



Kenya Power and Lighting Company Limited v Murungi (Environment and Land Appeal E005 of 2024) [2024] KEELC 5735 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E005 OF 2024**

**CK NZILI, J
JULY 31, 2024**

**BETWEEN
KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT
AND
ASTERIA KAWIRA MURUNGI RESPONDENT**

JUDGMENT

1. The appeal before the court is based on the memorandum of appeal dated 7.2.2024. The trial court is faulted for:
 - i. Finding that the appellant acted with malice in destroying the respondent crop.
 - ii. Finding there was no justification to cut down and destroy the respondent's crops.
 - iii. Finding that the respondent had proved his case on a balance of probability.
 - iv. For entering judgment against it.
2. The suit at the lower court commenced against the appellant by a plaint dated 31.5.2018. The respondent, as the registered owner of L.R No. Abogeta/L- Kiungone/1063 blamed the appellant for trespassing into his land, destroying his trees, crops and fruits assessed at Kshs.421,867/= without any wayleaves permit or authority. At the trial, the respondent relied on witness statements dated 20.5.2018 and 18.11.2019 as her evidence in chief. PW 1 told the court that her land measured 1.12 ha and that on 29.8.2016, officers of the appellant visited her land indiscriminately and wantonly started selling tree crops and fruit trees, despite an attempt to stop it.
3. Additionally, PW 1 said that the appellant's officers ignored her yet it had taken her a lot of time and resources to tend the trees. PW 1 told the court that the appellant connected low-hanging live wirelines to her neighbor over her gate and farm, making it impossible for a lorry to pass through. Again, PW 1 told the court that she had visited the officers of the appellant severally for intervention in vain after



- which she wrote a demand letter to the appellant dated 13.10.2016, which was responded to by a letter dated 10.2.2017. The respondent relied on a valuation report by Roma valuers dated 19.9.2016, demand letter postage receipt as P. Exh No's. 1-3.
4. In cross-examination, PW 1 told the court that she told the court that by the time she bought the land, power lines and the trees were already in place and could not tell when they were installed; otherwise, she had no history of the mother title or whether the initial owners had granted way leaves permit to the appellant. Similarly, PW 1 said that she was unable to confirm if the initial owner had planted trees near the power lines.
 5. PW 1 asked about DMFI's 1, 2 & 3 acknowledged that she bought the land while there was a wayleave but was confident that trees were not near the power lines. Similarly, PW 1 clarified that she had nothing to show that the wayleave may have been lifted. PW 1 told the court that even if there was a wayleave, she was still not given any notice before the visit and destruction of her property.
 6. Cyprian Kirera Riungu testified as PW 2. As a licensed land valuer, PW2 told the court that he visited the suit land in September 2016 owned by the respondent and observed the destruction as per P. Exh No. (1). He said that almost $\frac{3}{4}$ of the $\frac{1}{4}$ of an acre land was under power lines installed after the property had been developed. PW 2 told the court that the power line was approximately 9 meters high. He doubted whether the trees, crops and fruit trees were a threat to the power line.
 7. The appellant opposed the suit through a statement of defense dated 5.7.2018 and a preliminary objection dated 24.7.2020. The appellant denied the alleged trespass or destruction of the suit land and its properties. On the contrary, the appellant averred that prior to commencing the laying of transmission lines traversing into the respondents' parcel of land, it had sought and obtained wayleaves and easement from the proper owner; hence the respondent was not entitled to any form of compensation, as alleged or at all. It denied the jurisdiction of the court.
 8. As to the preliminary objection the appellant averred that the court lacked jurisdiction by dint of Section 6 of the *Energy Act* and Section 9 (2) of the *Fair Administrative Action Act*. In a reply to the defense dated 19.9.2019, the respondent averred that she never granted any way leave to the appellant, its agents, or to anybody.
 9. At the defense hearing, James Kibet Sacho testified as DW 1. Relying on the witness statement dated 5.8.2020 as his evidence in chief, DW 1 told the court that as a wayleaves officer, the appellant was mandated by law to operate markings, protect its transmission lines and distribute grid to ensure adequate economic, reliable and safe transmission and distribution of electricity.
 10. DW 1 stated that the appellant constructed an ad 11 K.V. powerline that cuts across L.R No. Abogeta/Lower-Kiungone/197 to supply Kanayakine and Materi areas in 1982 and, in particular, to connect Imenti and Kinoro tea factories and the environs. DW 1 told the court that at the time, it acquired a wayleave consent from Mr. Mwamba Mwithirwa, the registered owner.
 11. Further, DW 1 told the court that on 31.3.2023, the said parcel was subdivided into L.R No's Abogeta, lower Kiungone/783-789 vide Mutation No. Mut/93/976/11/96 and on May 2006, L.R No. Abogeta/Lower Kiungone/785 was subdivided further into L.R No's. 1083 & 1064 vide Mut/60/17/4/06.
 12. Again, DW 1 said that the first owner of the suit land was Johnson Mbae Mwamba, who transferred it to Charles Munene M'Atugi on 9.5.2008; later, the respondent acquired it on 26.6.2011 while the power line was still in existence.



