



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 287 OF 2013
(FORMERLY CIVIL SUIT NO. 448 OF 2010)

NOORLANDS LIMITED.....PLAINTIFF

-VERSUS-

KENYA POWER & LIGHTING CO. LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff: Noorlands Limited sued Kenya Power & Lighting Co. Limited vide a plaint dated 6th December 2010 seeking for judgement for:

- i) A mandatory injunction to compel the defendant to remove all the equipment and supply lines from plot No 121/V/M.N**
- ii) General and punitive damages for trespass.**
- iii) Costs of the suit and interest thereon at Court rates.**
- iv) Any other and further relief the Honourable Court deems fit to grant.**

2. The suit was defended by a defence filed on 16th February 2011. The defendant denied the plaintiff's claim and at one point sought and obtained leave to bring 3rd party proceedings against some 480 persons. The 3rd party notice was taken out but it is not clear if it was served since there persons never participated in this suit.

3. Once pleadings closed parties proceeded to give evidence. The plaintiff's evidence was taken before Tuiyot J. on 17th July 2012. Mr Mohamed Khatib testified as PW 1. He told the Court that he is the plaintiff's attorney who owns plot No 121 Section V/M.N located at Jomvu Division in Mombasa County. He produced the title deed as Pex 1 and Power of Attorney as Pex 2. PW 1 continued that the plaintiff subdivided the land into 22 5 acre plots to be used as light industry premises and one plot measuring 35 acres for residential buildings. The application for subdivision was presented to the Mombasa Municipal Council and they received approval on 17.11.08 – Pex 4.

4. The witness continued that they did a preliminary survey of the land and there were squatters whom

they needed to move out of the 35 acres. However the defendant had entered the ground and erected poles to supply the squatters with electricity power without their consent. Mr Khatib said that he personally visited the offices of the defendant and Mr Aketch the way leave officer said he did not know who issued the way leave. Consequently he issued a demand letter and served on the defendant Pex 5 but the defendant never responded. In reply they filed this suit. It is the plaintiff's case that when the defendant supplied power, more squatters moved in. That the defendant has supplied more than 400 people. The plaintiff also seek damages for trespass.

5. The witness was put to cross – examination. He said the plaintiff was incorporated in Tanzania but they have an office in Moi Avenue Mombasa. He gave the names of the directors as Noorani (resides in Tanga) and Mrs Hamtili who is a resident of Mombasa. He said the property was vacant save for one or two structures which were occupied by the caretaker of the property. That the property is 168 acres therefore the plaintiff did not find it economical to fence it. The witness said that before 2008, the plaintiff had not done any economic activity on the land.

6. Pex 2 – that the land was sold to me but the transfer had not been done because we needed to subdivide it. Further that the plot was vacant at the time of power supply but there were structures coming up. The structures were temporary made of wattle. Initially there were 12 squatters until 2008. They were occupying the entire land. The witness was last there in 2009 and a big portion of the 168 acres had been occupied by the squatters and only 30 acres was vacant.

7. PW 1 said some structures are permanent and others are semi-permanent. That they had sued the squatters in another suit. He said the power was supplied between 2007 – 2008 and that the defendant has adequate expertise to find out who the owner of the land is. That at the time of obtaining the power of attorney he sued for evictions against the squatters, which case is still pending. He denied using the defendant to sort out the squatter problem. The plaintiff has a problem with both the squatters and the defendants. In reference to Pex 3 page 3 – infrastructure is available along MSA – Nairobi. That there are no feeder roads. In re-examination, he said the defendant has a duty to seek permission from the registered owner. That the supply of electricity led to the influx of squatters. With this evidence, the plaintiff's case was closed.

8. The defence case was heard on 8th June 2015. The defendant called Mr Walter Akello Mboro the Senior Wayleaves Officer as the witness. He worked for the defendant in Mombasa for 10 years before being transferred to Kisumu. He testified that before survey and erection of power lines is done, a wayleaves consent is usually obtained from public authorities and private land owner affected. Once consent is obtained, construction is done as per plan.

