



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)**

**CIVIL APPEAL NO. 80 OF 2016.**

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

**AND**

**FLEETWOOD ENTERPRISES LIMITED.....RESPONDENT**

*(Being an appeal against the Judgment of the Environment and Land*

*Court of Kenya at Malindi (Angote, J.) delivered on 7<sup>th</sup> November, 2014*

**in**

**E. L.C. Civil Case No. 5 of 2010)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The respondent bought all that piece or parcel of land known as **Plot Number 514 R, Malindi** “*the suit premises*” measuring 43.2 hectares sometimes in 2007 and was duly issued with the necessary documents of title. Immediately thereafter, the respondent engaged the services of a surveyor to subdivide the suit premises with a view to selling the subdivisions, as it was engaged in the business of property development. However, in or about April 2009, the appellant without any prior notice to or consent of the respondent, through its employees, servants and or agents invaded the suit premises, dug holes and erected electricity poles and thereafter laid electric supply lines thereon. The respondent deemed the appellant’s actions trespass and in breach of **Section 46** of the Energy Act. The respondent repeatedly asked the appellant to move out of the suit premises and remove the electricity poles together with the supply lines so as to bring the trespass to an end but its requests and demands fell on deaf ears. The appellant’s attitude forced the respondent to take out a suit against it seeking the following prayers:-

- 1. A declaration that the appellant had trespassed on the suit premises.**
- 2. An order by way of a mandatory injunction to compel and direct the appellant to immediately remove the illegal electric supply lines from the suit premises**
- 3. A permanent injunction restraining the appellant, its servants, employees and or agents from entering into or laying electric supply lines on the suit premises or otherwise interfering with the suit premises.**

**3. Damages for trespass.**

**4. Costs of and incidental to this suit.**

**5. Any other or further relief that the honourable court could deem appropriate to grant.”**

The appellant in its defence denied the respondent's claim that it had trespassed on the suit premises. Instead, it averred that if at all any poles were erected by its employees, then it was on a totally different parcel of land from the suit premises to which it had obtained the relevant electricity way leave consent and approval from the Municipal Council of Malindi.

The respondent's case unfolded through three witnesses. Essentially, it was that the respondent acquired the suit premises in the year 2007. In support of this contention **Mr Mohamed Salim Juma**, (PW 3) a director of the respondent, tendered in the evidence the indentures dated 23<sup>rd</sup> August and 4<sup>th</sup> December, 2007. He testified further that the respondent was involved in property development and that when they purchased the suit premises their intention was to subdivide it and sell the sub-plots. After the subdivisions carried out by **Edward Kiguru** (PW 2), a licenced land surveyor, 500 plots were created. However, his manager on the suit premises, **Firoz Jusab Sumar** (PW 1) sometimes in May 2009, called him and informed him that power lines had been installed by the appellant in some of the subplots without his consent, knowledge or permission. In fact 16 out of the 500 plots had been affected. PW3 then referred PW1 to the appellant's offices to lodge a complaint. According to PW1 he received no assistance from the appellant's offices. As a result, the respondent issued a formal demand letter followed by a reminder to the appellant but to no avail as the appellant insisted that it had done nothing wrong.

In preparation of filing a suit, the respondent once again in the year 2011, engaged PW2 to ascertain the poles that had been erected by the appellant in the suit premises. In his report that was tendered in evidence, PW2 established that the poles affected 16 plots. According to PW2 the sketch plan used by the appellant to lay the electric line over the respondent's 16 plots showed that the appellant was aware of the existence of the suit premises and the subdivisions thereof. Accordingly, the appellant had trespassed on the respondent's suit premises.

In defending itself, the appellant called one witness, **Gabriel Mlawata Kaghanga**, its wayleaves officer then based in Malindi. It was his testimony that in the year 2009, a customer applied for power supply. Appellant's people visited the site and saw a murram road crossing the suit premises which by then looked like a playing ground. They were however unable to establish the beacons to the suit premises at the time. On 31<sup>st</sup> March 2009, they wrote a letter to the then Municipal Council of Malindi seeking approval to erect the electricity power lines following the murram road. The Council gave its approval vide a letter dated the 7<sup>th</sup> of April 2009. According to the appellant, therefore it laid the impugned electric poles and electricity line on the basis of the aforesaid approval and that they were not aware that the poles were erected on a private land, the suit premises. The witness conceded though that the sketch plan that was used to erect the poles and the electric line emanated from the Municipal Council of Malindi and that they never consulted the survey department before laying the lines. He also conceded that he was aware of the provisions of the Energy Act which required that the consent of the owner of private land be obtained first before laying of electric lines and poles on his land. Nonetheless, he maintained that the area that they had erected the transmission lines was a road and not private land.

