



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karani v Kenya Power (Environment & Land Case 662 of 2012)  
[2023] KEELC 717 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 717 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 662 OF 2012  
JA MOGENI, J  
FEBRUARY 13, 2023**

**BETWEEN**

**ROBERT KARANI ..... PLAINTIFF**

**AND**

**KENYA POWER ..... DEFENDANT**

**JUDGMENT**

1. By a Complaint dated 1/10/2022, an Amended Complaint dated 24/06/2013 and a further Amended Complaint dated 01/04/2019, the Plaintiff sought judgement against the defendant for the following orders:
  - i. A declaration that the defendant by itself, its agents and or servants has unlawfully trespassed on the plaintiff's Plot No 103 of 6485/182 Embakasi Utawala Estate.
  - ii. Mesne Profits as from 4<sup>th</sup> November 2011 till the date the defendant shall vacate.
  - iii. General damages for trespass.
  - iv. An order for eviction from Plot No 103 OF 6485/182 Embakasi Utawala Estate of the defendant by way of an order compelling it to forthwith relocate its voltage power cables therefrom.
  - v. General damages for psychological and emotional pain and suffering.
  - vi. Special damages of Ksh.14,000
  - vii. Costs of the suit.
2. The suit is opposed, the Defendant filed a Statement of Defence dated 18/07/2013, an Amended Statement of Defence dated 5/07/2021 and Defendant's Further Amended Statement of Defence dated 21/03/2022.



3. The suit proceeded by way of Viva Voce evidence. The Plaintiff and the Defence each called one witness. Both parties testified on 7/07/2022.

### **The Plaintiff's case**

4. The Plaintiff avers that, at all material times he was and is the registered proprietor of all that plot known and described as Plot No.103 Of 6485/182 Embakasi Utawala.
5. The Plaintiff asserts that, his plot is partially developed with the ground floor of a commercial stone building duly completed and occupied. The defendant transmits, distributes and retails electricity throughout Kenya. Equally, the defendant has unlawfully, recklessly and negligently erected high voltage electric power cables which dangerously overhang the plaintiff building being aforementioned.
6. It is the Plaintiff's case that, on 4<sup>th</sup> November 2011, the he raised a complaint regarding the aforesaid high voltage power cables with the defendant. The defendant's employees frustrated him and so he had to engage Legal services.
7. The Plaintiff contends that, on 17/04/2012 his Lawyer wrote a demand and notice of intention to sue in lieu of the complaints above. In the same breath, on 04/05/2012, the defendant's way-leave officer of the Nairobi region made a response to the letter and requested to be furnished with a route sketch to the plaintiff's plot and contracts of Liaison officer to enable him visit the site and carryout investigation.
8. The Plaintiff asserts that, on 17/05/2012, before a response to his earlier letter could be made, the way-leave officer wrote another letter in which he confirmed that the Plaintiff's house was under power lines. He said that before he could complete the investigations, he needed the plaintiff to furnish him with a cadastral plan of the area and a copy of land ownership documents in regard to the said plot.
9. The Plaintiff avers that, on 11/06/2012, his Lawyer made a response and forwarded the documents that had been requested for. Again, on 9/07/2012 the Plaintiff's Lawyers wrote to the defendant's way-leave officer seeking to be provided with an update on progress of his investigations. Also, on 14/08/2012 the way leaves officer made a response in which he indicated that he had visited the scene and had referred the matter to the defendant's chief engineer O&M N/South for further guidance and implementation.
10. It is the Plaintiff's case that, on 13<sup>th</sup> September,2012 the Plaintiff's Lawyers made a response in which they inter alia, indicated that no timeline was given for rectification of there of the problem. They demanded an indication on the time line within 7 days lest the Plaintiff be constrained to move to Court.
11. The Plaintiff contends that, on 21<sup>st</sup> November,2012 the defendant's employee removed some of the low-lying cables and installed a transformer near his Plot. He was therefore able to construct the first floor of his building. However, he cannot construct another floor because high voltage power cables still dangerously and unlawfully overhang the suit premises.
12. The Plaintiff asserts that, on 17/05/2017, the defendant's employee's aboard Lorry registration number KBQ 225 D went to the subject plot and started the process of relocating the poles that supported the offending cables. The said employees finalized the process by 19/05/2017 when the high voltage electricity power cables were completely relocated. Further on 4/11/2011 when the complainant raised a complaint with the defendant until 19/05/2017, defendant had trespassed on to the Plaintiff's plot by way of the high voltage electricity cables that prevented him from utilizing half his plot on second floor.
13. It is the Plaintiff's case that, ½ of the 2<sup>nd</sup> floor that he developed had been bringing in monthly rented income of Ksh,20,000. Equally, he lost income that he would have earned from half the 2<sup>nd</sup> Floor had