9. He continued that in December 2006, they had a World Bank funded project to supply all slums in the Coastal towns with electricity. The slum in dispute is Alidina located in Jomvu area – Changamwe. They went to the lands office to trace the land owner but they could not get him. So they approached a village elder on the ground who signed the wayleaves consent form. The village elder wrote to the defendant seeking for connections and attached a list of 341 names. This letter and the list was produced as Dex 1. They also received a letter signed by the village headman dated 7th January 2007 and produced as Dex 2. The wayleaves form was thus signed by the people who wrote the letter of 7.01.07 and wayleaves form produced as Dex 3.

10. DW 1 stated further that once they got the executed forms, they ran along the road and low voltages into the houses. He produced the map showing how the power lines were as Dex 4. He continued that they received no objection during the constructions of the power lines. That there were murrum roads running through the settlement which is comprised of both permanent and semi-permanent structures. DW 1 said that they found the people already on the ground and not that it is their supply which brought squatters. They did not cut down any trees as the area was already built up. They denied being trespassers to the suit property.

11. On cross – examination by Mr Jengo advocate for the plaintiff, the witness said the plaintiff is the registered owner of the plot. That his assistant went to the registrar of lands but they did not do a search

nor did they get consent of the plaintiff. He also admitted that persons who signed the wayleaves were not the registered owners. He stated that the government in conjunction with the World Bank approached the defendant. The idea of supplying power was sold to the slum dwellers not the slum dwellers who went to the defendant. The witness visited the area before the supply and after the project ended. He could not tell whether the number of occupants increased from 2007 to date. The defendant also closed their case.

12. The Court visited the site on 17.10.16 on request of the defendant. I noted that the place was built up with schools, residential houses, mosques with main access road crisscrossing the land tarmacked and the feeder roads murramed. The parties filed their rival submissions which addressed the list of issues filed in Court on 1st December 2011. The plaintiff submitted that they have proved they are the owners of the suit property. Secondly that the defendant did not seek the requisite wayleaves permission from the plaintiff. On this account the plaintiff submits that the action of the defendant amounted to trespass and he relied on the case of **M'mukanga vs M'mbijiwe (1984) KLR 761** where the Court of appeal described the tort of trespass this

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13. The plaintiff also submitted the defendant's action caused damage because as a result of the supply of electricity on the said land, the number of squatters increased thus infringing on the plaintiff's right to possession. The plaintiff submitted that since it has proved its case, it is entitled to the prayers contained in the plaint. The plaintiff proceeded to propose payable damages at Kshs 9,000,000 (General damages – 3,000,000 & punitive damages 6,000,000).

14. The defendant in his submissions confirmed the plaintiff is the registered owner of plot No 121/V/MN. On whether they entered the suit land in 2006 or 2008 and supplied power to squatters without permission/wayleave of the plaintiff, they submitted that they supplied powers to persons in occupation of the suit property at the time. That the defendant honestly believed that the inhabitants of Allidina village were the owners of the suit property and it cannot be said that they knowingly supplied squatters with electricity power.

15. The defendant submitted that they obtained wayleaves from village headmen and the defendant could not have doubled them as nobody else including the directors of the plaintiff claimed ownership then. That if it is true there was a caretaker in occupation of the suit property before 2007 then the plaintiff could have taken immediate action to deal with the squatters who invaded the suit property. The defendant denied their actions amount to trespass and was justified under chapter 4 of the constitution. They also submitted that the plaintiff has not suffered any loss and are therefore not entitled to the orders sought.

16. I have considered the pleadings, the evidence adduced and the submissions filed. I have also considered the matters raised by the list of issues filed in Court on 1st December 2011 by the plaintiff. The plaintiff gave evidence through its appointed attorney being Mohamed Khatib. The witness is an advocate of the high Court of Kenya and thus well versed with the procedures and functions of a holder of a donee of a power of attorney.

17. A holder of a power of attorney is a recognised agent under order 9 of the Civil Procedure Rules. The power of attorney dated 8th July 2008 and produced as Pex 2 bestowed on the donee powers to perform any or all of the following acts:

1. To complete sale and transfer of the land to himself or to his nominee as he may direct for the agreed price of Kshs 12 Million.

2. We declare that all our right and interest in the land shall vest in our attorney for all purposes herein and the power of attorney shall be irrevocable and continue till the transfer

of land is completed and registered.

3. Generally to do all such acts and things as may be necessary or expedient in connection with completion and registration of sale and transfer of the said land.

