



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 177 OF 2017

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITEDPLAINTIFF

VERSUS

SIMEON ONGERI NYAUNDI, ANDREW OBUBA NYAUNDI

AND PAULINA KEMUNTO (SUED AS JOINT OWNERS)1ST DEFENDANT

PERIS KWAMBOKA NYANCHWAYA2ND DEFENDANT

DOMINIC ONTARIGE MIKAYE3RD DEFENDANT

WILFRED MONYENYE YOGI AND BEATRICE NYANGARA MARANGA

(SUED AND JOINT OWNERS4TH DEFENDANT

AND

PHILIP GICHABA GICHANA1ST INTERESTED PARTY

RUTH K. OTWEKA2ND INTERESTED PARTY

AMOS OBWOGI3RD INTERESTED PARTY

KEFA OMBUI MOGIRE.....4TH INTERESTED PARTY

R U L I N G

1. The plaintiff/applicant was vide a ruling delivered by the court on 10th November 2017 in addition to being granted an injunction restraining the defendants/respondents from interfering with the construction of a High Voltage Power line over a portion of 1.66 acres of land parcel number **Bassi/Bogetaorio II/813** Kisii - Awendo pending the hearing of the originating summons to determine who should be paid the compensation, allowed to deposit the amount of kshs. 1,450,000/= being the adjudged compensation in court. The 4th defendant/respondent being aggrieved with the aforesaid ruling filed a Notice of Motion dated 16th November 2017 seeking a stay of execution of the ruling and the consequential orders pending the hearing of the application and further sought an order varying, reviewing and/or setting aside of the ruling.

2. The application was premised on the grounds set out on the body of the application and the affidavit sworn in support thereof by Wilfred Monyenye Yogi. The following grounds have been set out in support of the application:-

a. THAT the plaintiff/respondent by application dated 15th September 2017 obtained orders thereto on the 10th of November 2017.

b. THAT from the ruling of the court, the court was misled by the respondents to believe that LR NO. BASSI BOGETAORIO II/813 had not been subdivided.

c. THAT this court therefore made a ruling based on the affidavits of Simeon Ongeri Nyaundi and its annexures on the official search dated 23rd October 2017.

d. THAT the annexed official search to the said affidavit of Simeon Ongeri Nyaundi was erroneous and therefore was prepared in a manner to mislead the court to issue the orders in vacuum.

e. THAT the applicant has since discovered that there is new evidence which was not within his reach as at the time of prosecuting this matter in terms of the green card from the lands office confirming that the said property was subdivided on the 10th of October, 2014 and does not therefore exist.

f. THAT due to the aforesaid grounds it would serve the interest of justice that the ruling/order be varied, set aside and or reviewed.

g. THAT this application has therefore been made so timely and without any unreasonable delay.

h. THAT it is fair and just that this application be allowed.

3. The applicants in the supporting affidavit aver that after the delivery of the ruling they obtained an abstract of title for land parcel number **Bassi Bogetarorio II/813** annexed as “**WMY-03**” which confirmed that the said property was subdivided on 10th October 2014 and did not exist. The applicants further averred that the court in making the ruling placed reliance on a copy of search furnished by the 1st respondent, Simeon Ongera Nyaundi annexed and marked as “**SON-01**” which they claim was irregularly obtained with the intention of misleading the court. The applicants further contend that the abstract they have annexed reflect the true status of the land and they assert that the developments on their parcel of land were not factored in the compensation computed by the plaintiff. The applicants assert that the orders made by the court on 17th November 2017 were made in a vacuum and are incapable of being implemented as land parcel number **Bassi/Bogetarorio II/813** did not exist as at the date of the application.

4. Lydia Wanja the plaintiff’s legal manager swore a replying affidavit filed on 29th November 2017 in opposition to the 4th respondent’s application. She averred that the plaintiff had already fully complied with the court order of 10th November 2017 by depositing the sum of kshs. 1,450,000/= as per annexure marked “**A**” attached to the affidavit. She further averred that the applicants’ application lacks merit as there is no discovery of any new evidence that was unavailable at the time the ruling was made. The plaintiff further stated that by the ruling/order of 10th November 2017 the court did not award any party any compensation but only directed the funds to be deposited into court to be preserved until the originating summons was heard and determined and the proper party or parties entitled to the payment identified.

