

IN THE SUPREME COURT FOR ZAMBIA

APPEAL NO. 022/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ZESCO LIMITED

AND

CLIVE MUKANDO

(SUING AS PERSONAL REPRESENTATIVE OF
THE ESTATE OF THE LATE JUSTIN JEREMIAH MUKANDO)



APPELLANT

RESPONDENT

Coram : Mwanamwambwa DCJ, Malila and Mutuna JJS

On 2nd October 2018 and 23rd November 2018

For the Appellant : Mrs. D. Machona, Chief Legal Officer, ZESCO

For the Respondent : Mr. G. Phiri of Messrs PNP Advocates

J U D G M E N T

Mutuna JS. delivered the judgment of the Court.

Legislation referred to:

- 1) **Electricity Act, Cap 433**

Other works referred to:

- 1) **Blacks Law Dictionary, by B. Garner, 7th edition, West Group, USA.**

Introduction

- 1) The Appellant is charged with the responsibility of the provision of electricity to households and institutions in Zambia. In doing so, it erects electricity poles, installs electricity lines and generators and erects substations in various locations throughout the country.
- 2) In order to effectively carry out its mandate, the Appellant invariable has to enter upon various properties owned by individuals and institutions because electricity lines cut across various pieces of land. The Appellant is thus required to respect the property rights of these property owners and, for this reason, the ***Electricity Act*** has made provision for the obtaining of consent by the Appellant to erect electricity lines across properties in certain instances.
- 3) This appeal questions the award of compensation to the Respondent following the installation of electricity lines across his late father's property. The basis for the award was the finding by the Learned High Court Judge that the Appellant omitted to appeal to the Minister, in

accordance with the provisions of the ***Electricity Act***, after the Respondent's late father refused to give his consent to the installation of the electricity lines.

Background

- 4) The Respondent's late father, one Justice Jeremiah Mukando, the property owner, (hereinafter referred to as the deceased), was the registered proprietor of property know as Lot number 2551/M situate in Chief Muchinka's area of Serenje district of Central Province. Sometime in the year 1993, the deceased donated a 20 hectares portion of the said property to Serenje district council for purposes of construction of a school.
- 5) Subsequently, the school was constructed on part of the 20 hectares which was adjacent to the deceased's property. Between 2008 and 2010, whilst the deceased and his wife were away in the United Kingdom visiting a daughter, the Appellant's workers entered upon his property and caused electricity cables and poles to be erected across the property.

- 6) At that time the deceased's son, one Crofford Kunda Mukando, was the caretaker of the property and upon his return home from work found the poles erected on the property. This prompted him to enquire from the Appellant's officers who, in response, sent their worker to conduct an assessment. Following the assessment, Crofford Kunda Mukando was informed that, the deceased had given verbal consent for the erection of the poles and the electricity lines.
- 7) Upon his return from the United Kingdom, the deceased travelled to South Africa for treatment and later died. There is no evidence on the record of appeal to show that he took any drastic action against the Respondent prior to his death around 2010.

The Respondent's claim in the High Court and contentions of the parties

- 8) The Respondent commenced the action in the High Court against the Appellant in 2013 by way of a writ of summons and statement of claim. He claimed that the

Appellant had illegally erected two 11 KVA power lines through the deceased's farm without the consent of the deceased. Further, in consequence of the foregoing, the Respondent had suffered loss and damage arising from the devaluation of the property which cannot be sold or leased out.

- 9) In its response, the Appellant contended that verbal consent was obtained from the deceased prior to construction of the power lines across his property. It contended further, that a search conducted on the property revealed that the deceased's estate in the property had expired. Lastly, since the property's boundaries could not be properly distinguished from customary land, the Appellant also obtained the consent of the Chief prior to erecting the power lines.
- 10) At the trial, the Respondent's evidence restated the contentions made in the pleadings. The emphasis being that at no time did the deceased give consent to the Appellant for construction of the power lines across his property. On the other hand, the Appellant's evidence

revealed that: verbal consent was obtained from the deceased prior to construction of the power lines; the deceased did not object to the construction of the power lines; the construction of the power lines was done in the interest of the public as power was being supplied to the school; and the power lines erected over the property were medium voltage lines which did not require a way leave to be created prior to construction but still required the consent of the deceased.

Consideration by the Learned High Court Judge and decision

- 11) The Learned High Court Judge considered the pleadings, evidence and arguments by the parties and found that the issue that arose for determination related to one question of fact being, whether or not the deceased gave consent to the Appellant for the construction of the power lines across his property? She then considered the evidence of the witnesses and found that the Appellant's

witnesses contradicted themselves as to whether or not notice was given to the deceased prior to the erection of the power lines across the property and none of the Appellant's workers who allegedly visited the deceased to obtain his consent were called to testify.

