

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 1005 OF 2012

JOSEPH ABRAHAM KAFWA.....PLAINTIFF

VS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

(Suit for recovery of damages against Kenya Power Co. Ltd; Claim by plaintiff that KPLC entered his land without his permission and fell down trees; whether such claim sustainable; requirements of the Energy Act; notice; whether notice is required before entering premises and felling down trees interfering with power lines; notice required; no notice issued in this instance; whether compensation payable; unilateral amount paid by defendant; whether such amount was fair compensation; judgment entered for plaintiff for fair compensation for the trees and for damages for trespass)

JUDGMENT

A. INTRODUCTION AND PLEADINGS

1. This suit was commenced by way of plaint filed on 5 December 2012. The case of the plaintiff is that he is the owner of the land parcel Bukhayo/Kisoko/2770 on which he planted 50 indigenous trees called "Olushiola", which he intended to sell as timber on their maturity, and thereafter plant more trees to sell again in future. However, in March 2012, without the consent of the plaintiff, the defendant, Kenya Power & Lighting Company Ltd, entered into the plaintiff's land and cut down 15 of the said trees which were already mature. The plaintiff on realizing that his trees had been cut down, demanded compensation from the defendant, and the defendant only paid a sum of Kshs. 11,250/= by way of cheque on 6 November 2012. This, the plaintiff has contended, is an under assessment and a figure that was arrived at without his express authority or involvement. In so far as the plaintiff is concerned, he expected a sum of more than Kshs. 956,770.70/= for the trees. In the plaint the plaintiff has sought the following orders:-

(a) Special Damages of Kshs. 945,520.70/=.

(b) General damages for the pain and agony, inclusive of mental torture the plaintiff underwent as a result of the defendant's action.

(c) General damages for loss of use for a period this court may deem fit and appropriate should the defendant fail to relocate the power line.

(d) A permanent injunction barring the defendants, their agents and or servants from interfering in any way with the plaintiff's parcel of land without the plaintiff's prior permission and/or consent.

(e) Any other remedy this court may deem fit to grant.

(f) Costs of the suit plus interest.

2. The defendant entered appearance and filed defence. The defence is basically a denial of all the claims of the plaintiff. The defendant has added that the suit is misconceived as it offends express provisions of overriding interests in land enjoyed by the defendant. It asked that the suit be dismissed.

B. EVIDENCE OF THE PARTIES

(i) Evidence of the Plaintiff

3. The plaintiff testified that he is the registered owner of the suit land and he produced a certificate of title and an official search as exhibits. He testified that without any notification nor permission, the defendant entered his land on 19 March 2012 and started making holes to put up electric posts. They also damaged several of his trees including 15 mature "tsisiola" (same as "olushiola") trees. The plaintiff came to know of this when he was called by his step-mother, Doris. After the information, he went to the land and also engaged a forester to assess the damage. He stated that the defendant needs to compensate him in line with the assessment of the forester and also for occupying his land. He stated that he cannot now use his land as he wishes. Cross-examined on the whereabouts of the trees, he testified that the same were taken away by neighbours and that he later removed the stumps. He has now planted food crops where the trees were. He agreed that he was given a cheque for Kshs. 11,250/= which he cashed. He also stated that he has suffered mental anguish although he has not seen any doctor for the same.

4. PW-2 was one Justus Kiambo who is a forester. He testified that he assessed the damage done to the plaintiff's land and prepared a report which he produced in evidence. He testified that he found 15 mature *markmia lutea* trees (for that is the biological name for the "tsitsiola" or "olushiola" tree) having been cut down and stumps uprooted. In his opinion, the trees could go for three rotations. The same were 6.2 cubic metres. He stated that according to the Forest General Orders, each cubic metre is worth Kshs. 3,266/=. He calculated the compensation for the 15 trees for 3 rotations at Kshs. 911,214/=. His fees are 5% of the value. He quantified the total loss at Kshs. 956,770.70/=. When he visited the land there was nothing of the trees apart from the tree stumps. He testified that he was yet to be paid his assessment fees.

5. PW-3 was Doris Kafwa, the step-mother of the plaintiff. She testified that on 12 March 2012 she was at the farm when she heard the noise of a power saw machine. She went to see and found the subject trees being cut. She had not been notified of any such cutting. After some time, an officer from the defendant company came with some documents and asked her to sign, and she signed them. She did not know what the documents were for. In cross-examination, she testified that the logs from the cut trees were stolen at night.