In disposing of the suit, **Angote, J.** observed thus:-

**“ .....I have perused the deed plan that is annexed on the two indentures before the suit property was subdivided into various plots. I have also perused the print which was prepared by PW2. The said print shows the various subdivisions which were created in the year 2007 and the 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 subdivision. The print on scale by PW2 clearly shows that the poles were not erected on a road or road reserve but in the middle of 16 plots and the electric line was then laid over the said 16 plots.....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 subplots over which the power line was to pass and the positioning of the poles.....Although DW1 stated that the council assured them that the points indicated in the sketch map 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.....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. The court therefore finds and holds that the defendant has trespassed and continue to trespass on the plaintiff's sixteen plots....”

Accordingly, the learned judge entered judgment for the respondent as prayed in the plaintiff. He then assessed damages payable for the trespass at Kshs.3,840,000/= on the basis that had the 16 plots been developed but for the illegally connected electric line the respondent would have earned at least Kshs.4,000/= per plot per month for the 5 years that the appellant had trespassed on the suit premises. In sum, the damages worked out as follows  $Kshs.4,000 \times 12 \times 5 \times 16 = 3,840,000/=$ .

It is against this judgment and decree that the appellant has instituted this appeal on four grounds. In summary, its complaints are that the learned judge erred in law and fact in finding that the appellant was aware at the time they sought and obtained from the Municipal Council of Malindi that the line was to be laid on private property; in using an amount of Kshs.4000/= per month as the average monthly income that the respondent would have earned per plot for 5 years in computing damages for trespass; by awarding of Kshs.3,840,000/= which amount was manifestly excessive; and in finding that the respondent would have developed all the 16 plots if the appellant had not connected the electricity supply line which was contrary to the evidence of the respondent.

In the case management conference presided over by the Deputy Registrar of this Court, parties agreed to have the appeal heard by way of written submissions with limited oral highlights. Parties subsequently complied with the directions and duly filed and exchanged their respective written submissions. The written submissions were a replica of the pleadings, the evidence tendered as well as the written submissions in the trial court. Therefore, we need not rehash them here, save to add that during the highlighting only **Mr Bosire**, learned counsel for the respondent exercised that option. **Ms Obara**, learned counsel for the appellant was content with her written submissions on record.

In his brief highlights, Mr Bosire reiterated that it was not denied that the suit premises belonged to the respondent. That it was on record that the Municipal Council of Malindi had no interest in the suit premises. That it was incumbent upon the appellant to comply with the provisions of **Section 46** and **47** of the Energy Act. However, there was no evidence that the appellant sought and obtained from the respondent the requisite consent. That having found that the appellant had committed trespass it was actionable *per se* requiring no proof of damage contrary to the submissions by the appellant.

As this is a first appeal, we are alive to the responsibility bestowed on us to analyse and evaluate the evidence on record afresh and reach our own independent conclusions but bearing in mind that we neither saw nor heard the witnesses testify. There is also the further caution that an appellate court should not substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the trial judge was plainly wrong. See **Kiruga v Kiruga [1988] KLR 348**.

In its written submissions, the appellant abandoned ground 4 in the memorandum of appeal. So that in this judgment we shall only address grounds 1, 2 and 3 of the appeal.

Dealing with the 1<sup>st</sup> ground, can it really be said that the learned judge erred in finding that at the time the appellant obtained the approvals from the Municipal Council of Malindi it already knew that the project

would go through the suit premises? We do not think so and this is why. There is overwhelming evidence that the respondent was the registered proprietor of the suit premises. Had the appellant exercised due diligence as required, by taking up the matter with appropriate land registry and survey records and not relying solely on the records and approvals by the Municipal Council of Malindi, it would have easily confirmed the legal status and ownership of the suit premises. The appellant cannot really hide behind the fact that it saw a murrum road running through the suit premises to claim that it was not private property. How many private properties have private murrum roads and even tarmacked roads? Is the appellant serious and should it be believed on the basis of such an assertion? It cannot be that the mere presence of a road is an open invitation to the appellant without as much as establishing true ownership, to erect transmission lines for the supply of electricity to its customers.

