



## REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 21 OF 2017

PETER MWANGI KABUE.....PLAINTIFF

VS

RURAL ELECTRIFICATION AUTHORITY..... DEFENDANT

### JUDGMENT

1. The Plaintiff sued the Defendant seeking orders for;

- a) Special damages in the sum of Kshs. 2,305,382/-.
- 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 and was in possession of LOC.9/KIRURI/60,61, 703 ,2016,2017 and 1621 (the suit lands) where he farmed trees of various types for commercial purposes. That in the month of October 2009 the Defendant unlawfully entered the suit lands without consent and cut off 605 assorted trees valued at Kshs.2,305,382/=. The Defendant also installed a high voltage electric line traversing the said suit lands and with instructions that nothing should be grown on the portion of land underneath it. The Plaintiff adverts having suffered loss and damage because of the Defendant's actions aforesaid.

3. The Defendant denied the Plaintiff's claims in a Statement of Defence filed on 22/11/13. It denied that 605 trees were felled without permission nor that it unlawfully installed a high voltage power line traversing the suit lands. Further, it denied that no growth underneath the said high voltage line 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 power 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 October 2009.

4. During the trial, the Plaintiff testified and stated that he is the owner of the suit lands. That from the 1980s he started commercial farming of various types of trees on the suit lands. By 2009, the trees had grown to various sizes with the average heights and diameters of between 20-100 centimeters. He testified that in July 2009 the Defendant cut 605 trees and installed a high voltage line traversing the suit lands over an area of approximately 1 acre. That since 2009 he has not utilized the land underneath the high voltage for construction of buildings. He stated that the Defendant has not compensated him despite several demand notices to do so. He stated that he is seeking compensation in the sum of Kshs 5,763,455/- which is 1.5 times more than the original figure of Kshs. 2,305,382/-. This is because had the Defendant not cut the trees he would have harvested 1.5 times for the period. He testified that despite executing a wayleave agreement in 2011/2012 he is yet to be paid any compensation.

5. James Ngunjiri Muiro informed the Court that he is an agricultural officer with experience in agricultural services and valuation of agricultural produce including trees. He holds a Masters and Undergraduate degrees from the University of Nairobi in Agriculture. In 2013, he worked as an agricultural officer at Kangema Division. Upon the Plaintiff approaching the office for valuation, he was assigned the task to value the trees which he did and produced a report. He measured the tree stumps on the ground and applied the rates as per the Kenya Forest Rates thus arriving at the value of Kshs 2,305,382/-.

#### **The Defence case**

6. DW 1 – Caroline Ochichi testified and stated as follows; she is the Senior Wayleave Officer at the Rural Electrification Authority and a holder of a 1<sup>st</sup> class degree in Bachelor of Arts (BA) in Land Economics and a Master’s degree in Planning Studies from Oxford University in the United Kingdom. She is also a full member of the Institute of Surveyors of Kenya (ISK) and a registered valuer.

7. 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 lands, some of which belonged to the Plaintiff. She informed the Court that the Plaintiff gave way leave consent after the project was complete and therefore there was no trespass. She stated that she assessed the trees in the presence of the Plaintiff and applied the Ministry of Agriculture rates arriving at Kshs. 537,090/-. She clarified that she did not use the volumetric method in arriving at the valuation but measured the diameters and applied the rate as given by the Ministry of Agriculture excluding the height of the trees. Though she placed reliance on the rates by the Ministry of Agriculture, she did not produce any in Court. She confirmed that the power line is still in situ and the Plaintiff has not been compensated. She stated that the Defendant is still willing to compensate the Plaintiff. She admitted that there was no way leave consents for plots Nos. 2017, 1621 and 703.

8. Parties filed written submissions, which I have carefully read and considered.

9. Having analysed the pleadings, evidence and the written submissions the issues that commend themselves for determination are;

- a. Whether the Plaintiff has any title and/or interest in the suit lands;
- b. Whether the Defendant has trespassed on the suit land;
- c. Whether the Defendant should pay compensation for the trees and; if yes how much?
- d. Whether the Plaintiff is entitled to general damages for the trespass?
- e. Whether a mandatory injunction can be issued ordering the Defendant to remove the high voltage line from the Plaintiff’s land.
- f. Who meets the cost of the suit?

