plaintiff to enter and install the electric lines. Therefore, the Plaintiff's claim should be dismissed. The Defendant further stated that the claim is time barred in accordance with the provisions of Limitations of Actions Act since the cause of action occurred in July 2009.

4. During the trial, the Plaintiff testified and stated that he is the owner of the suit land. That on it he practices commercial farming of Eucalyptus trees. That in July 2009 the Defendant without consent and authority entered the suit land cut down 300 trees and installed a high voltage power line across suit land. The high voltage power-line supplies power along the Kangema-Tuthu high voltage line project. He informed the Court that by then he had not signed any wayleave agreement with the Defendant. It occupies about  $\frac{3}{4}$  acre of the land and the lines are still on site. That as a result he does not farm on the land underneath the power lines. The Defendant has cut down all the trees under the pylons. He produced a certified copy of the title to support the land ownership. He stated that he obtained a valuation report in respect to the cost of the damages.

5. On cross-examination by Mr. Wahome for the Defendant, he stated that he wrote a complaint to the company who sent a way leave officer to the land, Caroline Ochichi who counted the trees. That he was promised compensation by the Defendant. The Defendant did not carry the felled trees away from the land. He stated that the valuer valued the trees 3 years later. The tree logs and stumps were still on the site.

6. Finally, the Plaintiff stated that by the time the way leave officer visited the land to assess the damage, the installation of the high voltage line was complete. He reiterated that he did not sign any way leave agreement in respect to the installation of the power line. He informed the Court that he lives on another parcel of land. That the Defendant has not discussed the issue of compensation with him at all. That no offer has been given to him despite the Defendant still trespassing on the land.

7. PW 2 – James Ngunjiri informed the Court that he is a graduate of University of Nairobi with MSC and BSC in Agriculture between 2008-2013. That on request by the Plaintiff he was assigned the task to carry out a valuation to determine the assessment of damage of 300 trees on the suit land. He produced a valuation report dated 26/8/13 marked as PEX No.2. He arrived at a value of Kshs.981, 939/=.In arriving at the assessment, he informed the Court that he applied the Kenya Forest Service Guidelines of 2012. That he used the volumetric base costing – i.e. measured the diameter of the tree trunk calculated the area and multiplied by the volume of the tree. Further that he applied the rate of 24.61 x300 trees to arrive @ Kshs. 981,939/=.

8. On cross-examination by Mr. Wahome Advocate for the Defendant, the witness stated that though the trees were cut in 2009, he applied the Kenya Forest Guidelines of 2012, 3 years after. He explained that he used 2012 because the farmer (Plaintiff) came for assessment in 2013. In respect to the Forest Act No. 7 of 2005, he informed the Court that this applies to gazetted Government of Kenya forests. He stated that he is unaware that the legal notice does not apply to valuations nor that the valuation of trees was subject to the Trees Act.

9. Further, he stated that he used an average diameter per tree for 300 trees. The total area was 0.19 acres and not  $\frac{3}{4}$  of an acre. The trees were on private land and not a gazetted forest. He explained that the legal notice is a guideline to assess the value of the trees. The notice applied to forest products only and according to him, 300 trees were forest products.

#### **The Defence case**

10. DW 1 – Caroline Ochichi testified and stated as follows; she stated that she is the Senior Wayleave Officer at the Rural Electrification Authority. That she holds a 1<sup>st</sup> class degree in BA in Land Economics and a Master's degree in planning studies from Oxford University in United Kingdom. She is also a full member of the Institute of Surveyors of Kenya (ISK) and a registered valuer.

11. She testified that in 2009 the Defendant commenced the Kangema/Kanyenyaini Tuthu project to supply power to Tuthu market. The survey identified the route through various private land, one of which belonged to the Plaintiff. She stated that she visited the suit land and got the Plaintiff to sign the property damage assessment report on 17/10/09. The document was not produced in Court. She informed the Court that she assumed the Plaintiff had given consent for the project to pass through his land. That she found 300 trees had been cut with a diameter of 10 inches. She approved Kshs. 670 per tree giving her the value of Kshs. 201,000/=using the guidelines of the ministry of Agriculture to arrive at the rate. The guidelines were not however produced in Court. She explained to the Court that the Kenya Forest Service guidelines on fees and charges are for valuing forest produce but the ministry of Agriculture are used for compensation purposes. She argued that the Defendant was not purchasing trees from the Plaintiff. The trees were left on the land and he was free to sell the trees if he wanted to. She argued that the legal notice of 2013 was not applicable for purposes of compensation. She informed the Court that the Defendant did not receive any objection from the Plaintiff when felling the trees in accordance with the Energy Act despite him being aware that the lines were passing through his land. She informed the Court that the Defendant is willing to pay the compensation as assessed by it and the Plaintiff filed suit before the process was completed.

12. On cross-examination Mr. Chege for the Plaintiff, the witness stated that the Defendant did not comply with section 46 of the Energy Act 2006 by issuing the appropriate notice. She informed the Court that there is no evidence that the Defendant signed a way leave agreement with the Defendant. That she visited the land after the complaint from the Plaintiff. She found the trees had been cut and the electric lines installed. She stated that the valuation of Kshs. 201,000/= was not communicated to the Plaintiff at all. She stated that she did not measure the land occupied by the pylons.

