



**Rosewa Agencies Limited v Kenya Power & Lighting Company Limited (Environment and Land Case Civil Suit 1048 of 2014) [2023] KEELC 16289 (KLR) (22 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 16289 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1048 OF 2014**

**JA MOGENI, J**

**FEBRUARY 22, 2023**

**BETWEEN**

**ROSEWA AGENCIES LIMITED ..... PLAINTIFF**

**AND**

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

**JUDGMENT**

1. The plaintiff moved this court by way of a plaint dated August 5, 2014 and amended on July 1, 2021. In the amended plaint, the plaintiff has averred that at all material times, it was the registered proprietor and owner of all those parcels of land known as LR number 18697 (the suit property); that on or about June and July 2014, without prior notice to or assent of the plaintiff, the defendant entered, encroached upon the suit property and erected power 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 permanent injunction restraining the defendant by itself, its employees, servants, agents from encroaching and trespassing on the suit property and for an order of mandatory injunction to compel the defendant, its servants or employees to immediately remove the electricity poles and he power lined, back fill the excavated holes and remove any other unlawful development it has carried out without the authority of the plaintiff in any part of the suit property together with general damages for trespass and injury occasioned on the said parcels of land.
4. At the same time the plaintiff is seeking mesne profits from June 2014, costs of the suit in the alternative an amount of Ksh 82,528,875.00 being the cost of the compulsory acquisition of the suit property and interest of the said amount.
5. In the statement of defence dated October 12, 2021, the defendant denied the averments by the plaintiff and stated that the said poles do not belong to the defendant and further that the plaintiff is



not entitled to the mesne profits. That the suit is misconceived in both law and fact. That the prayers sought are time-barred by virtue of section 4(2) of the Law of *Limitations of Action Act* and that this honorable court lacks jurisdiction to hear the matter at hand.

### **The Plaintiff's Case:**

6. PW1- Charles Kigwe Wathua Kigwe informed the court that he was a business man and he is a director of the plaintiff. He stated that he had sworn a witness statement dated November 30, 2021 and the plaintiff's list of documents. It was his testimony that the power lines were placed on the suit property in March 2014 and that before then there were was no power line.
7. In cross-examination, PW1 stated that the witness statement he filed did not indicate that he was duly authorized to write the witness statement. It was his testimony that by the time he went to the suit property there was supply of electricity but that the suit property never had power lines on it.
8. It was his evidence that the power lines were not on the entire suit property which measures 1.14 hectares translating to 2.82 acres. That the surveyor measured the area that has been encroached by the power lines and the valuer assessed the encroached area at Kesh 63,000,0000 but the valuation report shows that the market value of the property to be Kesh 45,120,000. placed on the suit property in the year 2014 March and that he had known the property for 48 years. He stated that he had asked for mesne profits as a result of the valuation report and that the rental of property in that area is Kesh 100,000 per acre.
9. On further cross-examination he testified that the demand letter dated June 10, 2014 made reference to the removal of poles which were on the site but the photograph that was in the bundle of the plaintiff's documents at page 28 shows power transmissions lines. Further, he testified that the photograph at page 20 of the plaintiff's bundle of documents shows concrete poles of the power lines yet Kenya Power before was using wooden poles.
10. It was his testimony in cross-examination that the concrete poles shown in the picture on page 20 were on site to replace the wooden ones. He testified that the surveyor advised that the area covered by the power line was 10 metres on each side of the centre pole but that he did not advise or explain the rationale behind the 10 metres. He testified that under the power line no activity can be undertake.
11. In re-examination he testified that the title he provided to the court has no provision for way leave. Further that he asked the defendant not to deposit the poles on the suit property but when they persisted the plaintiff then wrote a demand letter. He testified that the rental value figure he provided was informed by the going land rents in the area which he is conversant with since he buys and sells land. He stated that the power lines are high voltage lines.
12. The surveyor, PW2 – Gidraph Kuria Mutungi informed the court that he prepared a valuation report on March 3, 2021 which he wished to have adopted and that he inspected the property on February 23, 2021. The report was produced as an exhibit. He testified that the property was in the name of Joseph Wathua Kigwe and Rosemary Wanjiru Wathua who he stated gave him verbal instructions to carry out the valuation.
13. He testified that he was asked to prepare a report for compensation for land taken up by the power line on LR No 18697/4 . It was the evidence of the surveyor that he picked up the traceline and plotted the area encroached as being covered by the traceline . The surveyor referred the court to the document in the bundle plan A at page 16. He testified that the area valued was 1.14 hectares approximately 2.82 acres which he said he arrived at a market value of Kesh 45,120,0000. He testified that in his report he sued the worked way leave but he meant trace-line. He testified that for safety any developments near