13. DW 1 told the court that the subdivisions and transfers of land carried along the existing encumbrances on the land, including the power lines and way leaves agreements, which provide that the land owner shall not interfere or permit any interference with the electricity supply line nor construct buildings, plants, trees or dump materials beneath the electricity supply line.
14. Moreso, DW 1 testified that in blatant breach of the agreement, the respondent went ahead and planted trees whose growth posed a great danger to herself and society in general as they were interfering with the existing power line. He said that the wayleave agreement allowed the appellant to enter from time to time for purposes of operating and maintaining the supply line; hence, it was within its mandate to enter the land and carry out maintenance of the electricity power line.
15. Further, DW 1 stated that the respondent was duty-bound to carry out due diligence pertaining to the existence of the power line and the conditions thereof, at the time of acquiring the suit property.
16. Similarly, DW 1 told the court that the trees were legally cut as they were planted under the power line. If left unattended, DW1 told the court that it could interfere with the power line and cause an accident, which could lead to severe consequences, including fatalities, serious injuries, and damage to property and the area. DW 1 relied on a copy of two survey maps showing the mutation forms, further subdivision alluded to above and a way leave agreement executed on 6.7.1982 between its predecessors in title and Mwamba Mwithirwa over L.R No. Abogeta/L-Kiungone/197.
17. Again, DW 1 explained that the width of the wayleave for a power line of 11000 volts is about 1 ½ meters wide, occupying five meters on another side of the line. He added that the wayleave trace was a safety corridor that at all times must be kept clear for safety purposes and must allow sufficient space for repair and maintenance whenever the need arises.
18. DW 1 also told the court that even if a land with a way leave changes hand, the appellant still has the rights over the way leaves since it was an encumbrance passed on.
19. D.W. 1 said that the appellant had the sole mandate to maintain the wayleave to ensure that trees did not come into contact with the power lines, and since the wayleave was a registered one, clearing vegetation was within its mandate. DW 1 also confirmed that he visited the site and established that the vegetation was cleared within the wayleave, corridor, hence there was no trespass as alleged or at all
20. DW 1 told the court that as per the survey maps, the power line is along the boundary but inside the land with a width of about 12 meters and that the trace way leave should be about 10 meters wide; hence the respondent was not entitled to any compensation. He said that power line corridors were not hived off like roads but existed within a parcel of land. He also 1 said that whereas under power lines, owners are allowed to grow crops like coffee, maize and beans, trees growing beyond 3 meters high are outlawed.
21. This appeal was canvassed through written submissions dated 3.7.2024 and 15.7.2024. The appellant submitted that the destruction of the respondent's property was not proved since the evidence available was that the appellant had obtained way leave and hence had the right to enter and clear any vegetation interfering with the way leave, which is an analogy right recognized by Section 143 – 149 of the [Land Act](#) and which was an encumbrance to a title under Section 26 (1) of the [Land Registration Act](#).
22. The appellant submitted that the growth of vegetation below the way left by the respondent posed a danger to the power line and fell within its mandate.
23. The appellant submitted that Kshs.421,827/= sought as damages was misconceived for there was no trespass or damages payable under Section 143 (4) of the [Land Act](#) and Section 46 of the [Energy Act](#), for the acquisition of the land by the respondent was subject to the existing way leave. Reliance was



