REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO.257 OF 2013

LESIIT, J

KENYA POWER AND LIGHTING CO. LTD ....APPELLANT

V E R S U S

JUSTICE (RTD) DAVID M. RIMITA…….RESPONDENT

(*An appeal from the ruling and order of acting principal magistrate honorable JM IRURA dated 4th June 2013 in Isiolo CMCC No.8 of 2013)*

JUDGEMENT

1. The Appellant, Kenya Power and Lighting Co. Ltd has filed this appeal against the decision of Ag. PM JM Irura given in favour of the plaintiff in that court Justice (Rtd) David M. Rimita.
2. There are 11 grounds of appeal as follows:

i. **The learned Magistrate erred in law and fact in finding that the Respondent had demonstrated that there were special circumstances warranting the granting of a mandatory injunction at an interlocutory stage.**
ii. **The learned Magistrate having appreciated that an interlocutory mandatory injunction is granted very sparingly and only in exceptional circumstances such as where the applicants case is very strong and straight forward and when the plaintiff's case is clear and incontrovertible misapplied the law as follows:**

a. **Having found that one would not be able to know that the Appellants design plan done in 1979 and a Commission Report, applied to the particular place where the applicant (now Respondent) is claiming to own land proceeded to find that photographs produced as exhibits by the Applicant (now Respondent) related to the particular place where the Applicant (now Respondent) claimed to own land; and**
b. **Having taken judicial notice of the fact that no proper demarcation has been done in Isiolo Area, proceeded to find with no doubt that the Applicant (now Respondent) was the registered owner of Plot No. 331 Upper Bulapesa and that also the subject pole was not erected on a road reserve.**

iii. **The learned magistrate erred in law and in fact in finding that the Respondents case was clear and incontrovertible that no permission was sought from the Respondent at the time of erecting the electric supply line on the basis.**

a. **The learned Magistrate does not make a finding on when the electric pole was erected.**
b. **The Appellant could not have sought the Respondent's permission if the said electric pole was erected prior to the purchase of the property by the Respondent.**

iv. **The learned Magistrate erred in law and in fact by determining the application on inter alia the presumption that there must have been required some authority either from the Ministry of Lands or from the custodian of such land on the ground being the County Council of Isiolo at the time.**
v. **The learned Magistrate erred in law and in fact by restricting the address of Counsel for the Respondent (now Appellant) to matters of law only and in the same breath went through the Respondent's (now appellant's) papers' in determining the application.**
vi. **The learned Magistrate erred in law and fact by determining the issues in question on the basis of Affidavit evidence whereas a full hearing of the suit by way of calling viva voce evidence would have fairly and fully determined the issues between the parties.**
vii. **The learned Magistrate erred in law and in fact in failing to appreciate that the dispute related to land, a sensitive matter, and should not have been determined solely on affidavit evidence,.**
viii. **The learned magistrate erred in law and in fact by allowing the Respondent's Application without proof of ownership of the suit property.**
ix. **The learned magistrate erred in law by finding that the Appellant could not rely on a defence of adverse possession.**
x. **The learned Magistrate erred in law and in fact by granting orders determinative of the suit at an interlocutory stage without taking into consideration that the Appellant is a public company that provides a public good and disruption of electricity power supply to the public should be interfered with only in the clearest of cases upon a full and careful determination of the suit.**
xi. **That the learned Magistrate erred in law by failing to put the Applicant (now Respondent) to incontrovertible proof of the grounds relied upon in the application and therefore arrived at a decision that was not borne by the evidence tendered before her.**

3. The brief facts of the case are that the Respondent in the appeal filed a suit against the Appellant seeking two orders.

a. **That the honourable court be pleased to issue a mandatory order of injunction, compelling the Defendant either by itself servants, agents associates contractors or otherwise howsoever, to remove the electric pole and re-route the electricity power lines installed across the Plaintiff's Plot No. 331, Upper BulaPesa.**
b. **General damages for trespass upon plot No. 331 Upper BulaPesa.**