he developed it. The income would have been similar to the income generated from the developed half amounting to Ksh.20,000 per month and to Ksh.1,340,000 for period between 4/11/2011 and 19/05/2017.

14. The Plaintiff avers that he was issued with Title deed for plot number 103 of 6485/182 Embakasi Utawala Estate which was re-numbered as Nairobi/Nairobi Block 186(Nawell)103.

### **Evidence by the Plaintiff**

15. PW 1 Robert Karani testified he is a security officer. He relied on his two witness statements dated 5/09/2012 and 19/02/2019 as well as list and bundle of documents produced as exhibits Nos 11-77 as his evidence in chief.
16. It was the plaintiff's testimony that he made official complaints to the defendant although he did not write an official letter. He then engaged an advocate, who took up the matter and communicated they communicated formally. The defendants took up the matter but he filed his suit in 2012. In his further amended Plaintiff, he stated that the offending cables were rectified. From Pg.63-65, he had filed a surveyor Report. One of the transmission lines has encroached on to his property. Pg.48-50 of the trial bundle indicates the annexed photographs and the position of the cables.
17. The Plaintiff stated that, after Nov 2012, he was able to construct but prior to the removal of cables, he could not construct. Equally, he had filed approved building plans by the relevant offices.
18. During re-examination, he stated that there was rerouting of the power line that was rectified in two phases. The First phase was 2012 while the second was 2017. So within the five years there was a line hanging, and has attached the agreement for rent.
19. With that, the Plaintiff closed its case.

### **The Defendants Case**

20. The Defendants entered appearance on 26<sup>th</sup> October, 2012, and filed a Statement of Defence, an Amended Statement of Defence and a Further amended Statement of Defence dated 18<sup>th</sup> July, 2013, 5<sup>th</sup> July, 2021 and 21<sup>st</sup> March, 2022 respectively.
21. The Defendant avers that, they took adequate steps to reverse the installation and the electricity lines were moved away and far from the affected areas including the alleged property hence rendering the suit mute.
22. The Defendant asserts that, the Plaintiff's own Surveyor's Report confirmed that only one of the transmission lines passed over the said plot by 0.1 Metres which transmission line was immediately and permanently removed by the Defendant.
23. The Defendant contends that, the electricity poles and power transmission lines are on the road reserve and not on the Plaintiff's alleged property.

### **Evidence by the Defendant**

24. DW 1 Patrick Musyoki Mutisya testified that he is a Way Leave Officer at Kenya Power. He relied on his witness statement dated 21/03/2022 and a list of documents dated 11/03/2016 and 21/03/2022 as his evidence in chief.



25. During cross examination, he testified being an employee of the 1st defendant and confirmed having received a complaint via the Plaintiff's advocate regarding a power line encroachment through his advocate.
26. DW1 stated that, the hanging cables were removed in 2012 and not 2017 as was indicated in Paragraph 10 on maintenance. No 10 of Paragraph 10 of his statement he states about maintenance.
27. DW1 asserted that, his actions for moving the lines that were hanging in 2017 was not an admittance of liability, but a normal maintenance, and the defendant took action to correct the anomaly. Further, the survey report dated 7/09/2017 ascertained that all the poles were within the road reserve.
28. During re-examination, he testified that, upon receiving official complaint, investigations were conducted and the cables were rectified in 2012. Accordingly, the defendant Company erected the power lines with the prescribed road reserve.
29. With that, the Defence closed its case.

### **Submissions**

30. Both the Plaintiff and Defendants filed submissions dated 20<sup>th</sup> day of July 2022, and 20<sup>th</sup> September 2022 respectively.