- placed on John Peter Mwangi Kagiri vs. National Land Commission & another (2019) eKLR and Charterhouse Bank Ltd vs Frank N. Kamau (2016) eKLR.
24. The appellant termed the valuation report coming about a month after the alleged destruction as inaccurate, lacking independence and factual foundation. Reliance was placed on Bonaventure Michael Okello Agina vs Sinohydro Corporation Ltd (2017) eKLR.
 25. The respondent submitted that the appellant acted with malice and unlawfully into the vegetation and hence was vicariously liable for the acts of its agent under Section 33 a of the Penal Code. The respondent submitted that she proved ownership of the suit property, which was willfully and unjustifiably destroyed by the appellant's agent as per the valuation report by PW 1 and PW 2.
 26. On the award, the respondent submitted that under Section 148 of the Land Act, compensation was payable. Reliance was placed on Swalhe C Kairuki & another vs Violet Owiso Okuyu (2021) eKLR. As to the wayleave or consent, the respondent submitted that under Sections 18 and 143 of the Land Act, the manner of creating a way leave is established and that before 2012, the applicable law was the Way Leaves Act (Cap 292). The respondent submitted that what the appellant produced was not a wayleave as envisaged under Section 98 of the Land Registration Act.
 27. The respondent submitted that there was no notice issued under Section 80 of the Energy Act before the trees were destroyed and therefore, the appellant was malicious.
 28. The role of this court under Section 78 of the Civil Procedure Act is to review the lower court record with a fresh perspective and come up with independent findings as to the facts and the law while giving credit to the lower court that saw and heard witnesses testify. See *Selle & another vs Associated Motor Boat Company Limited & others* (1968) E.A 123.
 29. The three issues for my determination are whether the respondent as the owner of L.R No. Abogeta/Lower-Kiungone/1063 was subject to any way leave obtained by the appellant in 1982 over the initial land and from the initial owners. In other words, were the wayleave rights by the appellant capable of being transmitted to bind future successors in the title?
 30. The second issue is whether the appellant was a trespasser to the suit land in carrying out statutory duties to maintain the way leave.
 31. The third issue is the jurisdiction of the trial court to entertain the dispute. There was no dispute at the trial court that the respondent held a title deed and occupied land which had electric transmission lines running across it. The title deed produced by the respondent showed that the land was a resultant subdivision of an initial land where the appellant pleaded that it had obtained wayleaves and out of it was able to lay electric transmission poles and lines before the respondent became a registered owner and occupied the suit land. The respondent did not refute the said pleadings or offer evidence to controvert what the appellant tendered. What the respondent pleaded was that her consent, authority, and approval to continue maintaining the way leave and its attendant rights to the appellant were not sought or obtained.
 32. Way leaves are overriding rights which goes with the land under Section 28 of the Land Registration Act. In *Phills N. Mbaluto vs KPLC* (2012) eKLR, the court observed that by the time the plaintiff commenced her construction, power lines were already in place; otherwise, she would have ensured that the power lines did not run over the building and could have taken steps; to reroute them or taken measures to mitigate her loss.
 33. In *Ajit Bhogal vs KPLC* (2020) eKLR, the court observed that under Sections 4, 6, 47 & 52 of the Electric Power Act 1997, there was a presumption to assent to a proposal to lay an electric supply line



- against an owner of the land if he did not dissent within 60 days after service upon him of the notice for permission to survey and use the land to lay electric lines.
34. The court said that a way leave was an analogous right under PART X of the *Land Act* and that under Sections 143 – 149 of the said Act, there was a procedure on how to create and maintain a way leave.
 35. In *Joseph Mungaya Makotsi vs KPLC & another* (2014) eKLR, the court observed that under Section 55 of the *Energy Act*, where trees interfere with an electric supply line, a seven-day notice is required to be given to a land owner requiring such an owner to or cut down the trees affecting the power line and where the trees have to be cut there should be a minor damage as possible to the trees, fences, hedges and growing crops.
 36. In *KPLC vs Kipevu Inland Container, Export Processing Zone Ltd* (2018) eKLR, a land owner, had interfered with a wayleave, posing a danger to the pylon holding the power lines. Yano J held that the rights of a registered owner under Section 25 (1) of the *Land Registration Act* were subject to such liabilities, rights and interests as declared in Section 28 of the *Land Registration Act*. The court further observed that since the plaintiff had applied and obtained a public wayleave, a trace for the power lines to run across the defendant's land who had encroached on it was itself a breach of the easement rights. Eventually, the court made a finding that the defendant's possession of the land was subject to a public right of way or a way leave with a duty imposed on the latter to safeguard the way leave.
 37. In this appeal, the appellant's evidence of the existence of the way leave rights and the presence of the respondent on the suit land and in the title register with effect from 1982, the subdivisions of the initial land on 31.3.2003 and at the creation of the respondent's title on 17.4.2006, was not challenged. A party who seeks to obtain a title is expected to undertake due diligence and find out the root of the title. In this appeal, the presence of electric power lines on the suit land was known to the respondent before and after she acquired the title from the initial owners.
 38. The respondent did not complain of the presence of the power lines before and after the alleged trespass. There is no evidence that the respondent sought a rerouting of the power lines and or compensation, given that they were occupying a significant portion of her land.
 39. Trespass is unjustified entry into remaining on and commission of acts of destruction of the suit land without the owner's consent, authority or approval.
 40. In this appeal, there is evidence that the respondent acquiesced and or waived her rights to the presence of the electric power lines on her land with effect from 26.6.2011, acquiring the land and up to the lodging of the complaint on 13.10.2016. There is no evidence that when the respondent acquired land in 2011 she made a formal request to the appellant to formalize the presence of the power lines on the land. In the absence of a complaint on the existence of the power lines as illegal and amounting into trespass. I find that the appeal was not an intruder. There is no evidence that the respondent invoked Section 46 of the *Energy Act* that no permission was sought in the first instance and or compensation paid for the entry and erection of the power lines in the first instance if the respondent did not even know when the electric power lines were erected in the first instance, how then would she be able to prove that the entry and maintenance of their presence were illegal without making any inquiry from the predecessor in the title or the appellant as early as 2011?
 41. In *Reginald Destro & others vs AG* (1980) eKLR, the court said waiver and consent were closely akin to estoppel and that a defense of acquiescence can only be raised against a party who knows his rights, the other party's mistaken belief in his own inconsistent legal right and knowledge that he is entitled to the legal rights to which the facts giving rise to his legal rights arise. Additionally, the court observed