**Whether the Plaintiff has interest in the suit lands;**

10. The Plaintiff has pleaded that at all material times he occupied and was in possession of the suit lands to wit; LOC9/KIRURI/60, 61,703, 2016, 2017 and 1621. In support of his averment he has attached copies of titles for parcels No.s 1621 in the name of Christopher John Kirubi, parcel No 2017 in the name of Mwangi Kimani , parcel No.s 2016, 60 61 and 703 all registered in his name. In respect to the parcel, No 1621 he has annexed a license agreement dated 1 Nov 2009 between him and Christopher John Kirubi, the registered owner. The Defendant has challenged this title on the basis that the licence was given in November when the cause of action took place in October 2009. He however admits that there are trees growing on the suit land. In the absence of evidence to the contrary, it is the Court’s view that the suit land is under licence to the Plaintiff.

11. In respect to plot No. 2017, the Plaintiff has not adduced evidence to support ownership or permission to use the land by way of license, lease or any other permitted usage. The Plaintiff led evidence that plot No 2017 was registered in the name of Mwangi Kimani who sold the land to him. He however did not attach any evidence by way of title, official search, and agreement for sale or transfer to evidence change in ownership. The Court is unable to hold that the Plaintiff has a valid title or interest in this particular land. There is evidence of trees on all the plots aforesaid. The Court will discount any trees growing on this land for that reason.

**Whether the Defendant has trespassed on the suit land;**

12. Trespass is defined as unlawful act committed against the person or property of another especially wrongful entry of another’s land. See Black’s Law Dictionary, 10<sup>th</sup> Edition at Page 1642. Continuing trespass on the other hand is defined by Clerk On Law of Torts, 16<sup>th</sup> Edition Para 23-01 as;

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

The Defendant has raised a defence that the claim is time barred in accordance with the provisions of Limitations of Actions Act since the cause of action occurred in October 2009. Granted the above definition and as long as a trespasser continues to occupy another land unlawfully, such occupation remains a continuing trespass which is actionable from day to day so long as the trespasser remains on the land. The Defendant through its witness has admitted in evidence that the electric power line is still on the land.

13. The Defendant has argued that it sought and obtained way leave consent from the Plaintiff and therefore trespass cannot arise. It is the Plaintiff’s case that he did not give any consent for the construction of the power lines. The consent he signed later in 2012 was in respect to the compensation for the damaged trees. The high voltage line had been constructed in 2009 without his consent and permission. I have examined the record and it is clear that the Plaintiff signed property damage report on 17/10/09 for Plot No. 60, 61, 2107, 1621 and 703. There is no evidence that he signed property damage report for plot no 2016. In this report, the Plaintiff acknowledged the full extent of the damage of the trees on the suit land. The report contains the number of trees type and the measurement in diameter of the same. A Mr P K Thagishu, surveyor on even date, witnessed the said report. According to the evidence on record, the entry into the lands commenced in October 2009. This, therefore, means that the Plaintiff signed the report within one month of the damage happening on site.

14. Did the Defendant obtain consent from the Plaintiff? It is the contention of the Plaintiff that he did not give consent for the erection of the power lines. He has stated in evidence that he signed a document in 2011/2012 after the electric line had been erected in 2009. That he believed the documents would pave way for payment of compensation for the trees felled on the lands.

15. A wayleave is 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, organizations, authorities and bodies to carry out their functions. Such functions include installation of power lines, gas pipes and oil pipelines, among others.

16. A wayleave is an analogous right governed under Part X of the Land Act, 2012, section 143-149 of the said Act. The Act provides the manner in which wayleaves and other rights of way should be created and maintained. Section 98 of the Land Registration Act, 2012 provides for the creation of easements and analogous rights over land. Prior to the enactment of the Land Act 2012, way leaves were governed by the provisions of The Wayleaves Act Cap 292.

17. A valid wayleave agreement contains the names of the contracting parties, the description of the land, the consideration (if any), the obligations of both the wayleave owner and the landowner, the demarcation and measurements of the power line, the site plan and the consent. Both parties must sign the document. See also section 98 (3) of Land Registration Act, 2012.

18. I have seen on record a document (alleged to be the wayleave consent) signed by the Plaintiff in respect to Plot Nos. 60 and 61 to the effect that;

“I/We.....of..... in Kenya being the proprietor of the land comprised in Title No. ....(registered under the Registered Land Act) in consideration do hereby consent to The Rural Electrification Authority laying or erecting an electric supply line on my said piece of land and from time to time entering upon and having access to my said piece of land for purposes of construction, buying, maintaining, using, removing and replacing the electric supply line substantially on the alignment shown by a red line on the Site Plan. By consent to the above, Rural Electrification Authority also hereby undertakes to favourably consider me for inclusion in the project currently being installed or any other future projects as per my load requirements.