13. In re-examination she stated that the Plaintiff could still utilize the area occupied by the pylons for growing crops except he cannot built under the power lines. She took the Court through the process of acquisition of way leave agreements and compensation to land owners before installing such a project.

14. With that, the defence closed its case.

#### **Written submissions.**

15. The Plaintiff submitted that at the hearing of the suit the parties were agreed that the main issues were the amount of compensation payable to the Plaintiff and whether the Defendant should be ordered to remove the high voltage line from the Plaintiffs land. In his submissions, the Plaintiff gave a summation of the evidence of the witnesses on both sides.

16. The Plaintiff further submitted that though the Defendant under Para 6 of its defence alleged that it had sought and obtained way leave consent by the Plaintiff to enter into his land and erect electric line, the Defendants witness denied knowledge of such a consent. She specifically stated that the Plaintiff did not sign any way leave agreement. The witness stated that she was called in 2011 to assess the damage after the line was complete having been installed in 2009. The Plaintiff argued that though Miss Ochichi presented a valuation report on the damage on the trees, the said report is unsigned and undated and therefore has no probative or evidential value at all and the Court should not rely on it to determine the value of the felled trees. Further that the Defendant's witness did not produce the legal notice or any document from the Ministry of Agriculture to support the basis of Kshs. 670/= per tree. The Plaintiff argued that the witness measured the stumps only and did not consider the height of the trees nor did she use the averages to arrive at a diameter of 10 inches per tree. He concluded that she could therefore not tell the size of the trees. He submitted that without obtaining the average size of the trees, multiplying it by a rate published in the legal notice, the assessment and the resultant value would have no basis in law and fact. He contrasted the valuation produced by his witness and urged the Court to disregard the Defendant's valuation.

17. The Plaintiff submitted that the Defendant be found liable to trespass which is actionable per se. The Plaintiff further submitted that were it not for the installation of the high voltage lines he would have harvested Eucalyptus trees one and half times more. He urged the Court to allow special damages in the sum of Kshs. 981,939.00 and general damages in the sum of Kshs. 1,473,908.50 totaling Kshs. 2,454,847.50.

18. The Defendant submitted that special damages must be specifically pleaded and proved. It argued that since the Defendant did not carry

out the trees from the land, the Plaintiff ought to have mitigated his losses by making use of the cut trees and seek damages for the difference.

19. It was argued that the Plaintiff is not entitled to compensation as it executed a way leave consent and in any event, the high Voltage electric lines are serving the public and not private individuals.

20. It was submitted that the claim for general damages of Kshs. 1,473,908.50/- is a prospective claim for trees that would be presumably planted in future. Relying on the case of **Kenya Power & Lighting Company Limited vs Josphat P. Kingara (2013) eKLR** the Defendant contended that said claim is not payable. The Court pronounced itself that prospective losses are not payable. It argued that the general damages therefore for Kshs. 1,473,908.50/- should be rejected since the Defendant did not carry the logs away. It argued that the claim for permanent injunction or removal of the high voltage line should fail as well.

#### **Analysis and determination.**

21. The issues for determination are;

- A. Whether the Defendant trespassed on the Plaintiffs land.
- B. Whether the Defendant should pay compensation for the trees and; if yes how much?
- C. Whether the Plaintiff is entitled to general damages for trespass?
- D. Whether a mandatory injunction can be issued ordering the Defendant to remove the high voltage line from the Plaintiff's land.
- E. Who meets the cost of the suit?

#### **A. Whether the Defendant trespassed on the Plaintiffs land.**

22. According to the **10<sup>th</sup> Edition of Black's Law Dictionary** trespass is defined as follows;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. **Clark & Lindsell on Torts, 18<sup>th</sup> Edition on page 923** defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason”.

23. In para 6 of the Plaintiff, the Plaintiff has pleaded as follows;

“that due to the Defendant's unlawful destruction and the continuing trespass and insistence that nothing should be grown underneath the said high voltage line, the Plaintiff has suffered and continues to suffer immense loss and damage”.

24. A continuing trespass is defined in **Black Law Dictionary at Page...**as follows;

“A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property”.

Similarly, in **clerk and Lindsel on Torts 16<sup>th</sup> Edition Paragraph 23-01** a continuing trespass is defined as;

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

25. It is the Plaintiffs case that the Defendant unlawfully and without permission entered into his land cut trees and installed an electric power line across the land. The Defendant has denied the claim and pleaded that in the alternative that it sought and was granted way leave consent to enter the land and install the electric line by the Plaintiff. The Defendant's witness Mrs. Ochichi informed the Court that she assumed that a way leave consent had been granted by the Plaintiff. Finally, she informed the Court that none had been signed and that she went to the land to assess the damaged trees upon receipt of a complaint by the Plaintiff.

26. The Energy Act Cap No 12 of 2006 at section 46 provides as follows;

“No person shall enter upon any land, other than his own—

- a) to lay or connect an electric supply line; or
- b) to carry out a survey of the land for the purposes of paragraph (a), except with the prior permission of the owner of such land.

