



**The Kenya Power & Lighting Company Limited v Mburu (Civil Appeal
130 of 2019) [2022] KECA 512 (KLR) (6 May 2022) (Judgment)**

Neutral citation: [2022] KECA 512 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 130 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MAY 6, 2022**

BETWEEN

THE KENYA POWER & LIGHTING COMPANY LIMITED APPELLANT

AND

SAMUEL MWANGI MBURU RESPONDENT

*((An appeal from the judgment of the Environment and Land Court at
Mombasa (Omollo, J.) dated 21st September 2018 in ELC Case No. 151 of 2013))*

JUDGMENT

1. The appellant, The Kenya Power & Lighting Company Limited has in this appeal challenged the judgment of the Environment and Land Court at Mombasa (A. Omollo, J.) (ELC) dated and delivered on 21st September 2018. In that judgment, among other reliefs granted to the respondent Samuel Mwangi Mburu, the ELC: ordered the appellant to remove a power line illegally installed on the respondent's property known as Kwale/ Ukunda/50; restrained the appellant, by permanent injunction, from interfering with the respondent's said property; ordered the appellant to pay to the respondent Kshs. 300,000.00 as damages for trespass.
2. The respondent's claim as pleaded before the ELC was that in 2003, without his knowledge or consent, the appellant constructed and installed a power line traversing his property known as Title Number Kwale/ Ukunda/50 (Plot No. 50); that despite his repeated demands to the appellant to remove the offending power line from his property, the appellant had failed or refused to do so. He accordingly sought a permanent injunction to restrain the respondent from interfering with his property; a declaration that the appellant had violated his right to property under Article 40 of the Constitution an order compelling the appellant to remove the power lines illegally installed on his property; a declaration that the appellant trespassed on his property and damages for trespass to his property.



3. In its statement of defence, the appellant denied that it constructed or installed a power line traversing the respondent's said property.

It further averred that the low voltage power lines were constructed or installed in Title Number Kwale/ Ukunda/47 (Plot No. 47), a property adjacent to respondent's property, and not on the respondent's property; that the appellant had obtained the necessary way leave, consents and permissions prior to installing the power lines; that in the alternative, if indeed the appellant had constructed the power lines on the respondent's property, then "the same was an honest mistake" which "can be rectified by way of payment of way leave so as to compensate" the respondent. The 2 appellant also pleaded that if indeed such power lines were constructed or installed in 2003, the respondent's claim was statute barred.

4. Upon conducting a trial, the learned Judge found that the appellant had put up the power line on the respondent's property without his consent and that the respondent had established his case on a balance of probabilities and granted judgment as prayed.
5. The appellant has challenged the judgment on grounds that the Judge erred in: holding that the power line crossed the respondent's property; failing to make a determination as to the correct position of the boundary between the respondent's property and Plot No. 47; holding that the appellant trespassed on the respondent's property; holding that the respondent had suffered damage and awarding him damages.
6. During the hearing of the appeal, the parties were represented by learned counsel. Mr. T. Mugambi appeared for the appellant while Mr. Mburu Nyamboye appeared for the respondent. Mr. Mugambi submitted that the resolution of the dispute lay in establishing the boundary between the two properties which was not done; that the Judge failed to take into account a report dated 12th August 2013 and failed to appreciate the evidence led by the appellant as to where the electricity pole was erected; that it was clear from the evidence that the respondent had encroached on and developed an area beyond the boundaries of his property; that in that regard the Judge failed to address findings of a report dated 4th October 2016 which was obtained pursuant to orders of the court but wrongly relied on conflicting testimony of witnesses. Counsel submitted that the Judge gave undue weight to the testimony of PW1 which had discrepancies; that she took into account extraneous factors in reaching her decision and failed to take into account relevant factors.
7. It was submitted further that the Judge wrongly relied on her observations during a site visit and failed to appreciate that the respondent had encroached beyond his property and fenced it off as his own; that the Judge should have invoked Sections 18 and 19 of the Land Registration Act to compel the District Land Registrar, Kwale to fix the boundary between the two properties but failed to do so.
8. It was also counsel's argument that the respondent admitted that the power line was erected in 2002 yet he did not take action until 2013, after a lapse of over 10 years. In the end, counsel urged that the respondent had not proved his case against the appellant on a balance of probabilities.
9. Opposing the appeal, Mr. Nyamboye submitted that there is no basis for this Court to interfere with the findings by the trial court; that there is no dispute that the respondent is the registered owner of Plot No.50; that contrary to claims by the appellant that the respondent had encroached on the neighboring Plot No. 47, no evidence in that regard was produced before the trial court. On the contrary, it was submitted, there was evidence that the power line traversed the respondent's land.
10. Counsel urged that the learned Judge visited the property and confirmed that the power line indeed passed through the respondent's property; that under Section 46 of the Electric Power



Act No. 11 of 1997, the respondent should have been given notice of intention to lay the power line in his property and no such notice was given to him and neither did he consent to the power line being installed in his property. In the circumstances, counsel urged, the Judge properly ordered the removal of the power line from the respondent's property.

