



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 5 OF 2010

FLEETWOOD ENTERPRISES LIMITED.....PLAINTIFF

=VERSUS=

KENYA POWER & LIGHTING LIMITED.....DEFENDANT

JUDGMENT

Introduction:

1. The Plaintiff moved this court by way of a Plaint dated 8th January, 2010. In the Plaint, the Plaintiff has averred that at all material times, it was the registered proprietor of land known as plot number 514 R, Malindi (the suit property); that on or about April 2009, without prior notice to or assent of the Plaintiff, the Defendant entered upon the suit property, dug holes, erected poles and that the Defendant thereafter laid electric supply lines on the suit property.
2. The Plaintiff has alleged in the Plaint that the Defendant, through its employees, has trespassed onto the suit property and deprived the Plaintiff of the use and enjoyment thereof.
3. The Plaintiff is seeking for a declaration that the Defendant has trespassed on the suit property and for an order of Mandatory Injunction to compel the Defendant, its servants or employees to immediately remove the illegal electricity supply lines from the suit property together with damages for trespass.
4. In the Defence, the Defendant denied the averments by the Plaintiff and stated that if at all any poles were erected by the Defendant's employees, then the same was done on a totally different parcel of land from the suit property and subsequently obtained the relevant electricity way leave consent and approval from the Municipal Council of Malindi.

The Plaintiff's case:

5. PW1 informed the court that he works for the Plaintiff as a manager. It was his evidence that in the year 2009, while checking on the Plaintiff's parcel of land being plot number 514/R, he came across the Defendant's employees digging holes and putting up electricity poles on some of the plots within plot number 514/R.
6. PW1 stated that he tried to stop the Defendant's employees from erecting the said poles but they were adamant and continued erecting the said poles.
7. In cross-examination, PW1 stated that the whole plot belongs to the Plaintiff who has subdivided it. It was his evidence that the sub-division of the plot was done by Mr. Edward Kiguru, a surveyor. It was his evidence that the Plaintiff cannot develop the plots that have the electricity poles that were put up by the Defendant.
8. According to PW1, the poles were put on the Plaintiff's land within two (2) days and that the land

- in question is private property.
9. The surveyor, PW2, informed the court that he was instructed by the Plaintiff to carry out the sub-division of plot number 540/R which he did. It was his evidence that the said sub-division created over 500 plots of which the Deed Plans were prepared and issued by the Director of Surveys. By this time, there were no electronic poles plot 540/R.
 10. In the year 2011, the Plaintiff engaged him again to ascertain the poles that had been erected by the Defendant on the original plot number 540/R which had since been sub-divided.
 11. PW2 stated that he did a report in respect to the said poles which he produced as PEXB1.
 12. It was the evidence of the surveyor that he picked the position of the electric poles and drew a map on scale which is annexed on the report. PW2 informed the court that the poles affected sixteen (16) sub plots in the suit property.
 13. PW2 referred the court to a sketch plan in the Defendant's list of documents which the Defendant's employees purport to have used while erecting the poles. According to PW2, the said document did not emanate from the Department of Surveys of Kenya and that the beacons in respect to the affected sub-plots are also shown in the Defendant's sketch map. PW2 produced the sketch plan which the Defendant used while carrying out its work as PEXB2.
 14. According to PW2, the sketch plan which was used by the Defendant to lay the electric line over the Plaintiff's sixteen plots shows that the Defendant was aware of the existence of plot number 514/R and the sub-divisions thereof and that the road indicated on the said sketch map is non-existent.
 15. In cross-examination, it was the evidence of PW2 that when he sub-divided plot number 514R in the year 2007, he created roads within plot number 504/R. The scheme plan, according to PW2, shows the said road network which the Defendant could have followed while laying the electric poles.
 16. The Plaintiff's director, PW3, stated that the Plaintiff acquired the suit property in the year 2007. PW3 produced two Indentures dated 4th December 2007 and 23rd August 2007 in respect to the suit property as PEXB 3a and 3b respectively.
 17. The suit property, according to PW3, was sub-divided and several sub plots were created for the purpose of developing and selling them.
 18. It was the evidence of PW3 that the Defendant laid electric poles on the sub-plots in the year 2009. The Plaintiff complained about this state of affairs vide letters dated 11th May, 2009 and 10th July, 2009 which were produced as PEXB 4 and 5 respectively.
 19. According to PW3, the laying of the electric poles on the Plaintiff's land has affected sixteen plots which they can neither sale nor develop.