(2) The permission sought in subsection (1) shall be done by way of notice which shall be accompanied by a statement of particulars

of entry.

27. The Defence witness took the Court through the process of seeking and obtaining way leaves from private landowners. She stated that at the onset the surveyor would identify the route of the project line, the target to be supplied power, identifying the land parcels and the landowners that the line would traverse. The consent of the landowners would be obtained in writing by way of way leave document. The way leave document would be signed by the Chief of the area, as a witness and the landowner and the Defendant. The way leave would contain the land reference, the name of the landowner and attached would be the route map through which the power line would pass. She informed the Court that it is only after their preliminaries are concluded that a contractor is assigned to erect the power line. She stated that during construction of the power line, trees might be felled to create way for the construction of the power line. An assessment is carried out of all the damages that may have been occasioned during the installation and thereafter the process of compensation begins and on agreement with the landowner, the same is paid. This may even be after the works are completed.

28. The Defence witness stated that she visited the land in 2011 when the power line had been installed in 2009 to assess compensation.

29. Following that evidence, it is clear from the record that no consent, authority or permission of the Plaintiff was ever sought and/or obtained. No notice was given to him of the impending project as contemplated by section 46 of the Energy Act. The irresistible conclusion is that the Defendant is guilty of trespass.

30. The nature of the trespass has been determined in the ruling by my brother Justice Olao in his ruling delivered on 25/11/16. It is a continuing trespass as defined in **Clerk and Lindsel on torts 16<sup>th</sup> Edition, Paragraph 23-01** aforesated.

31. Having determined that indeed there is a continuing trespass the next issue is the compensation payable. The Plaintiff called an agricultural valuer Mr. James Ngunjiri who produced a valuation report in the sum of Kshs. 981,938.00. He explained to the Court how he arrived at the figures. He stated that he was guided by the Kenya Forest Service Guidelines of 2012. Applying the volumetric method, he measured the diameter of the trees and applied an average diameter of the trunk, calculated the area and multiplied by the volume of the trees. He then applied the rate of 24.61 x 300 trees giving him a value of Kshs. 981,939/=. He stated that the total area under trees was 0.19 acres, which did not include the area without trees. He stated that though the trees were on private land the guidelines applied to forest products irrespective of where they are.

32. In response, the Defendant challenged the valuation and stated that the correct guideline is the Ministry of Agriculture Guideline to arrive at the rate of 670/= per tree x 300 trees which gave her Kshs. 201,000/=. She however did not produce the guidelines for the Court to appreciate its import. She urged that unlike Kenya Forest Services Guidelines, which valued Forest produce, the Ministry of Agriculture guidelines are for compensation and it applied to a case like this one, as the Defendant was not purchasing the trees. The trees were left on the land.

33. The Defendant's Chief witness produced a valuation report, which is unsigned and undated. The Court is unable to rely on the report as its probative value in evidence is in doubt. The valuation by the Plaintiff therefore remains unchallenged and the Court upholds it in its entirety.

34. Trespass being actionable perse and even if the Plaintiff did not lead evidence to guide the Court under this heading, it is clear that the Plaintiff has suffered loss directly because of the installation of the power line. It is clear that the Plaintiff may still be able to cultivate crops underneath the power lines but will be restricted in its use for building and growing trees among other uses that may interfere with the safe maintenance of the high voltage electric line. Doing the best I can I will award the Plaintiff general damages in the sum of Kshs. 250,000/= which in my considered opinion is reasonable in the circumstances.

#### **D. Whether a mandatory injunction can be issued ordering the Defendant to remove the high voltage line from the Plaintiff's land.**

35. The parties at the commencement of the hearing presented 2 issues for determination, compensation and whether a permanent injunction/removal of power line would be granted. The voltage lines are in place and removal of the same has been pleaded for by the Plaintiff. Evidence has been led that the power line supplies power to Tuthu Market and the public along Kanyenyaini-Tuthu power line. It would be impractical to remove the power line on this section as doing so will incapacitate the whole line and cause untold suffering to the populace and public facilities along this line. The justice of the case is that the Defendant be given time to negotiate the appropriate wayleave agreements with the Plaintiff as provided for by the law. The Court shall make a pronouncement on this at a later stage.

#### **E. Who meets the cost of the suit?**

36. Section 27 of the Civil Procedure Act is my guide to costs. Costs follow the event. Equally, in this case the Plaintiff having succeeded in his case shall have the costs.

#### **37. Final orders;**

a. Special damages in the sum of Kshs. 981,939/-.

b. General damages in the sum of Kshs 250,000/- for trespass.

c. The Defendant is directed to negotiate proper way leave agreements/rights of way with the Plaintiff as per the provisions of section 148 of the Land Act, 2012 and such enabling provisions of the law. This should be done within 90 days from the date of this judgment.

d. Either party has liberty to apply.

e. The Defendant shall pay the Plaintiff's the costs of the suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15<sup>TH</sup> DAY OF NOVEMBER 2018**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mwangi Ben HB for Chege for the Plaintiff

Defendant - Absent

Irene and Njeri, Court Assistants