11. Counsel submitted that the contention that the respondent waited for ten years to make the complaint is not well founded; and that trespass was continuing and cannot be said to have taken 10 years.
12. As to the award of Kshs. 300,000 general damages awarded, counsel submitted that once the court established that there was trespass, it was entitled to grant relief and the respondent need not have proved that it suffered any loss to be awarded damages as trespass is actionable per se.
13. We have considered the appeal and the submissions and re-appraised the evidence in accordance with our mandate under Rule 29(1)(a) of the Court of Appeal Rules with a view to drawing inferences of fact. [See *Selle and another vs. Associated Motor Boat Co. Ltd* [1968] EA 123]. The only issue in this appeal is whether the Judge erred in holding that the appellant trespassed on the respondent's property by erecting electric power lines thereon without his consent and in awarding him damages for trespass. In addressing that issue, we are mindful that:

“The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.” (as held in *United India Insurance Co. Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs. East African Underwriters (Kenya) Ltd* [1985] eKLR)”

14. There is no dispute that the respondent is the registered proprietor of Plot No. 50 measuring approximately 0.10 Ha as is evident from a copy of the Title Deed dated 21st June 2002 that was produced before the trial court. In his testimony, the respondent as PW2 stated that after the appellant erected the power line, he wrote letters to the Manager Ukunda Power Station and initially received no response; that subsequently, after he had engaged an advocate in the matter, the way leaves officer of the appellant asserted that the power line runs through Plot No. 47 neighbouring the respondent's property. He stated that he had a dispute with the owner of Plot No. 47, who had claimed that the respondent's plot belonged to him, but that the boundary dispute was resolved and the power line remained in his Plot No. 50.
15. Under cross examination, the respondent maintained the power line passes through his plot; that he engaged a surveyor who confirmed that the power line passes through his land; that later the Kwale County Surveyor visited the land following an order of the court and a report in that regard made. He stated that he had started to build a foundation but the building could not be completed because of the power line.
16. Herbert Mboya Ndolo (PW1), the District Surveyor for Kwale testified for the respondent. In his testimony on 30th June 2016, PW1 stated that by a letter dated 21st January 2014, the respondent requested his office to assist him “with identifying location of the powerline traversing across” his plot and after payment of a fee “we went to the ground and took measurements. We made a report dated 20th August 2014 filed in court.” That report, which the witness produced before the trial court, was in the form of a letter dated 20th August 2014 addressed to the Deputy Registrar High Court of Kenya



Mombasa under the subject head “Ground verification report of parcel Number Kwale/ Ukunda/50” and read as follows:

“Reference is hereby made to a court order pertaining to case number 151 of 2013.

Officers from this office visited the site on 15th August, 2014 to establish whether a powerline passes over parcel number Kwale /Ukunda/50. It was established that the powerline passes over parcel number Kwale /Ukunda/50 as indicated on the attached map registry index nine of Ukunda registration section (power line is in red).

The report is hereby forwarded to you for your perusal and further action.

G. Kamadi

For: District Surveyor

Kwale.”

17. PW1 went on to state that, “from the survey, the power lines are almost in the middle of the plot”, adding that “the power line trespasses the [respondent’s] plot.” Under cross-examination the witness stated that he did not personally do the survey; that the survey was done by his deputy under his supervision; that the size of the plot can be ascertained from the map and he relied on Preliminary Index Diagram (P. I. D) while doing the survey and did not refer to the title deed; that the title deed and map should coincide in size; that there are developments on the plot-a nursery school; and that,