- 12) In addition, the Learned High Court Judge accepted the Respondent's evidence that the deceased did not give consent for the erection of the power lines because he was unwell at the time. She also found that the Appellant did not give notice to the deceased prior to erecting the power lines in accordance with the ***Electricity Act***. She however declined to award damages for trespass because at the time the lines were being erected the deceased was aware and should have sought an injunction.

- 13) The Learned High Court Judge did however, award compensation to the Respondent pursuant to Section 14(3) of the ***Electricity Act*** on the ground that the Appellant did not appeal to the Minister after it failed to get the deceased's consent for the erection of the power lines.

The ground of appeal to this Court and arguments by the parties

- 14) The Appellant is dissatisfied with the decision of the Learned High Court Judge and has launched this appeal advancing one ground of appeal as follows:

14.1 The learned trial judge erred in law by misapplying the law in awarding the (Respondent) compensation under section 15(3) of the Electricity Act, Cap 433 of the Laws of Zambia which provides for compensation for transmission lines when in fact it is not in dispute that the lines in casu are distribution lines that are outside the ambits of the said provisions."

- 15) Both parties filed written submissions which they relied upon in advancing arguments before the Court.
- 16) The gist of the Appellant's arguments was that in terms of Section 15(1) of the ***Electricity Act***, the requirement of service of notice by the Appellant and consent by the owner of the land is required where the Appellant is placing transmission lines as opposed to the medium voltage lines which were placed across the deceased's property.
- 17) The Appellant argued that the evidence of DW1 who testified on its behalf in the Court below reveals that the electricity lines that were placed on the deceased's property were small lines found in the high density residential areas carrying a voltage of about 400v. The evidence revealed further, that there is a requirement that there should be a way-leave of about 22 meters of clear ground where high voltage lines are placed whilst the same is not applicable to medium voltage lines. As a

consequence of the foregoing evidence, the Respondent was not entitled to compensation.

- 18) The Appellant argued further that the Learned High Court Judge was on firm ground when she found that there was no trespass on the deceased farm and as such no damages were payable because the erection of the power lines were a necessity which benefited the community. Finally it was contended that the deceased did not object to the erection of the owner lines.
- 19) In the *viva voce* arguments, counsel for the Appellant, Mrs. Machona argued that the lines that were erected across the deceased's property are distribution lines as opposed to transmission lines. These lines, she argued, were of a low voltage which do not require the consent of the property owner prior to being laid. In addition she argued that a proper interpretation of section 15 of the ***Electricity Act*** reveals that it is only where the Appellant is erecting transmission lines which have a high voltage that the consent of the property owner is required. In

concluding she argued that the evidence of the Appellant's witness in the court below reveals that the deceased's consent was obtained.

- 20) In response, the Respondent contended that by definition and with reference to Section 2 of the **Electricity Act**, the phrase transmission line includes "*any cable or overhead line for the transmission ... of electricity ...*". Therefore, there is no distinction between high, medium, or low voltage lines as contended by the Appellant. According to the Respondent, the phrase transmission line is a general term applicable to any line which conducts or conveys electricity from one undertaking to another.
- 21) In regard to the issues of notice and consent, the Respondent argued that the wording of Section 15 of the **Electricity Act** makes it mandatory for the Appellant to serve notice and for a property owner to give consent. The findings by the Learned High Court Judge that no such notice was given and consent obtained was thus on firm

ground. The finding is not amenable to setting aside in line with our decision in the case of ***Nkhata and others-v-The Attorney General***¹.

- 22) In the *viva voce* arguments counsel for the Respondent, Mr. G. Phiri, argued that it is not clear from the evidence whether the lines that were laid are distribution or transmission lines. Further, the Appellant had not advanced the argument on the distinction in the two lines in the Court below because the defence focused on the contention that consent was given. He concluded by drawing our attention to the evidence of the Appellant's witness who testified that consent was obtained from the deceased which revealed that he did know if the deceased was at the farm when the Appellant's employees went to seek his consent.

Consideration by this Court and decision

- 23) After considering the arguments by counsel and the record of appeal, we must state from the out-set that during trial the distinction between distribution and

transmission lines, if one does exist, which Mrs. Machona advanced in her *viva voce* arguments, was not presented in the Court below. It was thus not in issue whether notice and consent are required in relation to either or both of those lines.