a high voltage power line has to be 10 metres away from the centre of a 66 KV line which otherwise has to be stepped down for domestic use.

14. He testified that the land rentals would range from Kesh 120,000 to Kesh 150,000 per acre for leasing in the area where the suit property is situated.
15. PW2 In cross-examination, testified that he was instructed to prepare a valuation report for purposes of compensation and therefore he did not mention value of rentals because that was not his assignment. He clarified that he added a 15% line which was previously in the repealed Act [Cap 295](#). He stated that he was aware that when a law is repealed it ceases to exist.
16. It was the evidence of PW2 that he based his valuation on 20 metres width of the trace-line having 10 metres on each side. He testified that the area he sued was surveyed by Development Surveyors. It was his testimony that currently the values of the land would be higher in the margin of 20-21 million per acre. He testified that he did not annex his practice certificate and he stated that he had it in court and he produced it in court.
17. He stated that he visited the suit property and noted that the developments had to be older and that there were new buildings in the neighbourhood. He however stated that he could not determine the age of the power line that he saw but that the poles were wooden power lines. He stated that there was step down electricity available for connection.
18. He testified that the traceline traversed the suit premises in a manner that if sub-divided it would produce some plots but he stated that he did not come across a subdivision scheme which was to be proposed and approved but that it looked like a number of those sub-divisions could be adversely affected . He stated that he added 30% in the area of the trace-line which is an addition to what what the market value is in line with the practice of valuation.
19. In re-examination, PW2 stated that he saw wooden poles when he visited the property. He stated that on the suit property the poles could have been concrete but he could not speak to the nature of poles since his assignment did not include inspection of poles. With this the plaintiff closed his case

#### **The Defendant's Case:**

20. The defendant's senior property officer, DW1- Mr Jadel Muriuki, stated that he was a valuer and he prepared a valuation report regarding the suit property dated October 26, 2022. It was his evidence that he visited the site and valued the area measuring 1.41 acres and the market value was Kesh 30 million.
21. It was his testimony that the surveyor who went to the site with him carried out a trace analysis and a 66 KV power line is classified as a medium risk with a 5 metre distance which he testified to be the Electricity Standards and Guidelines.
22. He testified that he had indicated in his report compensation at 50% of the value of the land since according to his testimony power lines are not full acquisition of land but an acquisition of right of way. The compensation he stated is for restricted use of the trace-line
23. It was his testimony that when he visited the site the development were 10-15 metres from the centre pole and there were traces for removal of wooden poles. He stated that the manufacturing date on the concrete poles was indicated as the year 2015. He also testified that under the 66 KV lines there were other cables of 33 KV but he was not aware when they were put up.
24. He testified that the valuation report produced by the valuer for the plaintiff PW2 had given the traceline distance as 20 metres and not 10 metres and it is his testimony that the area under reference was doubled that based on the powerline guidance the distance of 20 meters is incorrect.



25. He stated that there was no evidence of sub-division and although his report has a 30% component for injury this could not be added. He was of the view that the compensation request of Kesh 82,000,000 is above the market value of the affected area and the tracement. He also stated that the lines were constructed a while ago from the ground and so he did not understand why there has to be compensation now. He urged the court not to find for compensation since there is minimal effect on the land.
26. During cross-examination he stated that he only visited the suit property on October 26, 2022 a day before the hearing of the case and he stated that he saw power lines belonging to the defendant. He stated that paragraph 50 of the defence was not in tandem with his observation as an expert witness. He stated that there was no indication of a way leave on the title. Further that the power line on the property was the 66 KV line which is a medium power line.
27. It was his testimony that one cannot construct anything under the power-line but one can cultivate crops although he stated that he never saw any activity under the power line.
28. He testified that any construction of a flat would require that one leaves a trace of 5 meters since this is what is provided in the guidelines. He indicated that the neighbouring properties had left the requisite 5m. It was his testimony that the power lines with the concrete poles were erected in 2015. It was his testimony that the plaintiff should not be compensated.
29. During re-examination, it was his testimony that his report embodied his valuation per acre and he depended on the market value to arrive at the figure. He finalized his testimony by stating that he visited the suit property with a survey and confirmed that the 5 meters' distance is what is recommended for the 66 KV power line and the trace area is assessed based on the safety guidelines the plaintiff should not be compensated. With that the defendant closed his case.