### **The Plaintiff's Submissions**

31. To establish the issue regarding the general damages for trespass, and whether the Plaintiff is entitled to mesne profits amounting to Ksh.1,340,000/=, the Plaintiff anchored his assertions on the decisions made in *Phillip Ayaya Aluchio v Chripine Ngayo* [2014]eKLR, *Nakuru Industries Limited v SS Mehta and Sons*, [2016]eKLR, *Park Towers Limited v John Mithamo and 7 others* [2014]eKLR as well as *Fleet wood Enterprises Ltd v Kenya Power and Lighting Co.Ltd* [2015]eKLR and submitted that, in the foregoing, he has established that indeed the defendant was a trespasser and prays that the orders sought be granted.

### **The Defendant's submissions**

32. To determine whether the defendant had trespassed on the Plaintiff's Property Plot No.1030/6485/182 Embakasi Utawala Estate, the defendant relied on the case of *Telkom Kenya Limited v County Government of Muranga* [2019]eKLR, as well as *Cecilia Mwangi Mwenda and 6 others v Isaac Kimatu Ikunga* [2019]eKLR, and submitted that, the Defendant did not trespass on the Plaintiff's property and that the Plaintiff has failed to produce evidence to anchor his claim.
33. To establish whether the Plaintiff is entitled to Mesne Profits as from 4<sup>th</sup> November 2011 to 19<sup>th</sup> May 2017, he relied on the Court's assertion in *Fredrick Korir v Soin Women Group* [2018]eKLR, *Harrow Investment Limited v Harbajan Singh Sembi* [2021]Eklr, *Peter Mwangi Mbutia and Another v Samow Edin Osman* [2014]eKLR, as well as *Karanja Mbugua and Another v Marybin Holding Co.Ltd* [2014]eKLR, and submitted that, having established that the Defendant did not trespass on to the Plaintiff's property, the Plaintiff is not entitled to damages for trespass including mesne profits.
34. Again, to determine whether the Plaintiff is entitled to general damages for psychological and emotional pain and suffering, the Defendant relied on the decision in *Caltex Oil (Kenya) Limited v Rono Limited* [2016] eKLR, and submitted that, the Plaintiff is not entitled to general damages for psychological and emotional pain and suffering, as he failed to emphasize how he had incurred the pain.



35. Lastly, to determine on who should bear the costs, the Defendant its averments on the decision in *Peter Muriuki v Equity Bank(K) Ltd* [2018] eKLR, and submitted that, the Plaintiff's Further Amended Plaint dated 1<sup>st</sup> April, be dismissed with costs to the defendant.

### **Analysis and Determination**

36. The issue that calls for determination is whether the defendant has trespassed onto the plaintiff's property or whether it is the plaintiff who has obstructed or interfered with the defendant's power lines by constructing a building beneath them thus contravening with the provisions of section 65 of the *Energy Act*. When cross-examined by the Court, the plaintiff stated that it was the defendant who put power poles and put high voltage cables over his plot. The plaintiff's evidence was rebutted by the defendant who stated in the amended plaint dated 21/03/2022 at paragraph 13 that the plaintiff's own Surveyor's Report confirmed that only one of the transmission lines passed over the plaintiff's plot by 0.1 meters. The defendant's claim to have permanently removed the offending cable and therefore they claim that the plaintiff's suit is overtaken by event and it therefore mute since the electricity lines were moved far from the affected area.
37. The defendant even denies that there was any loss of income by the plaintiff and further that there is no evidence that the plaintiff would have developed the plot were it not for the alleged trespass by the defendant since the plaintiff did not produce any approved building plans.
38. The plaintiff has also stated that his building was connected to power on 16/02/2012 by Kenya Power officers who visited his premises. This fact has not been controverted nor denied by the defendant. By connecting the plaintiff to be supplied with power, this was a clear indication that the building was not under the power lines and it is therefore the defendant's agents who as admitted in the witness statement at paragraph 6 that investigations on the plaintiff's complaint revealed that one of the poles was leaning on the side of the plaintiff's plot. The defendant witness Mr. Patrick Musyoki Mutisya stated that the plaintiff's property was under the power line and erected on the road reserve. This however contradicts the action of having connected the plaintiff's property to power.
39. I note that the plaintiff did not produce the approved plans for his construction. However, if indeed the plaintiff was supplied with power as he states, which is not denied, it is unlikely that the defendant would have supplied him with power if he had constructed his building under the power lines.
40. Then there is the report of the surveyor which was produced by the plaintiff and was not controverted which clearly stated that the Kenya Power and Lighting poles are in the road reserve but lean towards plot no.103 and that one transmission line encroaches into plot no. 103 by approximately 0.1 meters a fact that is also stated by the defendant in their defence. The report recommends that the transmission lines need repositioning. This fact is also not denied by the defendant's who however state that they are already repositioned the lines and therefore rendering the suit herein mute and unnecessary.
41. DW1 stated while giving his evidence that though he had stated in his witness statement that the plaintiff had encroached on a road reserve, he did not have evidence to prove this fact. He also stated he is the one who removed the power lines in 2017 after the plaintiff had complained although he states that this was not an admission of liability but it was normal maintenance undertaken by the company. At paragraph 6 of DW1's witness statement he states as follows:

