



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 29 OF 2015

BETWEEN

JOSEPH MUNG'AYA MAKOTSI .....APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED....1<sup>ST</sup> RESPONDENT

RURAL ELECTRIFICATION AUTHORITY (REA) .....2<sup>ND</sup> RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 1 OF 2018

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED.....APPELLANT

AND

JOSEPH MUNG'AYA MAKOTSI .....1<sup>ST</sup> RESPONDENT

RURAL ELECTRIFICATION AUTHORITY (REA) .....2<sup>ND</sup> RESPONDENT

*(An Appeal from a Judgment of the High Court of Kenya at Eldoret, Environment and land Court (S. Munyao, J.) dated 12<sup>th</sup> November, 2014*

in

**E & L CASE NO. 993 OF 2012)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

[1] **Civil Appeal No. 1 of 2018** has been consolidated with **Civil Appeal No. 29 of 2015**. Two judgments were delivered in **High Court Civil Suit No. 8 of 2012**. The first judgment was delivered by **Munyao Sila, J.** on 12<sup>th</sup> November, 2014. The second judgment was delivered by **A. Ombwayo, J.** on 18<sup>th</sup> August, 2017. **Civil Appeal No. 29 of 2015** will be referred as the first appeal and **Civil Appeal No. 1 of 2018** as the second appeal.

The first appeal is against the judgment of **Munyao Sila, J.** and the second appeal is from the judgment of **A. Ombwayo, J.**

[2] By an amended plaint dated 11<sup>th</sup> June, 2012, **Joseph Mung'aya Makotsi (1<sup>st</sup> appellant)** who is the appellant in the first appeal claimed that **Kenya Power & Lighting Company Ltd (KPLC)** referred to as the 2<sup>nd</sup> appellant and **Rural Electrification Authority (REA)** the 2<sup>nd</sup> respondent in both appeals who have an arrangement to supply power to rural population trespassed on his two pieces of land on two

occasions, forcefully erected a power line to connect electricity to a neighbour and also to Mutaho Primary School and cut down his trees. His main claim from the two entities jointly and severally was for:

- (a) (i) Shs. 1,865,900/= being the amount from the first harvest of trees cut.
  - (ii) Shs. 30,000/= being amount spent on professional fees.
  - (iii) Shs. 3,731,800/= being the amount for 2<sup>nd</sup> and 3<sup>rd</sup> harvest of trees should the defendants fail to relocate the power line.
- (b) General damages for pain and agony inclusive of mental torture that the 1<sup>st</sup> appellant underwent as a result of the defendants' action.
  - (c) General damages for loss of user for the period that court may deem fit should defendants fail to relocate the power line.
  - (d) Permanent injunction restraining the defendants from interfering with the 1st appellant's parcel of land.

Both KPLC and REA filed separate defences denying the claim.

[3] At the trial, the 1<sup>st</sup> appellant gave evidence and called two witnesses. **Herbert Amiani Najoli**, a Forest Officer who visited the two parcels of land, valued the trees cut and prepared a valuation report; **Donald Musungu** – an Assistant Chief who also counted the trees cut. KPLC called one witness, **Alfred Misolo**, an Assistant Way Leaves officer while REA called **Caroline Ochich**, a senior Way Leaves officer.

As the evidence disclosed, the dispute was not on liability as such but on the number of trees cut, their value and which of the two entities was liable. The 1<sup>st</sup> appellant claimed that 238 trees were cut on the first occasion while 651 trees were cut on the second occasion. The 1<sup>st</sup> appellant claimed that the trees were cut by KPLC.

Herbert Amiani Najoli valued the trees cut at Shs. 563,900/= as shown in his report dated 24<sup>th</sup> November, 2010.

The value of each tree was based on the values gazetted by Forest Services. Alfred Misolo testified that it is REA which constructs transmission lines and that after a line is constructed wayleave clerks are sent to assess the damage. He admitted that KPLC cut down 228 trees with the consent of the 1<sup>st</sup> appellant when supplying power to the 1<sup>st</sup> appellants' neighbour. Caroline Ochich testified that REA carries route survey; the surveyor acquires wayleaves; REA constructs the power lines and KPLC commissions and maintains them. She admitted that in the course of supply of power to Mutaho Primary School, 320 trees were cut from the two parcels of land which they valued at Shs.178,040/= using rates from Ministry of Agriculture. She produced the valuation report dated 22<sup>nd</sup> June, 2012.