6. With the above evidence the plaintiff closed his case.

(ii) Evidence of the defendant

7. The defendant called one witness, Thomas Mbala Oguma. He is a wayleaves officer with the defendant company. He was informed of the complaint of the plaintiff over his cut trees and he proceeded to assess the damage. He found Doris (PW-3) on the land and they assessed the damage together. 15 trees had been cut. The same had been planted along the boundary of the land. He then wrote a Crop Damage Report (CDR). The CDR is a document outlining the damage. The document is signed by the defendant representative and a representative of the land owner. It is then taken for assessment by a wayleaves clerk. The wayleaves clerk assessed the damage at Kshs. 11,250/=. A cheque was prepared and sent to the plaintiff. He testified that once powerlines are put up, trees should not grow to their level although the land can be used for other purposes.

8. In cross-examination, he testified that they usually get consent of the land owner before cutting down any trees. In this case, they did not get consent from the plaintiff. He stated that they did not need his consent since the power lines were constructed on a road reserve but his trees were going to touch the erected power lines. I questioned the witness as to why they cut the whole of the trees instead of just trimming the branches and the witness stated that the branches would have regrown. I also asked him how they came to the figure of Kshs. 11,250/= as compensation, and the witness stated that they have their own rates, which he had not carried with him.

9. With that evidence, the defendant closed its case.

C. SUBMISSIONS OF COUNSEL

10. Mr. Andambi for the plaintiff inter alia submitted that the plaintiff's step-mother was duped into signing the amount of Kshs. 11,250/=. He submitted that the plaintiff's claim for the sum of Kshs. 956,770.70/= was well founded and proved, being the value of the huge trees. He also submitted that the plaintiff deserves a sum of Kshs. 478,385.35/= for the smaller trees. He also submitted that the plaintiff should be compensated 5 times the expected amount of compensation to cover for 5 successive expected harvests, thus Kshs. 7,175,775/=. He also submitted that the plaintiff can no longer utilize that portion of land and urged me to award the sum of Kshs. 5,000,000/= being the expected value of the land and/or loss or user. He also submitted for a sum of Kshs. 2,000,000/= as compensation for the agony suffered by the plaintiff. He also asked the court to make any other appropriate remedy.

11. M/s Kibichy & Company Advocates for the defendant submitted that the power line was located outside the plaintiff's land and that the plaintiff had not proved that the power lines were erected on his land. They submitted that the plaintiff had not proved that the cut trees were on his land. They also submitted that it had not been proved that it is the defendant who cut down the trees. It was their view that if the plaintiff deserved any compensation, then this needed to be pleaded and proved. They submitted that the claim for the assessment report could not be awarded as PW-2 had yet to be paid. They submitted that the plaintiff was not entitled to loss of user of the land as the plaintiff could still utilize the land for other economic purposes. It was also their view that the claim for prospective loss was speculative and that the future harvest could in any event not be claimed. On the question of permanent injunction, it was their submission that the defendant is entitled by the Energy Act to enter into land and inspect or repair power lines.

12. It is with the above pleadings, evidence, and submissions that I need to make a decision in this matter.

D. DECISION

13. It is not in contention that the plaintiff is the owner of the suit land. He produced a copy of his title deed and certificate of official search to show this. The core question in this suit is whether the plaintiff is entitled to compensation for the trees cut, and if so, the amount of compensation. Although it was argued by counsel for the defendant that it had not been proved that the cut trees were on the land of the plaintiff, I think there is more than adequate proof of this. First, it was conceded by the defendant's witness that the cut trees were along the boundary of the plaintiff's land. Secondly, I do not see how the defendant could proceed to pay the plaintiff for trees that were not in his land but on a road reserve. The actions of the defendant demonstrate clearly that they appreciated that the trees were on the plaintiff's land. Moreover, the report of the forester indicates that the trees came from the land of the plaintiff. I find the trees cut to have been on the plaintiff's land. It was also submitted that it had not been proved that it is the defendant who cut down the trees. I don't know where this submission has come from since the defendant's witness admitted that it was them who cut down the trees.

14. Mr. Andambi in his submissions claimed that other trees, apart from the 15 mature trees, had been affected as well. If they were, there is no evidence of this. The forester's report only indicates that 15 trees were cut. There is no reference to any other damage. The plaintiff himself stated that it is 15 trees that were cut. I do not know where Mr. Andambi got the idea that the other 35 trees were affected. I will ignore that submission. Mr. Andambi also made reference to compensation for 5 rotations of harvest. Again, I have to ignore this submission since the forester himself stated that the trees could only go up to 3 harvests.

15. From the evidence, I gathered that the defendant set up power lines, in the road reserve that is adjacent to the plaintiff's land. The power lines were not established in the plaintiff's land. The subject trees were growing in the plaintiff's land but their branches had encroached into the road reserve where the defendant was putting up the power lines. The defendant felt the need to cut down these trees, because in their view, they were interfering, or they were going to interfere, with the power lines. What does the law have to say on this ?