### **Determination**

30. I have carefully considered the plaintiff's claim against defendant, the defendant's defence, the evidence adduced, the submissions, as well as the law applicable and the authorities herein cited.
31. I find the issues arising herein as being:
  - i. Whether the defendant trespassed on the plaintiff's land.
  - ii. Whether the plaintiff is entitled to orders sought in the amended plaint.
32. It is not in dispute that the plaintiff is the owner of the suit property. The photographs show that there are some power lines traversing part of the suit property and also there are holes dug and concrete electric poles deposited on the suit property (exhibit JWK3) showing that the defendant has work going on the plaintiff's land.
33. The plaintiff's case is that being the proprietor of parcel of land No LR 18697/4, its claim was thus against the defendant to the effect that sometime in the year 2014, the defendant trespassed on his land, and despite receiving a letter from the plaintiff dated June 10, 2014 requiring them to stop their activities of trespass they did not heed they proceeded and completed to erect the power lines between September 2014 and March 2015.
34. The defendant through DW1 testified that the power lines existed on the suit property since 1963 in view of the fact that there was a substation supplying the area with electricity. Further he submits that the area occupied by the power tracement is 1.14 acres and not 2.82 acres as submitted by the plaintiff and assessed the market value of the occupied areas as Kesh 30,000,000 and the compensation value at Kesh 15,000,000 being 50% of the market value.



35. The defendant maintained that the plaintiff has not proved any cause of action against the defendant since the said power lines were in existence since 1963 and that the concrete poles were being used to upgrade from the wooden power lines. The defendant however agrees with the plaintiff that the title for the plaintiff does not show existence of a way leave.
36. I am aware that whereas the rights and interests of a registered owner of a property are protected by section 25(1) of the [Land Registration Act](#), such interests will be subject to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register. Section 28 of the [Land Registration Act](#) provides as follows:
- Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-
- i. Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected constructed or laid in pursuance or by virtue of any power conferred by any written law;
- 37.. Similarly section 173 (1) of the [Land Act](#) provides for creation of public right of way and section 143(2) provides as follows:
38. A public right of way may be;-
- a. A right of way created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions referred to in this Act as a wayleave; or
  - b. A right of way created for the benefit of the public, referred to in section 145 of this Act as a communal right of way.
39. It is therefore clear that the rights of a proprietor can be defeated by operation of the law. For this argument to be upheld by court the defendant ought to have presented evidence that would persuade the court that this is the case.
40. In the instant case there is no indication that there is a way leave and DW1 stated so in his testimony. In its submissions the defendant stated that the property appears to have had a powerline since 1963 to supply 32 KV to Juja area and that the defendant is likely to have upgraded the existing powerline to KV 66 using concrete poles. However, no evidence was tabled to support this claim.
41. It is trite that construction of a wayleave on private land requires consent of its owner. In this instance, the defendant never adduced any evidence to confirm that the plaintiff's consent was obtained before the high voltage power lines were upgraded thereon.
42. Since the defendant never offered evidence to the contrary, and the burden of proof was upon it to do so, I find that it overlooked procedural regulations in the construction of high voltage power lines on the suit land as set out in sections 171 and 173 of the [Energy Act](#) cap 1 of 2019 which provides that; "171 (1)A person who wishes to enter upon any land, other than his own to—  
(a)undertake exploratory activities relating to exploitation of energy resources and development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, or drilling exploratory wells;(b)carry out a survey of the land for the purposes of paragraph (a);shall seek the prior consent of the owner of such land, which consent shall not be unreasonably withheld: Provided that where the owner cannot be traced, the applicant shall give fifteen days' notice, through appropriate mechanisms including public advertisement in at least two



newspapers of nationwide circulation and an announcement in a radio station of local coverage for a period of two weeks.”