[4] After analyzing the evidence, Sila Munyao, J. made a finding that 228 trees were cut on the first occasion with the consent of the 1<sup>st</sup> appellant and upheld the value of Shs.27,000/=. In arriving at that value, the learned judge stated that the 1<sup>st</sup> appellant did not demonstrate what he did with the trees cut with his consent and that he could not allow the 1<sup>st</sup> appellant to benefit twice. Regarding the second round of cutting of trees for purpose of supplying power to Mutaho Primary School, the learned judge made a finding that REA had shown readiness to pay. He preferred the evidence of Caroline Ochich to that of Herbert Amiani Najoli, gave reasons for the decision and awarded Shs. 178,040/= to the 1<sup>st</sup> appellant. The claims for loss of future earning and professional fees were rejected.

As regards the claim for relocation of power lines if REA did not pay for future loss, the learned judge made a finding thus:

**“I appreciate that the 2<sup>nd</sup> defendant trespassed onto the plaintiff's land and no consent was sought before entering into the land and placing electricity supply lines. The plaintiff is the owner of the land and he has the prerogative of deciding how his land is to be used. I think he deserved the order to have the lines relocated as they were placed on his land without consent unless he is compensated.”**

However, the learned judge left the issue of the relocation of power lines in abeyance and directed the parties to enter into negotiations on whether to relocate the second power lines to Mutaho Primary School or whether to maintain it and pay compensation and make a report within 30 days. The learned judge further directed that in the event parties failed to agree, the court would make further appropriate orders.

The result was that judgment was entered for the 1<sup>st</sup> appellant for 27,000/= against KPLC and for Shs. 178,040/= against REA. The court also awarded costs of the suit to the 1<sup>st</sup> appellant.

[5] Apparently Sila Munyao, J was transferred before he completed the proceedings. By a judgment dated 18<sup>th</sup> August, 2017, A. Ombwayo, J. directed the defendants to relocate the power lines within five months and awarded the 1<sup>st</sup> appellant 1,800,000/= as general damages for trespass for the period from 17<sup>th</sup> November, 2010 to the expiry of five months from the date of judgment. The court also awarded costs and interest to the 1<sup>st</sup> appellant.

It is not clear whether there were formal proceedings before the judgment was entered as no proceedings prior to the entry of judgement were included in the record of appeal. However, there are written submissions dated 16<sup>th</sup> March, 2017 filed by the 1<sup>st</sup> appellant, seeking

compensation of Sh.10,000,000/= or Shs.2, 000,000/= should the court order relocation. There are also written submissions by KPLC's counsel dated 27<sup>th</sup> March, 2017 intimating that it is REA which trespassed on the 1<sup>st</sup> appellant's land and ought to compensate the 1<sup>st</sup> appellant.

[6] In the first appeal – that is, Civil Appeal No. 29 of 2015, the 1<sup>st</sup> appellant complains *inter alia* that: Sila Munyao, J erred in failing to state exactly how much he was awarding per each tree felled; in writing the judgment in piecemeal; in sending parties back to the negotiating table; in failing to order compensation for loss of future earnings; in failing to state whether both defendants were jointly liable and who was to pay the costs; in failing to consider the evidence of Donald Musungu (PW3); in rejecting the evidence of Herbert Amiani Najoli (PW2); in accepting casually the evidence of defence witnesses; in failing to award interest and in overlooking issues raised in the 1<sup>st</sup> appellant's submissions.

For these reasons the 1<sup>st</sup> appellant prays that the judgment on quantum be set aside and his submissions dated 24<sup>th</sup> September, 2014 be adopted.