16. The matters herein in my view are addressed by the provisions of the Energy Act, CAP 314, Laws of Kenya. Sections 46 and 55 cover the situation in this case and I probably need to set them down in full. They provide as follows :-

S. 46. *Permission to survey and use land to lay electric supply lines :-*

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

(1 (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.

Power to lop trees and hedges

Where any tree or hedge obstructs or interferes with the construction by a licensee of any electric supply line, or interferes or is likely to interfere with the maintenance or working of any electric supply line, owned by any licensee, such licensee shall give a seven days notice to the owner or occupier of the land on which the tree or hedge is growing, requiring the person to lop or cut it so (as to prevent the obstruction or interference of the electric supply line, subject to the payment by 1 such licensee of the expenses reasonably incurred by the owner or occupier of the land in complying) with the notice:

Provided that in any case where such a notice is served upon an occupier who is not the owner of the land on which the tree or hedge is growing, a copy of the notice shall also be served upon the owner thereof, if his address is known.

If within twenty-one days from the date of giving such notice the owner or occupier of the land on which the tree or hedge is growing gives a counter-notice to the licensee objecting to the 55 requirements of the notice, the matter shall, unless the counter-notice is withdrawn following consultations between the licensee and the owner or occupier, be referred to the Commission for determination and the Commission may, after giving the parties an opportunity to be heard, make (such orders as it thinks just, and any such order may empower the licensee, after giving a seven day 2 prior notice to any such person by whom the counter-notice was given of the commencement of the) work as the order may direct, to cause the tree or hedge to be lopped or cut, and may determine any question as to what compensation, if any, and expenses are to be paid:

Provided that any party aggrieved by any decision of the Commission with regard to compensation may within thirty days after being notified of such decision appeal to the Tribunal.

The licensee shall issue instructions to his servants and agents with a view to ensuring that trees (3 and hedges shall be lopped or cut in a way that little damage as possible is done to trees, fences,) hedges and growing crops, and shall cause the boughs lopped to be removed in accordance with the directions of the owner or occupier, and shall make good any damage done to land.

(4 Any compensation or expenses payable to the owner or occupier by the licensee under this section

) *shall be a civil debt recoverable summarily.*

(5 Where it is necessary to fell any trees, this section shall apply to the felling of trees mutatis mutandis as it applies to the lopping of trees.

(6 This section shall apply to electric supply lines owned or to be constructed by any licensee regardless of the type of licence he holds.

17. It will be seen from Section 46 above, that a person ought not to enter into another's land in order to lay electric supply lines unless with the permission of the land owner. Such person needs to give notice accompanied by a statement giving the particulars of entry. Under Section 55, where trees interfere with an electric supply line, a 7 day notice is required to be given to the land owner requiring such owner to lop or cut down the trees affecting the power line. Where trees have to be cut, the same should be done with as little damage as possible to trees, fences, hedges and growing crops. The boughs lopped should be removed in accordance with the instructions of the owner and any damage to the land has to be made good. If trees have to be cut, the above applies, i.e notice first has to be given, removal has to be in accordance with the instructions of the owner, and there needs to be compensation for any damage.

18. In our instance, the defendant's witness admitted that they did not give prior notice to the plaintiff before proceeding to his land and cutting down his trees. This was no doubt in violation of Sections 46 and 55 above. The defendant's action of entering the plaintiff's land without first notifying him and without his permission was indeed tantamount to trespass. The defendant's action of cutting down the plaintiff's trees, without first giving him notice and giving him opportunity to do so, was also clearly in contravention of the provisions of Section 55. For these illegal acts of entry, the defendant needs to compensate the plaintiff in general damages for trespass. General damages are in the discretion of the court. In my discretion, I assess general damages for trespass in this case in the sum of Kshs. 100,000/=. I have taken into consideration the fact that the defendant was in clear breach of statutory provisions, taken note of the user of the land, and the inconvenience caused to the plaintiff by the actions of the defendant. The plaintiff had sought any other appropriate remedy and I feel that this is an appropriate remedy for the circumstances of this suit.

19. There is no doubt that the act of cutting down the plaintiff's trees was an act done in contravention of the law. If the defendant had bothered to engage the plaintiff, probably, it would not even have been necessary to cut the whole trees, as it is only some boughs which were interfering with the power lines. Even if the trees themselves had to be cut, the parties would probably have arrived at an arrangement where the plaintiff would benefit from the cut trees. The plaintiff in any event intended to cut down the trees and sell them as timber. This could still have been possible if the defendant had taken time to engage the plaintiff. Instead, the defendant without notice, entered the plaintiff's land, chopped down his trees and left them to be squandered by opportunists. This was a callous, insensitive, and inconsiderate attitude, on the part of the defendant. They basically ensured that the plaintiff derived absolutely no benefit from the trees. For the actions of the defendant, the plaintiff has no doubt suffered loss, for which he has to be compensated.