5. The application was argued by way of written submissions. I have reviewed the application together with affidavits in support and in opposition and the annexures thereof and I have also considered the submission filed by the parties. Firstly, I note that the plaintiff has fully complied with the court order of 10th November 2017 requiring it to deposit the sum of kshs. 1,450,000/= in court within 21 days. As per annexure marked “**A**” annexed to Lydia Wanja’s replying affidavit the RTGs to the Kisii Court Deposit Account at KCB Kisii Branch was effected on 21st November 2017 and as per the court record a deposit receipt No. 0062554 was issued on 4th December 2017. Thus this limb of the court order cannot be stayed as implementation has already occurred.

6. As to whether any basis has been made to warrant a variation, review or setting aside of the order, my view is that the applicants have not satisfied any of the conditions upon which review may be granted under Order 45(1) of the Civil Procedure Rules.

Order 45(1) provides:

1. Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for Kenya Subsidiary Legislation, 2010 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. The applicants place reliance on the fact there has been discovery of new and important evidence which was not available at the time of making the order. According to the applicant the discovery is that the subject land parcel **Bassi/Bogetarorio II/813** was subdivided sometime in October 2014. I do not think this indeed was a new discovery as the issue of subdivision was in fact canvassed and dealt with at the time of the ruling. At the heart of the matter was whether the subdivision was fraudulently carried out as claimed by some of the respondents. The ownership of the subdivided titles was in issue such that even if it was admitted land parcel **813** had been subdivided, there was no agreement as to who was the owner of the subtiles. In my ruling of 10th November 2017 I adverted to issue of the subdivision of land parcel **813** and under paragraphs 9 and 10 of the ruling I stated as follows:-

“9. The plaintiff filed a further affidavit sworn by Lydia Wanja, Manager legal services on 19th October 2017 where the plaintiff annexed a copy of a valuation for land parcel Bassi/Bogetarorio II/813 which was carried out on 19th March 2014. As at the date of inspection the property is said to have been registered in the names of Simeon Ongera Nyaundi, Andrew Obura Nyaundi & Paulina Kemunto as owners in common. The property measured 5.4Ha. A copy of a search certificate dated 18th March 2014 attached to the valuation report affirms these details of the property. The value returned for the affected part of the property was kshs.1,500,000/=.

10. The plaintiff acknowledges that the property was subdivided after they carried out the valuation but the 1st respondents who were the registered owners have challenged the subdivision arguing that the same was fraudulently carried out by the 2nd defendant/respondent behind their back. It is not clear how the 2nd defendant/respondent could effect the subdivision if she was not the registered owner given that the 1st respondents are shown to have been registered as joint/common owners on 26th February 1983 and were issued with title to the land parcel 813. At what point did the title change to the 2nd defendant/respondent so that she could do the subdivision? That is not evident from the record and I cannot on the basis of the material placed before the court say that the 1st respondents contestation that the land parcel 813 was subdivided fraudulently is without merit. The records do not assist the situation since we have a current copy of certificate of official search dated 23rd October 2017 which still indicates the 1st respondents are the current registered owners of land parcel Bassi/Bogetaorio II/813 measuring 5.4Ha. How would that be possible if the property was subdivided as alleged by the 2nd defendant? At the same time there are titles held by the 4th respondent and some of the interested parties which are said to have originated from a subdivision of land parcel 813. Quite clearly somebody needs to explain this state of affairs where the official records show and reflect divergent positions in regard to the ownership of the same parcel of land.”

8. I concluded that in the circumstances of this case the plaintiff could not determine the lawful owner of the affected land upon which the power line was to pass and was therefore justified to bring the present action for the court to determine the proper party to be compensated. There is no reason for me to change that view. The fact that the applicants have annexed an abstract of title showing parcel no. 813 was subdivided on 10th October 2014 cannot validate the subdivision if indeed it was fraudulent as alleged by some of the parties. The persons claiming to be the ones entitled to the compensation have to prove their right of entitlement either through the pending originating summons and/or another suit.

9. For the foregoing reasons, I find no merit in the applicants notice of motion dated 16th November 2017 and I order the same dismissed. Each party to bear their own costs for the application.

RULING DATED, SIGNED and DELIVERED at KISHI this 22ND DAY of JUNE, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the Plaintiff

N/A for the 1st Defendants

N/A for the 2nd and 3rd Defendants

Mr. Nyambati for the 4th Defendants

N/A for the interested parties

Ruth court assistant

J. M. MUTUNGI

JUDGE