43. While section 173 of the *Energy Act* states thus; (1)An owner, after receipt of a request for consent under section 171 may consent in writing to the development of energy infrastructure, upon agreement being reached with the applicant as to the amount of compensation payable, if any, and any consent so given shall be binding on all parties having an interest in the land, subject to the following provisions—(a)that any compensation to be paid by the licensee giving notice to the owner, in cases where the owner is under incapacity or has no power to consent to the application except under this Act, shall be paid to the legal representative of the owner; and(b)that an occupier or person other than the owner interested in the land shall be entitled to compensation for any loss or damage he may sustain by the development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, drilling geothermal wells or coal long as the claim is made within three months after the development.”
44. Section 3 of the *Trespass Act* further provides that, “(1)any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (2)Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
45. From the evidence before court while relying on the legal provisions cited above, I opine that the defendant’s aforementioned actions amount to an illegal entry into private property and can be deemed as trespass. The plaintiff contended that if the defendant is not directed to remove the said high voltage power lines from the suit land, the trespass will be continuous. Continuous trespass is defined in the *Black’s Law Dictionary* 8<sup>th</sup> edition as, “A trespass in the nature of a permanent invasion on another’s property.”
46. In the case of *Eliud Njoroge Gachiri v Stephen Kamau Nganga* ELC No 121 of 2017 “However in a case of continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts are aggregate form one indivisible harm.”
47. Further in the case of *John Kiragu Kimani v Rural Electrification Authority* (2018) eKLR the court held that: “following that evidence, it is clear from the record that no consent, authority or permission of the plaintiff was ever sought and/or obtained. No notice was given to him of the impending project as contemplated by section 46 of the *Energy Act*. The irresistible conclusion is that the defendant is guilty of trespass.”
48. The defendant constructed high voltage power lines which have remained on the suit land since 2014 to to date as evident by the photographs produced as an exhibit. Further, I concur with the plaintiff and find that its actions indeed amount to continuous trespass.
49. As to whether the plaintiff is entitled to the orders sought in the plaint
50. The plaintiff sought for a permanent injunction, mandatory injunction, general damages, mesne profits against the defendant. In the alternative a payment of a sum of Kesh 82,528,875 being cost of compulsory acquisition.
51. In the case of *Fleetwood Enterprises Ltd v Kenya Power & Lighting Co Ltd* [2015] eKLR Justice Angote while dealing with an issue of quantum of damages in trespass held that, “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 land is a determinant factor where parties consent that the power line should not be moved.

52. In the above case the plaintiff wanted the power lines removed. Judge Angote proceeded to further state that, “ it is trite law that the value of land keeps on appreciating, and had the plaintiff developed the 16 parcels of land 5 years ago, they would have generated income from them. In the circumstances of this case, I would agree with the plaintiff’s advocate submissions that had the 16 plots been developed were it not for the connected electric line. The plaintiff would have earned at least Kesh 5000 per month. However, due to the vagaries that come with such developments, I will reduce the said figure to an amount of Kesh 4,000 per plot per month. The total payable damages to the defendant’s acts of trespass over the 16 plots for a period of 5 years will therefore be Kesh  $4,000 \times 12 \times 5 \times 16 =$  Keshs 3,840,000.”
53. The Court of Appeal upheld the above decision, and dismissed the Appeal in *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR and stated that, “trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages 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.”
54. It was the testimony of the witness of the defendant DW1 that one cannot construct anything under the power lines but they can cultivate crops. This was corroborated by PW1 who testified that no activity can be done under the power-line. With respect to general damages, the defendant had conceded that the plaintiff should be awarded 50% of the market value because according to his testimony powerlines are not full acquisition of right of way. The compensation he recommended therefore is for restricted use for traceline Kesh 100, 000.00. In the case of *Duncan Nderitu Ndegwa v KP& LC Limited & another* (2013) eKLR P Nyamweya J held that: -
- “...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kesh 100,000/= as compensation of the infringement of the plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ trespass”
55. In so far as the plaintiff did not provide evidence on the loss he had incurred due the defendant’s acts of trespass but in associating myself with the decisions cited above and noting that the defendant has been on the suit land from 2014 to date which is 8 years, I find that the plaintiff may have been entitled to general damages exist indeed entitled to general damages for the continuous trespass.
56. On compensatory damages, the plaintiff particularized the loss and damages to an aggregate of Kesh 67,444,000 since in the words from the report of G.K Mutungi & Associates “...the way leave is viewed as a permanent condemnation of the land it occupies...” *vide* the valuation report has pegged the compensation at Kesh 67,444,000.
57. The defendant presented a valuation report that assessed the trace area covered by the way leave to be 1.14 acres and assessed the compensation at Kesh 30,000,000. In their submissions however they contend that the plaintiff does not deserve to any compensation. DW1 however testified that he did not include in his valuation report the injurious effect since in his testimony he states that they were valuing for right of way and for that they seek for a 50-50 usage. Further that the compensation indicated in the plaint of Kesh 82,000,000 is above the market value of the affected areas and the trace-line.