4. The Respondent then filed a Notice of Motion application dated 15th April 2013 seeking a mandatory order of injunction in pretty much the same terms as prayer (a) of the plaint.
5. The Appellant was served upon the Application on the 18th April 2013 after learned trial magistrate ordered interpartes hearing for 30th April 2013. On 30thApril 2013 the Appellants advocate sought adjournment for 21 days to put in a replying affidavit on grounds the firm had just been instructed to appear for the Appellant. The court granted the Appellant 14 days to file a Replying Affidavit and fixed the inter partes hearing of the Motion for 21st May, 2013.
6. On 21st May 2013 the day the application was to be heard inter parties, the Appellant had not filed or served any response to the application. The Appellant's advocate came 20 months after case had commenced and submissions by Respondents counsel had been heard. Even though the Appellant's advocate had filed a replying affidavit on same day of the inter partes hearing, that affidavit was ignored and Appellants counsel heard only on points of law.
7. The court ruled in favour to the Respondent granting a mandatory injunction at an interlocutory stage of the proceedings. The learned trial magistrate also ordered the Respondent to deposit

Ksh. 313,063 as security for costs.

8. The Appellants grounds of appeal are included in this judgment herein above. Parties have also filed submissions with copies of cases cited by them annexed. Ms Ameyo urged the appeal on behalf of the Appellant while Mr. Mwirigi urged the Respondents response. I have considered each of the counsel's submissions and the cases they have cited.
9. One of the main issues raised by the Appellant is that of ownership of the parcel of land where the offending power lines cross. It is the Appellants position that the Respondent had not proved its ownership of the suit land. It is the Appellants position that the letter from Isiolo County Council (now defunct) dated 16th January 2013 was insufficient as the maker was not called as a witness and secondly because the latter did not resolve the date of ownership of the plot.
10. The other grievance by the Appellant was fact its case was not heard because it was not given a chance to canvass facts and evidence but was limited to points of law. The Appellant contends that the learned trial magistrate effectively shut out the Appellant from being heard when she granted a mandatory injunction at an interlocutory stage.
11. Mr. Mwirigi urged that the Appellant had misconceived and misapprehended that fact of the case when it urged that the suit plot was not registered under any regime of the law when in fact it had been allocated by County Council of Isiolo. Mr. Mwirigi urged that the learned trial magistrate understood the case properly that the plots in Isiolo were not registered. Counsel urged that Respondent had proved ownership of the suit land through the letter from Isiolo County Council.
12. Mr. Mwirigi urged that the issue between the parties was not who owned the suit land but who would meet the cost of re-routing the power lines. Counsel urged that for that reason the Appellant had not proved that it had followed the law when they laid down the power line.
13. The key issue to determine is whether the learned trial magistrate rightfully granted the mandatory injunction sought in this case at an interlocutory stage.
14. Mandatory injunction would only be granted only in exceptional and in clearest of cases for this proposition there are a myriad of cases; for instance **Shepherd Holmes V. Sundham [1970]3 WLR 348; Mucuha v. the Ripples [1992] LLR 2164(CAK).** In the case cited by the Appellant **Virginia Njoka vs Joel Nathan Ouma& Another [2013] eKLR**an additional angle was given by Mugungi J. thus:

> **"A court will only grant a mandatory injunction in plain clear and oblivious cases where the facts are not disputed or where it is clear that the party against whom the injunction is sought is clearly the wrong doer."**

15. Volume 24 Halsbury's Laws of England 4th Edition Paragraph 948 reads:

> **"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the Act done is a simpleand a summary one which can be easily remedied, or if the Defendant attempted to steal a match of the Plaintiff…… A mandatory injunction would be granted on an interlocutory application."**

16. Also in **Locabail International Finance Ltd. V. Agro export and others** [1986] I ALL ER 901 at page 901 it was stated.