“when we went to the ground in January, there was a dispute with neighbour. Later the dispute was determined. I was told the neighbor on the west was disputing their boundary with the plaintiff. Disputes are handled by the Land Registrar. 50 marked by the black colour in the Plaintiff’s exhibit 2(b). We have marked on our map how the power line runs from boundaries of 47 & 48 toward the center of 50 then it goes northwards.”
18. It is noteworthy that subsequent to PW1’s testimony before the ELC on 30th June 2016, on 31st August 2016 that court ordered “re-survey of the plot/area” to “identify the spot of the disputed pole.” The order of 31st August 2016 was extended on 2nd September 2016. Based on those orders, on 4th October 2016, PW1 submitted his report dated 4th October 2016 to the court. The order made by the ELC on its own motion on 31st August 2016 directed the wayleaves officer, Coast Region together with the survey officer to liase with the County Surveyor Kwale County to visit the property “to verify whether the power line is erected in the middle of plot No. Ukunda/50” and that “if that be the position...they re-route the said power line forthwith”.
19. After the report dated, 4th October 2016 was transmitted to the court, on 6th October 2016, the learned Judge observed that “both counsels agree” that the report “does not resolve the dispute.” The court then ordered and directed the Director of Survey in collaboration with the District Land Registrar Kwale to visit the suit property “for purposes of confirming that the electricity pole on plot No. 50 is on the plot or on the boundary of the said plot” and thereafter to file their reports. There is no evidence of reports by Director of Survey and District Land Registrar Kwale having been filed. We shall return to this later in the judgment.
20. Simon Kihara Wangari (DW1), a Land Survey Assistant testified for the appellant. He produced his report for survey of Plot No. 50 dated 30th August 2016 in which he expressed that he undertook a survey of that property on 29th August 2016 in order “to re-establish the boundaries of the above plot Kwale/Ukunda/50 and to establish any encroachment on the same in relation KPLC power network in the area”. Based on his report, he found that “the boundary marks found on the ground defining



the plot did not fully conform to the map”. He concluded in that report that Plot No.50 “has not been affected under all circumstances by the powerline or the poles” which “were found to be running through plot Kwale/Ukunda/47 which is the immediate neighbour of plot number 50”. He stated further that the acreage of Plot No.50 according to their records is 0.1 Ha but, on the ground, the respondent “is occupying almost twice the size”; and that based on the title deed, “the power line does not affect” the respondent’s land but that on the ground, the area fenced off by the respondent encompasses Plot No. 47. In his view, the discrepancy between his

report and that of PW1 was on account of different reference points.

21. Richard Ouya Ottaro (DW2), a wayleaves officer with the appellant stated that due process was followed in erecting the power line in contention having obtained the consent of the owners of Plot No. 47 and 48 through which the line was to pass; that the appellant received complaints from the respondent after fixing the lines; but that the power line does not traverse the respondent’s property Plot No. 50.
22. Ali Abdalla Mafutu (DW3), testified that together with his brothers Salim Abdalla and Abdalla Kassim, as the registered owners Plot No.47 which they inherited from their father, they gave consent to the appellant to erect the power line through their land. He stated that he was aware that the respondent “is claiming the power line is on his portion of the land” and that there was a pending “case in court concerning the boundary” where the respondent sued them “because we had dug a boundary.”
23. Evans Amunga (DW4), a land surveyor in the employment of the appellant, was the last witness to testify for the appellant. He produced a report dated 12th August 2013 titled “wayleaves dispute on plot number 50 Ukunda registration section” in which he stated that the size of the plot as per the diagram “is approximately 0.1 hectares while “the area developed by the owner of plot number 50 is bigger than the size of the parcel as per the registration diagram”; that on the ground it is 0.25 Ha while on the map it is 0.1 Ha. His findings in the report were that the respondent’s development encroached on plot numbers 46, 47 and 2743 and that “KPLC’s powerline as per the ground is clearly on plot number 47 and 48”. Under cross examination, he maintained that “the power line does not pass on plot 50.”
24. Upon considering the evidence, the learned Judge in the impugned judgement framed the issue for determination thus: “the question for this court to determine is whether the powerlines as constructed falls on the plaintiff’s land and therefore has made him not able to complete his development that stalled at the foundation level.”
25. In answering that question, the Judge noted that even after the court made a visit to the property and having directed the government surveyors and the appellant’s surveyor to determine the boundaries of plot Nos. 50 and 47, no report could be agreed on; that the surveyors on the ground passed the button to the Director of Surveys Kenya to resolve the dispute but “the director never took up the baton.” The Judge expressed that during her visit to the property, she observed that the respondent’s Plot No. 50 was fenced; that the court was not told what formed the basis of the decision by the appellant to conclude that where they were to erect the power line belonged to portion of Plot No. 47 yet on the ground the area was fenced by the respondent.
26. The Judge discredited the report dated 12th August 2013 by Evans Amunga (DW4) on the basis that it was prepared after the respondent had lodged a complaint against the appellant and two years after the lines were built. In that report, DW4 had stated that the powerlines were on plot 47 and 48 and that based on the boundaries shown to him by the respondent when he visited the grounds, the poles were within the respondent’s land.