- 24) The transcript of the record of proceedings before the Learned High Court Judge merely shows that both DW1 and DW2, testifying for the Appellant, revealed that the electricity lines placed over the deceased's property by the Appellant were medium voltage lines. The relevance of this testimony was for purposed of showing that prior to erecting the lines there was no need for creation of a way-leave. DW1 testimony appearing at page 109 of the record of appeal was that: *"the lines were medium not 11KVA as stated. On site we found medium voltage lines which we use to tap power like in compound ... They are very safe and activities can be done near them"*. This evidence does not in any way distinguish between transmission and distribution lines as argued by counsel

but merely demonstrates that there was no need for a way-leave as the lines were safe.

- 25) Contrary to the argument by counsel that no consent was required in view of the nature of the lines erected, DW1 under cross examination at page 112 of the record of appeal expressly states that if consent is not given the Appellant does not erect lines. Further, throughout his testimony, he kept stating that verbal consent of the deceased was obtained.
- 26) Likewise, the evidence of DW2 confirmed that it was medium and not high voltage lines which were erected across the deceased's property. He went on to testify that where high voltage lines are erected over a piece of property there can be no erection of permanent structures or any trading activities under them. The witness also stated the need for a way-leave where high voltage lines were constructed.
- 27) As a consequence of what we have stated in the preceding paragraphs, the arguments advanced by Mrs.

Machona as to the distinction between transmission and distribution lines is an attempt at introducing new evidence. Further, we cannot accept her argument that in the case of transmission lines consent is required whilst non is required for distribution lines because no such evidence was led in the Court below.

28) Having made the clarification we have made in the preceding paragraph, the issue as we see it arising from the sole ground of appeal is whether or not the Learned High Court Judge misdirected herself when she awarded compensation to the Respondent pursuant to Section 14(3) of the **Electricity Act**? We have referred to Section 14 of the **Electricity Act** and not Section 15 as argued by counsel and indicated in the ground of appeal because the award of the compensation by the Learned High Court Judge which the Appellant is contesting was based on Section 14.

29) The relevant provisions of Section 14 are as follows:

- (1) **The President may, by Order, authorize the acquisition by compulsion of so much land, including State Land, as the President may consider necessary for any purpose associated with the generation, transmission, distribution or supply of electricity by an operator of any undertaking and any acquisition in terms of this section shall be completed in accordance with such directions as the President may give in that or any other order**
- (2) ...
- (3) ...
- (4) **Adequate compensation shall, from moneys appropriated for the purpose by Parliament, be paid to any person who suffers loss or damage through the exercise of the powers conferred by this section in accordance with the provisions of the Lands Acquisition Act ..."**

It is clear from the foregoing provisions of the section, that the compensation envisaged is following compulsory acquisition of a property from a land owner by the President for use by an operator. It does not relate to compensation following the entry onto a property owner's property by the Appellant without prior notice or consent for purposes of erecting power lines over the property. To this end, the Learned High Court Judge misdirected

herself when she awarded compensation to the Respondent based on Section 14 of the **Electricity Act**.

- 30) The misdirection notwithstanding, since the deceased did not give his consent to the erection of the power lines there was, trespass on his land. The dictionary definition of trespass as per **Black's Law Dictionary** Seventh edition at page 1508 is "*an unlawful act committed against the person or property of another, esp., wrongful entry on another's real property*". To the extent that the Learned High Court Judge found that the entry onto the deceased's property by the Appellant was not compliant with the provisions of Section 15 of the **Electricity Act**, it was wrongful and unlawful.
- 31) Having established that there was trespass, we have difficulty understanding why the Learned High Court Judge did not award damages. The position she took was that she could not award damages because: the Respondent took out the action against the Appellant late; and he could have obtained an injunction at the

time the erection of the power lines was going ahead. The facts, of this case reveal that at the time of the erection of the power lines the deceased, who was then in charge of the property, was indisposed and in and out of the country. The illness led to his death, which demonstrates its grave nature. Most important of all we must state that the Appellant acted with some amount of carelessness. The fact, in and of itself, that they were providing a community or public service does not mean they were entitled to ignore the property rights of the deceased by ignoring the law that regulates their activities. For this reason we are of the firm view that the Respondent is entitled to damages and we so order. We place the damages in the sum of K20,000.00 which is nominal because the Respondent did not aid us by quantifying them.

Conclusion

- 32) The appeal in this matter fails for the reasons we have given and we accordingly dismiss it with costs. These are to be taxed in default of agreement.



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M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE



.....
M. MALILA
SUPREME COURT JUDGE



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N. K. MUTUNA
SUPREME COURT JUDGE