I undertake that this consent shall be irrevocable.

**Dated** this.....day of .....20.....

**Witness** .....

PROPRIETOR

SITE PLAN”

The above document is undated and is on a plain letter/paper. It is unacceptable that such a public company entrusted with the duty to connect Kenyans to the National Grid would have a consent agreement written in the manner above and term it as a consent. A way leave agreement creates an interest in land. The Defendants witness Ms Ochichi laid bare to the Court that the document being referred to as a way leave fell short of a way leave as defined by the Law. In her own words she stated that the document is not signed, does not have the site plan, no identity of the property in reference and the details in respect to the power line are missing and more importantly doubtfully attributed to the Defendant due to missing letterhead and signature. In many words, she dismissed her own document. Candidly, she admitted that there are no consents for plot Nos. 2017, 1621 and 703. Ultimately, the document does not meet the requirements of a wayleave agreement or contract in law. There are no terms that bind the parties to the wayleave. Evidence was led that the alleged way leave consent document was signed in 2012 after the trespass had taken place. The Court is unable to find that the Defendant sought and obtained valid consent of the Plaintiff to erect the power line.

19. In conclusion, the Court holds and finds that the Defendant trespassed onto the Plaintiffs suit lands, which trespass is continuing.

**Whether the Defendant should pay compensation for the trees and; if yes how much?**

20. Under section 148 of the Land Act, 2012 the law provides for payment of compensation as follows;

“(1) Subject to the provisions of this section, compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified value”.

(4)The duty to pay compensation payable under this section shall lie with the State Department, county government, public authority or corporate body that applied for the public right of way and that duty shall be complied with promptly.

(5) If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation”.

21. It is commonly accepted by both parties that trees were damaged during the erection of the power lines. The question for determination by the Court is whether there should be compensation and to what extent. The Defendant has argued that since the trees were cut and left on site the Plaintiff ought to have used them to mitigate his losses. Both parties have presented to Court through their expert witnesses the quantum of the compensation that should be paid. The Defendant's witness Ms Ochichi presented an undated property damage report for Plot Nos. 60,61,2017 1621 and 703 in the sum of Kshs 537,090/- . She explained that she measured the diameter of the stumpage and applied the Ministry of Lands and Agriculture rates. That the requirements from the Ministry do not require calculating the height of the trees as it is based on the diameter of the stumps.

22. The Plaintiff on the other hand called a valuer who explained to the Court that he made the report in 2013. The trees were still on the ground. He counted the stumps on the ground, measured the diameters and applied the Kenya Forest Services Rates. That he used the volumetric method of valuation to arrive at the figure of Kshs 2, 305,382/-. That she based the valuation on market value of the trees.

23. Both parties have submitted the Kenya Forest Services rates for which I have considered in arriving at the determination of this Court.

24. The Court has held that the Plaintiff did not prove ownership of plot No 2017. The amount attributed to this parcel of land in the sum of Kshs. 505,480/- is therefore discounted from the total sum of Kshs 2,305,382/-. The Plaintiff is therefore awarded Kshs. 1,799,902/- for the loss of trees.

#### **Whether the Plaintiff is entitled to general damages for trespass**

25. Having held that there is trespass, it is trite law that trespass is actionable *per se*. The Plaintiff has stated that the erection of the power line had led to limited use of the land underneath. He avers that the total acreage affected by the pylons is approximately 1 acre. For example, he says he cannot build or grow trees underneath. Though there is clearly limited loss of use of the suit land underneath the power line it does not prevent the Plaintiff in using it for other uses save for construction and tree growing and other uses that do not pose a danger to the power lines and lives.

26. The Plaintiff has argued that if the Defendant had not trespassed onto his land he would have harvested 1.5 times the trees taking the average of the maturity of the trees since 2009. He has given a value of Kshs 3, 458,073/- as general damages. This is future compensation which would be discouraged. Granting that the area affected and taking a land rental figure of Kshs 3500/- per month that would translate to 378,000/- for the period that the continuing trespass is ongoing. The Court considers an amount of Kshs 378,000/- as a reasonable award under this heading.

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

27. 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/rights of way with the Plaintiff as provided for by the law. The Court shall make a pronouncement on this at a later stage. The Defendants witness informed the Court that the Defendant is willing to compensate the Plaintiff.

#### **28. Final orders;**

- a) Special damages for loss of trees in the sum of Kshs. 1,799,902/-.
- b) General damages in the sum of Kshs 378,000/- 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