“Investigations on the Complaint revealed that one of the poles was leaning on the side of the Plaintiff's Plot and one of the distribution lines hand over the plot. The matter was thereafter referred to the Operations and Maintenance Section for redress”.



42. The import of the above statement is that the defendant's agents had to address the issue of the cables and as was admitted by DW1 in his testimony they were moved from the plaintiff's plot meaning the power cable(s) trespassing onto the suit property. A casual glance at the photographs of the building and the lines shows that indeed there is an additional post further from the original post and the pictures show that the lines were shifted away from the building. This is a clear demonstration of trespass. If the plaintiff was at fault, the defendant should have been the first to institute criminal proceedings against the plaintiff for infringing section 65 of the [Energy Act](#).
43. The fact that the defendant did not do so suggests that it was them who laid their cables over an existing construction which amounts to trespass. Clerk & Lindsell On Torts 18<sup>th</sup> Edition defines trespass as "any unjustifiable intrusion by one person upon land in the possession of another". Proof of ownership of the property is prima facie proof of possession and a victim of trespass is entitled to damages to compensate him.
44. The evidence before me clearly shows that the Defendant laid and connected electric power cables lining towards the Plaintiff's land without the Plaintiff's consent contrary to the provisions of section 46 and 47 of the [Energy Act](#).
45. From the plaintiff's evidence, I am satisfied that it is the defendant which trespassed onto his property and he is therefore entitled to the orders sought in his plaint. Further, DW1 also produced the survey report which however only made observation regarding the poles and is silent about the power lines. Yet it is the power lines that the plaintiff complained about and instituted this suit about.
46. From both the plaintiff's and defendant's evidence the power lines have since been moved and are now not leaning over the property of the plaintiff. This admission on the part of the defendant is an admission of fault since in their evidence they said "...the power cables were removed in 2012 and not 2017." I find that the DW1 contradicted himself when in his evidence he stated that "... My action for moving the lines that were hanging in 2017 was not an admittance of liability it was a normal maintenance". This statement lends credence to the plaintiff's evidence that the power lines were removed in 2017.
47. 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 erected thereon.
48. 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 201.
49. 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.”
50. 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 of 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.”