[7] The 1<sup>st</sup> respondent (KPLC) conceded grounds of the appeal which mainly relate to ambiguity of the judgment on some issues; delivering judgment in piecemeal and directing parties to negotiate. Otherwise the 1<sup>st</sup> respondent does not impugn the findings against liability and quantum against it. On her part, **M.S Wanjala** for the 2<sup>nd</sup> respondent filed lengthy written submissions opposing the appeal. However, the judgment on liability and quantum is not challenged. Learned counsel disclosed in the written submissions that the power lines to Mutaho Primary School have been relocated and that the decretal sum including costs has already been paid by the respondent.

The first appeal was filed before the second judgment was delivered. As a result of the delivery of the 2<sup>nd</sup> judgment and the relocation of power lines, the 1<sup>st</sup> appellant has now abandoned the claim for loss of future earnings. Further, the 1<sup>st</sup> appellant clarified that some of the grounds of appeal such as delivering piecemeal judgment, directing parties to negotiate are being pursued for the clarity of the law.

[8] The issue of piecemeal judgment, and order for negotiation will be considered in the second appeal since the whole of the decretal sum has been paid including the costs and each respondent has paid its part according to the agreed apportionment, it is no longer necessary to consider the issue of ambiguity of the judgment on apportionment of costs.

It is sufficient to say that the impugned judgment is clear on the extent of each respondent's liability and the compensation to be paid by each. The 1<sup>st</sup> respondent (KPLC) was found liable for the first cutting of 228 trees and judgment entered against the 1<sup>st</sup> respondent for Shs. 27,000/=. The 2<sup>nd</sup> respondent was found liable for the second cutting of 320 trees and judgment entered against it for Shs. 178,040/=.

[9] As regards the merits of the appeal, this is a case where the trial judge had to resolve conflicting factual evidence relating to the number of trees cut and their value. As the judgment shows, the learned judge painstakingly evaluated the conflicting evidence, and considered the respective valuation reports before arriving at his findings. The learned judge found that the evidence of the appellant as to the number of trees cut was irreconcilable. The learned judge found Herbert Amiani Najoli, the 1<sup>st</sup> appellant's main witness as an unreliable witness. The learned judge observed that he was a shifty character who found it difficult to answer fairly simple questions. The questions put to him and his answers were recorded verbatim. The learned judge recorded that he was not impressed with his demeanour. The evidence of Donald Musungu was considered. His tally of the number of trees cut was not consistent with other evidence.

On the other hand, the learned judge was impressed by the evidence of Caroline Ochich. She was found to be an honest witness with nothing to hide and also a polished professional. Contrary to what the 1<sup>st</sup> appellant states, her report shows the rate per each tree. The findings of the learned judge was largely dependent on the credibility of witnesses.

An appellate court does not normally interfere with the findings of a trial court which are based on the credibility of witnesses in the absence of misdirection or non-direction and unless no reasonable tribunal could have reached at those findings.

Upon evaluation of the evidence we find that the learned trial judge properly evaluated the evidence and reached the correct decision and that there are no valid grounds for interfering with the trial judge's finding of fact on the number of trees cut and their value.

The award of interest was at the discretion of the court. These have been protracted proceedings and the first judgment has been fully satisfied. The decretal sum was granted without any conditions. It is not in the interest of justice to reopen the dispute at his late stage.

[10] The second appeal – **Civil Appeal No. 1 of 2018** relates to the second judgment of A. Ombwayo, J. It deals with the issue left in abeyance by Sila Munyao, J. – pending negotiation whether the second line to Mutaho Primary School should be relocated or should be maintained and compensation paid to the 1<sup>st</sup> appellant. Apparently the parties failed to agree and the learned judge directed that the line be relocated within five months and compensation of Shs. 1,800,000/= be paid to the 1<sup>st</sup> appellant with costs and interest. A close reading of the grounds of appeal and the 2<sup>nd</sup> appellant's submissions in both appeals show that the appellant (KPLC) is impugning the judgment only on the ground that it fixed liability on it to pay the sum awarded when Sila Munyao, J. had exonerated it from liability. Indeed, the order sought in the memorandum of appeal is that the judgment be set aside with regard to the appellant. It is clear from the memorandum of appeal and the 2<sup>nd</sup> appellant's written submissions that there is no grievance against the quantum of Shs. 1,800,000/=.