58. In note that the plaintiff has also sued for mesne profits against the defendant. Section 2 of the Civil Procedure Act defines mesne profits as follows:-

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

59. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded and stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages*, 18<sup>th</sup>Ed para 34-42.”

60. The plaintiff has sought for mesne profits from the defendant but he has not particularized the claim except for stating that the rental per acre is Kesh 100,000. It is not clear where he got this figure from and there is no evidence laid before the court to confirm this.

61. The Court of Appeal in the case of Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR was of the opinion that it was upon a party to place evidence before the court upon which an order of mesne profits could be made. The court stated as follows: -

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

62. I have considered the evidence herein adduced by the plaintiff and find that the same falls short of the requirements proving that the plaintiff had suffered loss of profits as a result of the defendants alleged impugned actions on his land, there no receipt produced therein confirming that the plaintiff had paid for renting out his parcel of land and neither was there evidence adduced on the income produced from the impugned 1.14-acre piece of land prior to 2014. The net result therefore is that i find and hold that the plaintiff has not proved his case as against the defendants for mesne profits. It is clear that no evidence was led on this and the court declines to grant the prayer.

63. In the same paragraph, at sub-paragraph 11(c) it was suggested that the defendant could take the plaintiff's land after compensation or pay at sum of Kesh 82,528,875. That is left for the parties to explore possibilities on their own.

64. In conclusion, on the admission of the defendant that they have erected a 66 KV line on the suit property in the area described by both the defendant and plaintiff as being 1.14 acres and 2.82 acres respectively. Considering the acreage involved and the fact that that the poles on the plaintiff's land are of permanent nature wherein nothing can be constructed underneath and based on the facts as presented, I will proceed to assess the compensatory award by considering the value of the suit property minus the injurious affection which is pegged at 30% and the 15% that was previously in the repealed Acquisition Act cap 295 as per the valuation report presented by the plaintiff. This means that I am awarding the plaintiff the loss of use of 2.82 acres of land translating to 1.14 hectares. The plaintiff has sought for a permanent injunction but since i have already compensated him for the portion utilized



by the defendant, I will decline to restrain the defendant from using the said portion. I further opine that it would be pertinent if the plaintiff and defendant had a structured wayleave agreement.

65. It is against the foregoing that I find the plaintiff has established its case on a balance of probability and will proceed to make the following final orders:

- i. A declaration be and is hereby issued that the defendant has trespassed on the suit property without the plaintiff's consent and caused permanent and irreparable damages thereto;
- ii. General damages for the continuous trespass be and is hereby awarded at Kesh 1 million.
- iii. Compensatory damages be and is hereby awarded at Kesh 45,120,000
- iv. Costs of the suit is awarded to the plaintiff.
- v. Interest on (ii), (iii) and (iv) above to accrue 60 days after the date of this judgment until payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2023.**

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**MOGENI J**

**JUDGE**

Judgment read in virtual court in the presence of:

Mr Agwara for the Plaintiff

Mr Muga for the Defendant

Ms. Caroline Sagina : Court Assistant.

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**MOGENI J**

**JUDGE**