> **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.**

17. This being an appeal from an interlocutory order I do not think it is expedient to delve deeply into

the issues in this case as that may preempt the case as it is yet to be heard, given the nature of the ruling and orders made by the learned trial magistrate, which are the subject of this appeal. That being so I will make it very brief and to the point.

18. The learned trial magistrate made a finding that

"**the court take Judicial Notice of the fact no proper demarcation had been done in isiolo.**"

See page 66 of the Record of appeal.

The learned trial magistrate went further to find

"**taking into consideration of the application now before the court there is no doubt that the applicant is the registered owner of plot Number 331 Upper BulaPesa"**

19. There is an apparent confusion and or contradiction in the learned trial magistrate's ruling when it found that no proper demarcations had been done in Isiolo County, and yet came to the conclusion that the Respondent was the registered owner of the suit plot. Those two findings are not in tandem. It is either there has been no demarcation or the land has gone through the registration process as a result of which the Respondent was registered as owner of the suit land.
20. The learned trial magistrate went further to find:

"**The Respondent has not shown that it has only claim over the land and the only claim it raises at this point which is not for consideration by this court is that of adverse possession"**

21. The finding that the Appellant had pleaded adverse possession is correct as same is pleaded as a defence in the Appellant's Statement of Defence and Counter claim. The learned trial magistrate was right that adverse possession was a matter to be addressed, and it should be determined at any stage of the proceedings in that case.
22. There was a misapprehension of the issue before the trial court by the Respondents counsel when he argued that having raised the issue of which the two parties would meet the cost of re-routing the power lines. The proper context is to consider the Appellants line of defence in the statement of defence which was having put up the power lines in 1979, any re-routing of the lines could only be done if the person desiring the re-routing of the lines met the cost.
23. The other apparent error I see from the ruling the subject of this appeal is in making a mandatory order and in the same breath ordering for deposit for security of costs. Having granted the mandatory injunction at the interlocutory stage, what was left pending was a determination of the general damages payable to the plaintiff. That beat any need for deposit of security for costs since the effect of the injunction was to compel the Appellant to re-route the power lines. The issue of the mandatory injunction could not rightfully be ventilated thereafter as after re-routing the power lines, that act could not be undone except on appeal.
24. A mandatory injunction cannot be granted except in plain and obvious clearest of cases and in exceptional and obvious cases where the facts are not disputed. This was not a plain, clear and undisputed case. There were controversies in the facts regarding ownership of the suit land, the date of the ownership and who would meet the cost if re-routing of the lines was ordered.
25. The most important matter however is the apparent shutting out of the Appellant from being heard and after so doing granting of mandatory orders at interlocutory stage effectively locking out the Appellant unheard. With respect the learned trial magistrate was in a great hurry to hear and dispose of the application denying the Appellant its right to be heard. Since the Appellant had already filed its Replying Affidavit, what the learned trial magistrate should have done is to penalize the Appellant if at all, for the delay in filing their responses to the application. The learned trial magistrate did not have an option to shut out the Appellant or to consider whether to hear the Appellant or not especially where the Appellant showed up on the date as required, albeit late. Further especially where the mandatory order determined the case without a trial.
26. Having considered this appeal, I have come to the conclusion that the learned trial magistrate inter alia misapprehended the application before her, shut out the Appellant from being heard and issued a final order at an interlocutory stage where the facts were controversial; and at the same

time in the same ruling made orders that were incompatible with the injunction issued.

27. Having come to the above conclusions the appropriate orders to make in this case is.

a. **The ruling of the learned trial magistrate dated 4th June, 2013 be and is hereby set aside.**

b. **There be a retrial of the case by having the Notice of Motion application dated 15th April 2013 heard and determined afresh interpartes.**

(c) The Appellant shall have the costs of this Appeal.

DATED SIGNED AND DELIVERED AT MERU THIS 3TH DAY OF APRIL 2014.

J. LESIIT

JUDGE