The Defendant's case:

20. The Defendant's Way Leaves Officer, DW1, stated that in the year 2009, one of their customer, Mr. Peter Muhindi applied for power. It was his evidence that his people visited the site and saw a murram road crossing the suit property which by then looked like a playing ground. It was his evidence that they could not establish the beacons of the property at that particular moment.
21. On 31st March 2009, the Defendant did a letter to the then Malindi Municipal Council asking for approval to proceed with the laying of the poles following the murram road which the Council had informed them was known as Casurina/Shella Road. DW1 produced the letter they did to the Council as DEXB1.
22. It was the evidence of DW1 that on 7th April 2009, they received a letter from the Council allowing them to proceed with the laying of the poles on the said road.
23. According to DW1, they laid the impugned electric poles and line on the basis of the approval that they received from the Council and that they were not aware that the poles which they laid was on private property.
24. In cross-examination, DW1 informed the court that the sketch plan that they used to lay the poles and the electric line emanated from the Municipal Council and that they never consulted the survey department before laying the lines.
25. DW1 conceded that he was aware of the provisions of the Energy Act which required that the permission of the owner of the land is required before laying of electric line and poles on private land. However, it was his evidence that the area that they were erecting the poles was a road and

not private land.

Submissions:

26. The Plaintiff's advocate submitted that the Plaintiff has proved that the Defendant's power line do fall within the boundaries of plot number 514/R; that the Defendant's employees were aware that the proposed power lines were going through a different parcel of land other than that of Peter Mutindi Catherine and that the Defendant is in breach of section 46 of the Energy Act.
27. The Plaintiff's counsel further submitted that despite being granted leave to amend its defence to claim indemnity against the Municipal Council of Malindi, the Defendant never issued a Third party notice to the Council as required under Order 1 Rule 15 of the Civil Procedure Rules.
28. Counsel finally submitted that the Damages should be ordered to pay general damages for trespass. According to counsel a sum of Kshs. 5,000 per plot per month from the period when the Defendant erected its poles on the Plaintiff's land is a fair amount of compensation for trespass.
29. The Defendant's advocate submitted that while aware of the provisions of section 46 of the Energy Act, the Defendant was under the honest belief that the land on which it wished to erect poles for the laying of electric lines was a public road and sought the approval of the now defunct Municipal Council of Malindi which was granted.
30. The Defendant's counsel submitted that the Plaintiff has not proved its case on a balance of probability.
31. The Defendant's counsel further submitted that an award of general damages is discretionary and that a sum of Kshs.5,000 per plot should not be awarded as submitted by the Plaintiff. Counsel submitted that I should not award any damages due to the peculiar circumstances of this case.

Analysis and findings:

32. The Plaintiff's director, PW 3, produced in this court two Indentures, one dated 4th December 2007 and 23rd August 2007. The two Indentures show that plot number 514 Malindi was registered in favour of the Plaintiff on 7th September, 2007. The Deed Plan showing the extent of the suit property has been annexed on the two Indentures.
33. The proprietorship of the suit was also confirmed by the decision of this court in Malindi HCCC No. 123 of 2009 on 20th March 2014. In the said matter, the court held that the Plaintiff had proved that it was the proprietor of portion number 514R.
34. The surveyor, PW2, produced his report dated 17th May 2011. In the report, the surveyor has enclosed a print on scale showing the position and alignment of the power-line that he found to have "cut" through portion number 514, Malindi and which affected sixteen sub-plots. The sixteen sub-plots that were affected by the power line that was laid by the Defendant have been specifically indicated in the report.
35. I have perused the deed plan that is annexed on the two Indentures before the suit property was sub-divided into various plots. I have also perused the print which was prepared by PW2. The said print shows the various sub-divisions which were created in the year 2007 and deed plans issued. The print further shows the specific points at which the poles for the power line were erected right across the Plaintiff's land after the said sub-division.
36. The print on scale by PW2 clearly shows that the poles were not erected on a road or a road reserve but in the middle of 16 plots and the electric line was then laid over the said 16 plots.
37. DW1 informed the court that it was true that they laid the power lines as shown in the surveyor's print in the year 2009. However, it was his evidence that they honestly believed that they were following a public road as per the consent and sketch plan that they received from the Municipal Council of Malindi.
38. DW1 produced in evidence a letter dated 31st March 2009 by the Defendant and addressed to the Municipal Council of Malindi. In the letter, the Defendant's Way Leave officer, Coast, attached a map and proposed to carry out "electric main construction to supply electricity to the premises of Mr. Peter Muhindi Catherine". The Defendant sought the Council's approval to carry out the said works.
39. The said Mr. Peter Muhindi's land seems to have been across the Plaintiff's land without an access

road through the Plaintiff's land.

40. The Municipal Council of Malindi responded to the Defendant's letter on 7th April 2009 as follows:

..“This is to advice that the council has no objection to the intended work and that the same can be carried out as applied.”