Further there was uncontroverted evidence by PW1 and PW2 to the effect that at the time of the appellant's application for approval and consent for the project, the suit premises had already been subdivided, fenced off and a new road network laid. All these were there for the appellant and its employees to see but simply ignored the same. Further the murrum road they claim to have misled them was in an enclosure.

Secondly, if the evidence of PW1 is anything to go by, when he came by the appellant's representatives digging holes and erecting electricity poles he protested and cautioned them to stop what they were doing as they were trespassing on private property. But that did not stop them; instead they hastened the pace and within two days they were done and left. One would have expected that having been approached by a representative of the owner of the suit premises demanding to know why they were trespassing on the suit premises, they should have downed their tools immediately pending verification, considering the provisions of **Section 46** and **47** of the Energy Act which they are deemed to know. The evidence on record clearly shows that the poles were not even erected on the road or on the road reserve as claimed by the appellant but in the middle of 16 plots. That fact alone displaces the appellant's assertion that they commenced the project in the belief that they were doing it on a public road. It is also evident that in its letter seeking the approval of the project from the Municipal Council of Malindi they indicated that the street on which the project would be undertaken was **Casuarina/Shell Road**. It appears, that is not the road they ended up on. Having reviewed the entire evidence on record in this regard, we are satisfied just like the trial court that the appellant trespassed on the appellant's suit premises by entering upon it, digging holes and erecting therein electric poles and transmission lines in complete violation of the mandatory provisions of **section 46** and **47** of the Energy Act.

Grounds 2 and 3 can conveniently be dealt together. It is trite law and as correctly submitted by counsel for the respondent that trespass to land is an actionable tort *per se* and proof of damage is not necessary or required. In other words, where trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damage or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course depending on the facts of each case. See **Simiyu v Sinino [1985] eKLR** and **Obadiah K. Macharia v Kenya Power and Lighting Company Limited**. This then puts to rest the submissions by the appellant that the respondent ought to have specifically pleaded the loss it had suffered and proceeded to prove the same. It does appear to us that perhaps the appellant was suffering under the illusion that this was a claim for special damages on the footing of trespass. Nothing could be further from the truth.

With regard to the quantum, the appellant takes the view that the sum of Kshs.3,840,000/= awarded was manifestly excessive on the basis that no evidence was led to assist the court to arrive at an appropriate award in the circumstances. Secondly, that the object of such damages being to place the victim in the position he would have occupied if he had not suffered the wrong complained of was not met in the circumstances of this case. To the appellant a nominal sum of Kshs.1,000,000/= would have sufficed. On the other hand, the respondent submitted that the award was most reasonable in all the circumstances.

We entirely agree with the submissions of the respondent in this regard, suffice to add that the award of damages is an exercise in discretion of the trial court to which an appellate court should pay respect. In **Kenya Bus Services & Another v Frederick Mayende [1991] 2 KAR 232** this Court held that:-

**“The principles on which an appellate court will interfere with the trial judge’s assessment of damages are well settled in the Court of Appeal. The Court will only interfere where an error of principle by the trial judge is shown, or where the damages awarded are so high or so low that they must be wholly erroneous estimate and an error of principle must be inferred.”**

Similarly in **Henry Hidaya Ilanga v Manyema Manyoka [1961] EA 713**, the predecessor of this Court applied the rule laid down by the **Privy Council** in **Nance v British Columbia Electric Railway Co Ltd (4), (1951) AC** at page 613 when discussing the perimeters to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge. It observed that:-

**“The principles which apply under this head are not in doubt. Whether the assessment of damages be by a judge or jury, the appellate court is not justified in substituting a figure of its own for that awarded below simply because it would have awarded a different figure if it had tried the case at the first instance. Even if the tribunal of first instance was a judge sitting alone, then before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”**

We do not discern anything untoward with the learned judge’s reasoning leading to the award of damages. He considered the relevant evidence led by the respondent in this regard. No wrong principle of law that the judge took into account in arriving at the award has been demonstrated to us. Nor has it been shown to our satisfaction that the judge took into account irrelevant or failed to take into account relevant considerations. Indeed, in his submissions the respondent had asked to be compensated for the loss at the rate of Kshs.5000/= per month. The judge in his absolute discretion and wisdom felt that, that was on the higher side considering the vagaries that come with property development and reduced the figure to Kshs.4,000/=. Accordingly, the appellant cannot be heard to complain that the award is manifestly excessive.

The upshot is that the appeal lacks merit. It is dismissed with costs to the respondent.

**Dated and delivered at Mombasa this 22<sup>nd</sup> day of June, 2017.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**