27. The Judge was also fortified in her decision by the fact that the owners of Plot No. 47 have not sued the respondent for encroaching on their land, but rather, it is the respondent who sued them for digging trenches along the boundaries of the two plots thus blocking entry into Plot No 50. The Judge went on to pronounce that it is not the function of the appellant to determine boundaries; that when DW4 visited the grounds on 12th August 2013, he was not in the company of any government land registrar or surveyor and was therefore in error in concluding in his report of 12th August 2013 that the respondent's development encroached on plots 46, 47 and 2743; that the conclusion in his report that the power line was clearly on Plot No. 47 and 48 contradicted his evidence in chief that on the ground the power line was falling on plot 50.
28. The Judge was also impressed by the evidence of PW1 who produced a map where he marked the power line in red showing they were on plot No. 50. In that regard, the Judge stated:

“PW1 who was the District Surveyor Kwale produced a map where he marked the powerline in red showing they are on plot No 50. The map does show plot 47 extends across the road (by brace) yet the power line is not lying on plot 47 beyond the road (as per PW1). This court having visited the site and observed that the powerline traverse directly above the foundation constructed by the plaintiff, I find the marking done by PW1 to be credible. This is authenticated by the fact that the owners of plot No 47 of 48 have not filed any claim for an order declaring the foundation put up by the plaintiff is on their island.

Consequently, the defendant having not obtained the consent of the plaintiff to put up the power line where they are, I find them guilty of trespass. I am therefore satisfied that the plaintiff has proved his case.”

29. We are conscious, as cautioned by the predecessor to this Court in *Peters vs. Sunday Post Ltd* [1958] E.A 424}} that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”

30. Undoubtedly, in reaching the conclusion that the power lines were erected on the respondent's property, the Judge was impressed by the testimony given by PW1 during the trial on 30th June 2016. However, the learned Judge does not appear to have taken into consideration that the same witness, PW1, had subsequent to his testimony and pursuant to the order of the court submitted a report to the court. In that report dated 4th October 2016 and prepared on the authority of a court order to which we have already made reference, PW1 expressed that the plot boundaries could not be authoritatively derived; that the developments made by the respondent “seemed not to conform to the area PID” while “the developments made by the [appellant] were within the area fenced by the [respondent].” PW1 then recommended that matter be referred to the Land Registrar and that, “the survey will then be able to measure the developments present based on the determined boundary of parcel

50” on account of the fact that, “the boundaries are disputed” and the survey office cannot authoritatively re-establish the boundaries using the PID. In our view, that report undermined the credibility of

PW1's earlier testimony that “the power line runs from boundaries of 47 & 48 toward the center of 50”.



31. Had the learned Judge considered the testimony of PW1 in light of that subsequent report, the Judge would not have relied, as she did, on the evidence of PW1 in concluding that the power lines, were undoubtedly, within the respondent's property. Based on the copy of the title deed produced, the area covered by plot 50 is clearly 0.1 Ha, approximately. There was considerable evidence that suggested that the land fenced off exceeded 0.1 Ha.
32. In our view, a determination of whether the power line was within the boundaries of Plot No. 50 was necessary before the Judge could conclude, as she did that the power lines were within the respondent's property. Indeed, in the course of the trial the learned Judge appreciated this by ordering involvement of the District Land Registrar, Kwale but failed to carry through to ensure that the court order in that regard had been complied with. As the Judge correctly stated, under Section 18 of the Land Registration Act, it is the function of the Land Registrar to determine boundaries. Indeed, had the order of the court given on 6th October 2016 directing "the Director of Survey in collaboration with the District Land Registrar Kwale to visit the suit property for purpose of confirming that the electricity pole on plot no. 50 is on the plot or on the boundary of the plot" been heeded, there would have been a basis for reaching a conclusion whether the power lines traversed the respondent's property or not.
33. Section 18(2) of the Land Registration Act provides that "the court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section". The essence of the respondent's claim is that the power lines are within his property, while the assertion by the appellant is that the power lines are outside the boundaries of the respondent's property. It was therefore necessary, a sine qua non, to establish whether the power lines, were within the boundaries of the respondent's parcel as determined in accordance with Section 18 of the Land Registration Act. In the circumstances, we do not think that it was safe to conclude, as the Judge did, that the fence erected by the respondent, correctly defined the boundaries of the plot in light of the other evidence that suggested that the fence went beyond the proper boundaries of the plot.
34. We are satisfied, therefore, that the learned Judge misdirected herself. Rule 31 of the Court of Appeal Rules empowers this Court to remit the proceedings to the lower court with such directions as may be appropriate and to make any necessary incidental or consequential orders. Pursuant thereto, we remit the proceedings back to the ELC and direct that court to order the District Land Registrar, Kwale to inspect the property within a time period to be determined by the ELC for purpose of establishing whether, as a matter of fact, the appellant's power lines and power poles are erected within the boundaries of the respondent's property and for the Land Registrar to file a report with the ELC court, within a period to be prescribed by that court. Based on such report, and any other evidence it may consider relevant, the ELC shall then determine whether the appellant has trespassed into the respondent's property.
35. To that extent, we allow the appeal and set aside the judgment of the ELC in ELC Case Number 151 of 2013 dated and delivered on 21st September 2018. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF MAY 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

Signed

DEPUTY REGISTRAR