41. A sketch map showing the way the power line was to be laid and which the Defendant's Way leaves Officer said he obtained from the Council was produced in evidence. The sketch map clearly shows that the power-line was laid across the already surveyed land belonging to the Plaintiff. Indeed, the said sketch map shows some of the sub plots over which the power-line was to pass and the positioning of the poles.
42. From the Defendant's own sketch plan, the power-line was to be laid over private property and not along a road. Indeed, the Defendant's employees were aware of that position as at the time they were laying the power line in the year 2009, according to their own sketch map.
43. Although DW1 stated that the Council assured them that the points indicated in the sketch plan are along a public road, the same sketch plan shows the contrary. The Defendants did not bother to get any other information concerning the plots indicated in the sketch plan either from the Council or the department of survey to ascertain that they were indeed laying their power-line along a road and not a private property.
44. However, as I have stated above, the Defendant was already aware as at the time they were given approval by the Council to lay the power-line that the line was to be laid over private property. The Defendant's employees however never bothered to get the consent of the Plaintiff before laying its power-line over the suit property, with a view of connecting their client with power. The Defendant's Way leaves officer cannot now be heard to say that he relied on what he was told by the then Municipal Council of Malindi.
45. In the amended Defence, the Defendant averred that it shall seek indemnity against the Municipal Council of Malindi for any loss, liability or judgment arising from the Plaintiff's claim.
46. The Defendant never filed any Third party claim as against the Municipal Council of Malindi as required under Order 1 Rule 15 of the Civil Procedure Rules. The claim for indemnity cannot therefore arise considering that the Council was not joined in this suit by the Defendant.
47. In any event, there is no evidence before me to show that the then Municipal Council of Malindi authorized the Defendant to lay electric supply line over the Plaintiff's land.
48. The evidence before me clearly shows that the Defendant laid and connected electric supply over the Plaintiff's sixteen (16) sub plots without the Plaintiff's consent contrary to the provisions of Section 46 and 47 of the Energy Act.
49. This court therefore finds and holds that the Defendant has trespassed and continues to trespass on the Plaintiff's sixteen plots.
50. Despite having been informed by way of letters dated 13th May 2009, 7th August 2009 and 23rd September 2009 of its acts of trespass, the Defendant declined to remove the said electric line and re-route it in accordance with the law.
51. The failure by the Defendant to purge its act of trespass by removing its electric lines from the Plaintiff's sixteen plots has caused the Plaintiff to incur damages.
52. It was the evidence of PW 3 that the Plaintiff bought the suit property and sub-divided it into over 500 plots for the purpose of selling them and developing some of them.
53. However, they have been unable to sell or develop the sixteen (16) sub-plots because of the electric line overpassing them since the year 2009, which is five years down the line.
54. The award of damages for trespass is discretionary in nature. The discretion by the court should however be exercised judiciously and all relevant factors should be considered. The value of the land is a determinant factor where parties consent that the power-line should not be moved.
55. However, the Plaintiff in this matter wants the power-line passing over its sixteen parcels of land removed so to be able to develop and sell them. The Plaintiff is also claiming for general damages for the five years that the said act of trespass over its land by the Defendant has been going on.
56. It is trite law that the value of land keeps on appreciating, and had the Plaintiff developed the sixteen parcels of land five years ago, they would have generated an income from them.
57. In the circumstances of this case, I would agree with the Plaintiff's advocate's submissions that

had the sixteen plots been developed were it not for the connected electric line, the Plaintiff would have earned at least Kshs.5,000 per plot per month. However, due to the vagaries that come with such developments, I will reduce the said figure to an amount of Kshs.4,000 per plot per month. The total payable damages for the Defendant's acts of trespass over the sixteen plots for a period of five years will therefore be $Kshs.4,000 \times 12 \times 5 \times 16 = Kshs.3,840,000/-$

58. For the reasons I have given above, I enter judgment in favour of the Plaintiff in the following terms:

- (a) A declaration be and is hereby issued that the Defendant has trespassed and continues to trespass on portion numbers 12392, 12393, 12394, 12395, 12396, 12397, 12389, 12399, 12400, 12405, 12406, 12339, 12338, 12336, 12337 and 12304, Malindi.**
- (b) An order of Mandatory injunction be and is hereby issued compelling the Defendant or its successor to immediately remove the illegal supply lines from the above parcels of land.**
- (c) A permanent injunction be and is hereby issued restraining the Defendant, its servants, employees and or agents from entering into or laying electric supply lines on the suit property or otherwise interfering with the suit property.**
- (d) Damages for trespass of Kshs.3,840,000.**
- (e) Interest on (d) above from the date of this Judgment until payment in full at court rates.**
- (f) The costs of the suit.**

Dated and delivered in Malindi this 7th day of November, 2014.

O. A. Angote

Judge