51. 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.”
52. The Plaintiff sought for mesne profits as from 4/11/2011 to 19/05 2017, general and aggravated damages for trespass, general damages for psychological and emotional pain and suffering and special damages of Ksh 14,000.
53. The Court of 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. From the foregoing it clear that the plaintiff is entitled to a reasonable sum to compensate him. The award of damages for trespass is discretionary in nature but this discretion must be exercised judiciously. There is no mathematical formula to guide the Court in assessing the quantum payable and each case has to be considered on its own peculiar circumstances remembering always that no two cases can ever be the same.
55. However, in assessing the damages payable, the Court will consider among other factors the size and location of the property and the length of time that the trespass has taken. If there is damage to the property, then that would have a bearing on the amount of damages. From the photographs produced (Exhibits 36-40 and 43-50), the property is not situated in the Nairobi Central Business District but in the Embakasi area which is a prime location by any standards. And from the rental agreements (Exhibit 12-23), the monthly rental income for the shops and one-bedroomed house range from Ksh. 5,000 to Ksh. 8,000 per month. These are crucial guides in assessing damages. I note that the plaintiff has sought special damage and mesne profits.
56. In his Amended Plaintiff the Plaintiff sought for a declaration that the Defendant’s actions amounts to illegal trespass onto the Plaintiff’s suit land. Having held that indeed that there was trespass, the Court finds this prayer merited. Further it is only fair then that the Defendant compensates for the trespass having removed the encroaching power lines.
57. The Plaintiff also sought for an eviction order against the Defendants. It is not in doubt that the Plaintiff is the registered owner over the suit property and is the indefeasible and absolute owner. Therefore, he is entitled to all the rights and privileges appertaining to it as provided by sections 24 and 25 of the *Land Registration Act*. In this regard, the Plaintiff therefore is entitled to the quiet use of his land. The court will however not pronounce itself over this order of eviction since the defendant has testified that they have already moved the powerlines. and the Court finds and holds that the Plaintiff’s entitled to the orders sought.
58. For the Special Damages sought the plaintiff referred to the cost of the surveyor that he engaged. It is trite that Special Damages must be specifically pleaded and proved. In his Amended Plaintiff at paragraph 10 (f), the Plaintiff pleaded for Kshs.14,000/= which has been pleaded and proved by production of the acknowledgment of receipt of payment to Titus Wambua the Surveyor.



59. As for General Damages for trespass, psychological harm the Court is persuaded by the case of *Park Towers Ltd v John Mithamo Njika et al* (2014) eKLR, where the Court held that:-

“I agree with the learned judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages, The Court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case.”

60. Further In the case of *Philip Aluchio v Crispinus Ngayo* [2014] eKLR, the Court held as follows:-

“..... The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage. It has been held that the measure of damages for trespass is the difference in the value of the Plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less .....

The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass....”.

61. As the Plaintiff has already proved that there was trespass, the measure of damages would therefore be the amount. The Plaintiff vide the Valuation Report was not able to adduce evidence with regards to the state of his property after the alleged trespass. Further the Plaintiff has also not indicated the value of the suit property before and after the alleged trespass. Without any other valuation of the land before the alleged trespass, the Court has nothing to adequately assess the General damages. The Court is therefore inclined to grant general damages of Kshs.3,000,000/=. See the case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR where the court held that ;

“A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, I have found the defendants did trespass onto the plaintiff’s land and conduct some excavation. For this reason, I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full.

62. As already noted in the elsewhere in this judgment the plaintiff had sought for mesne profit. Mesne profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates. It must be pleaded and proved. However, where a party claims for both mesne profits and damages for trespass, the Court can only grant one. In this instant as the Court has already granted General Damages, this prayer for mesne profit is declined. See the case of *Maina Kabuchwa v Gachuma Gacheru* (2018) eKLR, where the Court held that:-

“Where a party claims for both mesne profits and damages for trespass, the Court can only grant one.”

63. It is trite that costs follow the events and the Plaintiff being the successful party is therefore entitled to the cost of the suit.

64. Having now carefully considered the available evidence and the exhibits thereto, the written submissions, cited authorities and the relevant provisions of law, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

65. Ultimately therefore, this Court is satisfied that the plaintiff has proved his case against the defendant as required in law. Judgment is entered for the plaintiff against the defendant in the following terms:-



- i. A declaration that the defendants by itself, its agents and or servants have unlawfully trespassed on the plaintiff's Plot No 103 of 6485/182 Embakasi Utawala Estate.
- ii. Kesh 3,000,000 General damages for trespass.
- iii. Special damages of Ksh.14,000
- iv. Costs of the suit and interest on (ii) and (iii) until payment in full from the date of this Judgement.

It is so Ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**MOGENI J.**

**JUDGE**

In the presence of

Ms. Mudibo for the Defendants

Ms. Hamba holding brief for Mr Magee for Plaintiff

Caroline Sagina: Court Assistant

Mogeni J.

Judge