that the doctrine of approbate and reprobate was available in making an election of the alternative rights open to a party.

42. The respondent's case was that there was trespass and destruction of the vegetation in her land. There was no claim for a declaration of the presence of the electric power lines as illegal and for an order to relocate them. In essence, the respondent was merely questioning the entry to cut down the trees or vegetation. The appellant pleaded justification and a statutory duty to maintain and protect the wayleave. Compensation for the suit land, according to the appellant, was done when the wayleave was granted in 1982. If the respondent were sure that none was paid at all, she would not have waived the same
43. The respondent opted to elect to seek damages relating to an alleged trespass and cutting down of trees without addressing the question of the legality of the existence of the power lines in the first instance, how they came to be on the land, and whether they were justified to be on the suit land. Without addressing the said presence, nature, terms and conditions of the statutory duty held by the appellant, my finding is that the nexus between the same and the alleged loss or damage was a condition precedent to establishing liability on the part of the appellant.
44. The next issue is whether there was a wayleave dispute and whether the appellant was licensed to maintain and operate the electric power lines on or across the respondent's parcel of land. Section 46 of the *Energy Act* gave the respondent a right to raise a complaint if aggrieved on the license or wayleave to the appellant to maintain and operate electric power lines across her land.
45. Disputes between the appellant and interested parties are governed by Section 36 (3) of the *Energy Act* 2019 the Energy (Complaints and Disputes Resolution) Regulations 2012 Regulation 2012). Section 9 of the Act establishes the Energy and Petroleum Authority), which under Section 11 has the power to investigate and determine complaints over licenses and license conditions. An aggrieved party to such a determination has a right to go before the Energy and Petroleum Tribunal (PT). Section 36 of the Act grants the Energy, Petroleum Tribunal (EPT) powers to hear and determine matters arising from the energy and petroleum Sector Sector, the sector under the Act or any other Act, except criminal matters. The EPT has original civil jurisdiction as well as appellate jurisdiction of the licensing authority decisions.
46. The EPT tribunal thereof can grant equitable reliefs penalties, damages, and specific performance. Regulation 4 of the Regulations 2012 applies to complaints and disputes regarding, among other things, way leaves, easements, or rights of way in relation to generations, transmission, distribution, supply and use of electrical energy.
47. The appellant had raised a preliminary objection on jurisdiction. The dispute before the trial court touched on easements or the right of way in relation to generation transmission, distribution or supply lines. It was a dispute falling squarely under the E.P.T. The respondent failed to exhaust the internal dispute mechanism under the Act.
48. In *Speaker of The National Assembly vs Karume* (1992) eKLR and *Geoffrey Muthinja Kabira & others vs Samuel Munga Henry & 1756 others* (2015) eKLR, it was held that courts should be the last resort and not the first port of call the moment a storm brews. The dispute was prematurely filed before the trial court. The respondent ought to have exhausted the jurisdiction of the E.P.T and that has powers to determine, among other things, the regularity, appropriateness and the way forward on the existence or otherwise of the initial way leave and its binding nature over the respondent. The upshot is that I find the appeal with merits. It is allowed with costs. The suit at the lower court is dismissed for lack of jurisdiction.



**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 31st DAY OF JULY, 2024**

In presence of

C.A Kananu/Mukami

Anguche for the appellant

Kerubo for the respondent

HON. C K NZILI

JUDGE

