



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 716 OF 2014

OBADIAH K. MACHARIA PLAINTIFF

-VERSUS-

KENYA POWER & LIGHTING COMPANY LTD..... DEFENDANT

JUDGMENT

Introduction:

1. By a plaint dated **21st July, 2009** and amended on **28th August, 2009** the plaintiff, Obadiah K. Macharia, seeks judgment against the defendant, Kenya Power and Lighting Company Limited for:-

- a) an injunction to restrain the defendant by itself, its servants, agents or otherwise howsoever from remaining on or continuing to have its electronic power supply line traversing the parcel of land known as LR No. 15 Gathukeine/1010.**
- b) general damages**
- c) cost of the suit**
- d) interest on (a) and (b) above**
- e) any other or further relief that the court may deem fit and just to grant.**

2. It is the plaintiff's case that on or about 15th February, 2008 the defendant illegally/irregularly entered into the parcel of land known as **LR No. 15 Gathukeine/1010** (hereinafter referred to as the suit property) and laid an electric power supply line thereon. Terming the defendant's action of entering into the suit property and carrying out the impugned activities thereon, trespass to land, the plaintiff contends that owing to the defendant's impugned activities, he has incurred and continues to incur loss and damage.

3. Vide paragraph 7 of the plaint, the plaintiff claims that the defendant wantonly cut down and destroyed 12 fully grown trees from the suit property.

4. In its statement of defence, the defendant denies all the allegations of wrongdoing levelled against it, its servants, employees and agents and contends that if any trees were cut from the suit property, they were cut with the full knowledge and consent of the plaintiff.

EVIDENCE

The Plaintiff's Case

5. When the matter came up for hearing, the plaintiff reiterated his contention that the defendant trespassed into the suit property and illegally/unlawfully/irregularly carried out the impugned activities thereon. The plaintiff informed the court that owing to the defendant's alleged unlawful activities on the suit land, he suffered loss and damage. In this regard he stated that he lost a total of 49 trees.

6. Concerning the said loss, he stated that it was confirmed by the defendant's officers after he made a complaint. After the defendant failed to compensate him for the said loss, he consulted his advocate who issued the defendant with a demand letter.

7. In support of his claim, the plaintiff produced the following documents:-

- i) Title deed in respect of the suit property, **Pexbt 1**;
- ii) Registry Index Map (RIM) in respect of the area where the suit property is located, **Pexbt 2**;
- iii) Letter dated 22nd February, 2008, **Pexbt 3**;
- iv) Letter from defendant dated 29th February, 2008
- v) Photographs showing the power line and the felled trees as **Pexbt 5(a)** and **5(b)** respectively.

8. Urging the court to grant him the orders sought in the plaint, the plaintiff informed the court that after he complained about the defendant's unlawful activities the defendant removed and re-routed the power line.

9. On cross-examination, the plaintiff admitted that according to his letter dated 22nd February, 2008 he was demanding Kshs. 60,000/=; that he did not personally witness the defendant cut down the trees and that the plaint only refers to 12 trees and not 49 as per his testimony. The plaintiff further admitted that he did not provide any documents in support of the other 37 trees allegedly felled by the defendant and that he did not have any valuation report in respect of the value of the trees.

10. In re-examination, the plaintiff informed the court that Pexbt 5(b) shows the size of the trees felled. He pointed out that under paragraph 7 of the plaint, the trees are described as fully grown.

11. Explaining that when sending a demand letter he had assessed the cost of the trees at Kshs.5000 each, he contended that had the trees not been cut their cost today would be Kshs.15000/= per tree.

12. After close of the plaintiff's case, advocate for the defendant informed the court that the defendant would not be calling any witnesses and proceeded to close the defense case. Thereafter, advocates for the respective parties filed their submissions, which I have read and considered.

Submissions

13. In the submissions filed on behalf of the plaintiff, it is pointed out that the prayer for injunction has been overtaken by events (the offending power line has since been removed and re-rooted).

14. With regard to the claim for damages, it is submitted that vide paragraph 7 of the plaint, the plaintiff seeks compensation for 12 fully grown trees and that the documents produced in support of the plaintiff's claim suffices to prove the claim on a balance of probabilities.

15. With regard to the claim for general damages for trespass to land, reference is made to **Section 45(2)** of the Electric Power Act, No. 11 of 1997 and submitted that since the defendant did not issue the plaintiff with the notice contemplated in law, entry to the suit property was illegal/unlawful. Further reference is made to the case of **Gachoka & 3 others v. Kenya Power & Lighting Company** where it was held:-

“statutory duties of the respondent (read Kenya Power & Lighting Company Limited) do not entitle it to arbitrarily enter into private land to execute those duties.”