The 1<sup>st</sup> respondent in the second appeal (*Joseph Mung'aya Makotsi*) has not filed an appeal against quantum. He is satisfied with the award. Similarly, the 2<sup>nd</sup> respondent in the appeal (*REA*) has not appealed against quantum. However, the 2<sup>nd</sup> respondent submits that the issue raised in the appeal should have been addressed by the judgment of Sila Munyao, J; that both were found liable in the first judgment and that the appeal should be dismissed.

[11] Since the issue of quantum is not disputed, all other issues relating to piecemeal judgment, direction on negotiation, ambiguity of judgment, *functus officio*, *res judicata* are in reference to the liability of the 2<sup>nd</sup> appellant to satisfy the award of Shs. 1,800,000/= and are therefore subsidiary.

The real issue is the construction of the two judgments as regards liability. We construe the first judgment of Sila Munyao, J. as final judgment on liability and quantum in respect of cutting of trees and a preliminary judgment on the issue of trespass and relocation of power lines to Mutaho Primary School and the compensation thereof. From the passage of the judgment of Sila Munyao, J. quoted at paragraph 4 above, it is clear that the learned judge found the 2<sup>nd</sup> defendant in the suit (*REA*) liable for that trespass. Apparently due to the weight of the matter and the financial implications, the learned judge gave the parties an opportunity to negotiate before making final judgment on the issue of trespass. It is permissible for a court to give a preliminary decree depending on the circumstances of each case. Such a preliminary decree is appealable as **section 68** of Civil Procedure Act provides.

In directing the parties to enter into negotiations, the court was promoting reconciliation as it is required to do under **Article 159(2) (c)** of the Constitution. In the premises, the issues of piecemeal judgment, unlawful referral to negotiation, *functus officio*, *res judicata* do not, with respect, apply to the circumstances of this case.

[12] The judgment of A. Ombwayo, J. was the final decree relating to the issue of trespass, relocation of power lines and compensation. The final decree should conform with the preliminary decree on the issue of liability. In our view, Ombwayo, J. erroneously interpreted the preliminary decree when he said:

**“Parties were given room for negotiation but never agreed. The defendants are trespassers and cannot be allowed on the premises without the plaintiff’s consent.”** (Emphasis added).

In finding that the *defendants* were trespassers, the learned judge overlooked the finding in the preliminary decree that found only the 2<sup>nd</sup> defendant (*REA*) liable.

The reason why Sila Munyao, J. found REA liable is because Caroline Ochich stated in her evidence that it is REA which constructs power lines and that it is REA which constructed the power line to Mutaho Primary School.

We find that A. Ombwayo, J. erred in law and in fact in finding the 2<sup>nd</sup> appellant (*KPLC*) liable for trespass.

[13] On the issue of costs as ordered by Ombwayo, J, the costs incurred in the trial had already been awarded by Sila Munyao, J. As there was no further hearing before A. Ombwayo, J, a further order of costs should not have been made. As regards the costs of the consolidated appeals, it is just that the 1<sup>st</sup> appellant pays the costs of Civil Appeal No. 29 of 2015. The dispute in Civil Appeal No. 1 of 2018 was essentially between KPLC and REA. The appeal was not against the award of Shs.1, 800,000/= to the 1<sup>st</sup> appellant. The appeal was occasioned by an inadvertent error made by the trial court. It is just that no order of costs should be made in respect of the 2<sup>nd</sup> appeal.

[14] For the foregoing reasons: -

**(i) Civil Appeal No. 29 of 2015 is dismissed with costs to be paid by the appellant to the respondents therein (that is KPLC and REA)**

**(ii) Civil Appeal No. 1 of 2018 is allowed to the extent that the judgment as it relates to the appellant (*KPLC*) is set aside. The order of costs made in Civil Appeal No. 1 of 2018 is also set aside.**

**(iii) Each party in Civil Appeal No. 1 of 2018 shall bear its/his own costs of the appeal.**

Dated and Delivered at Eldoret this 9<sup>th</sup> day of May, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

H. OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**