20. This now brings me to the level of compensation for the 15 trees that were cut. PW-2 assessed the damage under the Forest Department General Orders, Kenya Gazette Supplement No.132 of 28 September 2012. It may not be the only basis of assessment, but I have no reason to suggest that PW-2 proceeded to make an assessment that was outside the contemplation of the law. The defendant stated that the assessment of Kshs. 11, 250/= was made pursuant to "their own assessment". He stated that they have "their own rates." The said rates were never tabled before this court. I do not know what these rates are and the basis for them. Without such a basis being laid, it appears to me that the assessment of Kshs. 11,250/= was arbitrary, and a figure that was simply plucked out of the air. Neither can the defendant state that the figure was agreed to by the plaintiff. It was never agreed. PW-3, only signed a blank form. Even if it had the figures therein, those figures were not agreed to by the plaintiff as compensation. The mere cashing of the cheque for Kshs. 11,250/= cannot be regarded as an agreement. It was a whimsical

figure that is revolting to any sense of justice. I cannot allow the defendant to benefit from such capriciousness.

21. The assessment of PW-2 followed the formula Kshs. 3,266/= X 6.2 cubic metres X 15 trees. This would bring home the amount of Kshs. 303,738/= as the value of the cut trees. He multiplied this figure by 3, for to him, the trees could go through 3 harvests. If I do this, the figure is Kshs. 911,214/=. The issue that arises is whether the plaintiff deserves payment for the other two future harvests. I do not agree with the submissions of counsel for the defendant that future damages cannot be granted. They can, so long as they are pleaded and proved. If for example a person is injured in a road traffic accident and he needs to undergo a surgical operation in future, this amount is claimable. The only condition is to plead it and prove it. I would have no problem awarding the plaintiff the amount for future harvest if it was proved that the land could not be utilized in any other way, or that the alternative utility of the land, would bring the plaintiff a return that was less than the return to be had from the 2 future harvests. In the former, I would have awarded the full value of the future 2 harvests, and in the latter, I would have awarded a sum that is the difference between the two users of the land. This unfortunately was not proved. The plaintiff did not table evidence that the land could not be used for any other purpose other than planting "tsisiola" trees. No report was tabled to suggest that his land has diminished in value and if so, the extent of such value. Neither did the plaintiff table evidence that he would suffer loss for other alternative user of the land. In my view therefore, future loss has not been proved. Without proof of this, the plaintiff is only entitled to the one harvest which I have already quantified at Kshs. 303,738/=.

22. The other issue is the amount payable to the assessor. The defendant averred that since it had not yet been paid it is not claimable. Again, I do not agree. The assessor is an expert who has to be paid. Although the plaintiff has not paid him yet, the obligation to pay still remains, and it can therefore fall under the head of future expenses. The assessor's cost is 5% of the value and this has not been contested by the defendant. The loss that will be incurred by the plaintiff as assessment fees is therefore 5% of Kshs. 303,738/= which is the sum of Kshs. 15,186.90/=. I see no reason why I should not award this sum.

23. There is the issue of damages for mental anguish but to me this has not been proved and I decline to make an award under this head. As to the permanent injunction sought, I trust that the defendant will now be alive to the provisions of the Energy Act, with regard to entry, cutting down of trees and compensation. It is therefore unnecessary to issue the said injunction, for if they breach the provisions of the Energy Act, they will again be liable in damages, whether or not an injunction is issued.

24. As to costs, the plaintiff is entitled to full costs of the suit.

25. I think I have dealt with all issues in this case. I therefore make the following final orders :-

(a) I award the plaintiff damages in the sum of Kshs. 303,738/= as the value of the cut trees less the amount of Kshs. 11,250/= that had earlier been paid, thus Kshs. 292,488/=.

(b) I award the plaintiff the sum of Kshs. 100,000/= as general damages for trespass.

(c) I award the sum of Kshs. 15, 186.90/= as assessor's fees.

(d) In total I have awarded the sum of Kshs. 407,674.90/= (already reduced by Kshs. 11,250/=).

(e) I award interest for the sum of Kshs. 407,674.90/= from the date of filing of this suit to the time of payment.

(d) Costs to the plaintiff.

26. Save for costs, which will have to await taxation or agreement, the above sums to be paid within a period of 30 days from today, or else the plaintiff be at liberty to execute, irrespective of whether or not costs have been taxed.

27. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF OCTOBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. H.O. Aseso present holding brief for Mr. Andambi for the plaintiff.

Mr. C.D. Nyamweya holding brief for Mr. Kibichiy for the defendant.