16. As to the damages payable to the plaintiff, based on the cases of **David Mutuku Nzau Vs. Kenya Power & Lighting Company Ltd (2006) e KLR** and **Hannah Wairimu Vs. Wanjiru Muchiri-Mombasa HCCC No. 1324 of 2000**, it is submitted that in the circumstances of this case, the plaintiff should be awarded special damages amounting to Kshs.735, 000/= on account of the 49 trees and general damages amounting to Kshs.300,000/=.

17. On behalf of the defendant, reference is made to the case of **Tharanira Karuri vs. Agnes Ncheche (1997) eKLR** and submitted that the plaintiff's claim being in the nature of a claim for special damages, the plaintiff ought to have specifically pleaded the damages he suffered and strictly proved them.

18. Although the plaintiff has pleaded that the defendant felled down 12 mature trees, it is submitted that no expert report as to size and/or value of the trees was produced to support that claim.

19. With regard to the claim for general damages, it is submitted that there is no evidence of the loss suffered by the plaintiff and contended that without evidence of the loss suffered by the plaintiff, this court cannot assess the general damages awardable to the plaintiff.

Analysis and determination

20. From the pleadings and the submissions filed in this suit, the issues for determination are:-

- 1) Whether the respondent carried out the impugned activities?
- 2) Whether the impugned activities were carried out with the knowledge or consent of the plaintiff?
- 3) Whether the plaintiff suffered any loss or damage?
- 4) If the answer to (3) above is in the affirmative, whether the respondent is responsible for the loss or damage?
- 5) Whether the plaintiff's claim for damages is sustainable?
- 6) What Orders should the court make?

1) Whether the respondent carried out the impugned activities?

21. As pointed out herein above, vide its statement of defence, the respondent denies having carried out the impugned activities on the plaintiff's land. In alternative, the respondent contends that the activities were carried out with the full knowledge and/or consent of the plaintiff. In his testimony before the court, the plaintiff maintained that the impugned activities were carried out without his knowledge and consent.

22. The plaintiff explained that he was aggrieved by the conduct of the respondent. As a result, he complained to the respondent through his letter dated 22nd February, 2008 (**Pexbt 3**). The respondent replied to that letter through its letter dated 28th February, 2008. The plaintiff took photographs of the

offending power line and the felled trees (see **Pexbt 5(a)** and **5(b)** respectively).

23. Upon considering the testimony of the plaintiff and the documents the plaintiff produced in support of his testimony together with the respondent's defence (which I find to be a mere denial) and cognisance of the fact that the plaintiff's burden was to prove his claim on a balance of probabilities, I find the evidence on record sufficient to prove that the respondent and/or its employees/servants carried out the impugned activities on the plaintiff's land.

2. Whether the impugned activities were carried out with the knowledge or consent of the plaintiff?

24. With regard to this issue, I note that other than alleging that the impugned activities were carried out with the knowledge or consent of the plaintiff, the respondent did not produce any evidence capable of proving that allegation. The burden of proof of that allegation lay with the respondent. In this regard see **Section 107(1)** of the Evidence Act, Cap 80 Laws of Kenya, which provides:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

25. In the circumstances of this case, to rely on the defence of knowledge or consent by the plaintiff, the respondent ought to have led evidence to prove that the plaintiff either knew about the impugned dealings or had given consent for the impugned dealings to be carried out on his land, which it did not.

26. For the foregoing reasons, I return a negative verdict to this question.

3. Whether the plaintiff suffered any loss or damage?

27. With regard to this issue, the plaintiff has through his statement of claim (plaint), testimony and submissions contended that owing to the impugned dealings of the respondent he suffered loss and damage. The Loss suffered has being identified as loss of trees valued at Kshs.735,000/= (special damages). The plaintiff also claims to have suffered general damages for which he claims Kshs. 300,000/=.

28. On its part, the respondent denies the allegation that the plaintiff suffered any loss. The respondent also contends that the plaintiff's claim for damages is unsustainable. The reasons given for that contention are that the claim for special damages is improperly pleaded and that there is no evidence to support the claim for general damages.

29. The issue as to whether the plaintiff suffered any loss or damage on account of the impugned activities is closely related with issues number (1) and (2) herein above. concerning issue number (1), based on the evidence on record, I determined that there is evidence that the respondent was responsible for the impugned activities on the respondent's land. With regard to issue number (2), I determined that the respondent had no consent or approval of the plaintiff to enter into his land.