18. In the introduction of the power of attorney the plaintiff confirmed owning the land and in paragraph 2 stated that they had sold all their rights and interest in the land to Mr Mohamed Faki Mwinyi Haji of Mombasa for the price of Khs 12 Million on the terms and conditions appearing. The power of attorney as construed was a specific power of attorney which in my interpretation was to enable the donee complete the sale and transfer of the land to himself and secure registration. There was no clause allowing the donee to give evidence in Court on behalf of the plaintiff.

19. Order 9 rule 2 (a) of the Civil Procedure Rules provides that

“Subject to approval by the Court in any particular suit persons holding powers of attorney authorising therein to make such appearance and application and do such acts on behalf of parties”.

Order 18 rule 2 also provides that unless the Court otherwise orders:-

1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

20. The only evidence the plaintiff relied on to prove her case is the one given by the donee. Did he have capacity to testify on behalf of the plaintiff in order to prove that which the plaintiff was required to prove under Order 18 rule 2? On account of the contents of the power of attorney produced Pex 2 my opinion is otherwise as there was no power donated to undertake such acts. On this point the plaintiff's suit would fail for not being proved.

21. Now proceeding on the assumption that PW 1 had capacity to give evidence was the case proved? There is evidence Pex 1 that the plaintiff is the registered owner of the plot No 121/V/MN. Although the same appears to have been sold to PW 1 the transfer had not been done. It is also not in dispute that the plaintiff did not sign the requisite wayleaves for the defendant to undertake the erection and supply of the power to the villagers of Allidina Visram. In the plaint, the plaintiff is described as a company incorporated in Tanzania. Although it is stated that it has the registered offices in Mombasa. In the amended plaint in HCC 101 of 2009, the registered office is described to be in Tanga in Tanzania.

22. During his testimony the witness said the land was occupied by the caretaker and a few squatters. The defendant on his part said the area was already built up and they tried to trace the owner of the land from the Land Registrar without success. There is no address given in the plaintiff's (Pex 1) and the registration took place on 23rd July 1955. There was no way the defendant would have the whereabouts of the plaintiff. The defendant also said that they honestly believed the land was owned by the occupants and no objection was raised during the construction exercise. Before the construction was done, there were wayleaves duly executed giving the defendant authority to install the powers. The people who signed may have had no authority but at the time the defendant had no way of establishing the same until the plaintiff made the demand but which demand was made after the supply had been undertaken. Secondly before the demand and subsequent filing of this suit; there was no evidence led to show the defendant was aware the structures were unauthorised and illegal.

23. Under the heading of particulars of damage, there are averments that there has been increase of illegal structures, trees were cut down to clear land for the constructions and that the unplanned structures have interfered with the plaintiff's use of the land. It is public knowledge that the defendant cannot supply power to non – existent consumers. The defendant stated this was a slum upgrading project funded by the Kenya government and the world. Although DW 1 admitting selling the idea to install power to the slum dwellers, this did not change the fact that the area was already occupied. The plaintiff

did not tell this Court how many people increased because of the power supply. The defendant's exhibit dated 3rd December 2006, the application by Charles Mvuu Tungwa enclosed a list of 341 residences even before the poles were erected. The structures were owned by these occupants and not the defendant. Lastly there was no evidence of trees cut. The defendant stated that they made their lines run along the roads. If anyone has stopped the plaintiff from using his land then it is these occupants and not the defendant.

24. The plaintiff has since sued some of these occupants vide HCC 101 of 2009. The pleadings in this suit was annexed to the defendant's application for 3rd party notice. The plaintiff did not deny its existence. This suit has not been concluded. It is this Court's view that it would make public sense to issue the prayer (a) in the plaint herein only once the plaintiff has obtained an order for vacant possession from the squatters. The defendant would as a matter of course remove its poles when the said squatters are ordered evicted. However it is thus my considered view that granting the order now is premature and for that reason I would shelve it. As regard prayer (b), the particulars of damage as set out in paragraph 5 of the plaint was not proved. The plaintiff also failed to prove that the loss he is suffering if any is a result of the acts of trespass of the defendant as the area was already built up when the defendant erected the power lines.

25. In conclusion, I am not satisfied that the plaintiff met the threshold of proving his case with the balance of probabilities. For the reasons contained in the body of this judgement. Consequently I do dismiss the suit with costs to the defendant.

Dated and signed at Mombasa this 4th day of November 2016.

A. OMOLLO

JUDGE