30. There being no evidence that the respondent's action of entering into the plaintiff's land and carrying out the impugned activities was lawful or otherwise legally sanctioned, I find the respondent's action to have constituted trespass to land.

31. It is trite law that trespass to land is actionable *per se* (without proof of any damage). See the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014)** eKLR where **J.M Mutungi J.**, stated:-

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ..”

32. In issue number (1) above, I found the evidence adduced by the plaintiff sufficient to prove that the

respondent and/or its agents/employees/servants destroyed the plaintiffs property (trees). In my view the plaintiff is entitled to raise a claim in respect of those infractions. This is so, regardless of whether or not he will sustain the claim for compensation in respect of those infractions.

33. For the foregoing reasons, I find and hold that the plaintiff suffered loss and damage to wit, loss of trees and unwarranted interference of his property and the rights which accrue to a property owner.

4. Whether the respondent is responsible for the loss/damage the plaintiff suffered?

34. While analysing issue number (3), I determined that the respondent's actions amounted to trespass to private land. On whether the respondent is responsible for the loss/damage the plaintiff suffered, I reiterate my earlier finding that the respondent trespassed into the plaintiff's land. As pointed hereinabove, the said action by the respondent is by law actionable against the wrongdoer, in this case the respondent.

5. Is the plaintiff's claim for damages sustainable?

35. As pointed out hereinabove, the plaintiff's claim for damages is challenged on the grounds that:-

i) the claim for special damages was not specifically pleaded and strictly proved as by law required.

With regard to this contention, having read and considered the plaintiff's claim in respect of this relief, the evidence adduced in support thereof and the law applicable, I agree with counsel for the respondent that the claim is unmaintainable. I say this because whereas in his plaint the plaintiff claims to have lost 12 fully grown trees, in his evidence he claimed that 49 trees were felled down. There is, therefore, a deviation between the plaintiff's pleadings and evidence. It is now a trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. In this regard see the case of **Adetoun Oladeji (Nig) Ltd v. Nigeria Breweries PLC S.C 91/2000** quoted with approval by the Court of Appeal in the case of **I.E.B.C & Another v. Stephen Mutinda Mule & 3 other (2014) e KLR.**

36. I also agree with counsel for the respondent that the plaintiff's claim in respect of the destroyed trees is a claim in the nature of a claim for special damages. That being the case, the plaintiff ought to have specifically pleaded the damage suffered and strictly proved it by tendering evidence. In this regard see the case of **Zacharia Waweru Thumbi v. Samuel Njoroge Thuku (2006) eKLR** where it was held:-

“The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts, are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in HAHN V. SINGH, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

37. In the circumstances of this case, the plaintiff needed to plead not only the number of trees lost but also the value of the trees. To prove the value of the trees, the plaintiff, needed to produce a valuation report, to at least guide the court on the value of the trees felled down. Without such evidence it is not possible for the court to determine the claim for special damage.

38. With regard to the contention that evidence is required to prove the claim for general damages, based on the authority of the case of **Park Towers Ltd v. John Mithamo Njika & 7 others** *supra*, I reiterate that no evidence is required before damages for trespass to land can be awarded. In this regard also see the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR** where **P. Nyamweya J.** held:-

“...once a trespass to land is established it is actionable *per se*, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants’ trespass”

39. Having found the conduct of the respondent actionable, I now turn to the issue- **What orders should the court make?**

As pointed out herein above, beside the prayer for special damages, the plaintiff seeks an injunction compelling the respondent to remove the offending power line, general damages for the infractions, costs of the suit and interest.

40. With regard to the prayer for injunction, in his testimony, the plaintiff informed the court that the offending power line has since been removed and re-routed. In view of the foregoing, I find and hold that the prayer for injunction has been overtaken by events. It would, therefore, be redundant to consider that prayer.

41. With regard to the prayer for general damages, having found that the plaintiff does not need to prove damage/or loss before he can be awarded general damages for trespass to land, in the special circumstances of this case, I find that there was loss of some unascertained number of trees.

42. Since the offending power line has been removed, I find that general damages of Kshs.100,000/= will adequately compensate the plaintiff for the wrongful entry to his land and the infractions carried thereon.

43. As the plaintiff has succeeded in his claim, I award him the costs of the suit. The plaintiff will also have interest as prayed for calculated at court interest rates, from the date of delivery of this judgment until payment in full.

Orders accordingly.

Dated, signed and delivered at Nyeri this 10th day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Court assistant - Lydia