



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 166 OF 2013

HON. PATRICK SIMIYU KHAEMBA.....PLAINTIFF

VERSUS

**1. KENYA ELECTRICITY TRANSMISSION CO. LTD
(KETRACO)**

2. KENYA POWER & LIGHTING CO. LTD.....DEFENDANTS

RULING

1. The applicant Hon. Patrick Simiyu Khaemba is the Governor County Government of Trans-Nzoia. He together with his wife Rose Kabutia Khaemba own LR No. Kitale Municipality Block 15/Koitogos/1358. The land is at Naisambu area where he has put up his residential house and does farming. The land adjoins LR NO Kitale Municipality Block 15/Koitogos/3115 which belongs to the first defendant Kenya Electricity Transmission Co. Limited (Ketraco).

2. The first respondent is a limited liability company wholly owned by the Government of Kenya whose functions include among others planning, designing constructing and operating electrical power transmission lines.

3. The second respondent is a limited liability company whose functions include sell and transmission of electricity.

4. The applicant filed a notice of motion dated 2nd December, 2013 in which he seeks the following reliefs:-

(a) A temporary injunction jointly and severally restraining the defendants/respondents, their agents, employees, servants and/or any other acting on their behalf from commencing and/or proceeding with the construction of an electricity power sub-station on land parcel No. Kitale Municipality/Block 15/Koitogos/3115 in Naisambu area in Kitale in Trans-Nzoia or anywhere in the immediate neighbourhood of the plaintiff/applicant's land parcel No. Kitale Municipality/Block 15/Koitogos/1385 until the hearing and final determination of this suit.

(b) An order that pending the hearing of this application and suit, the Defendants/Respondents to furnish the Plaintiff/Applicant with copies of the Environment impact Assessment (EIA) Study Report and the EIA licence if any in respect of the proposed project, namely Construction of a High Voltage Electricity Power sub- station

on land Parcel Kitale Municipality/Block 15/Koitogos/3115 in Naisambu area in Kitale in Trans-Nzoia County.

(c) A declaration that the Defendants/Respondents violated the provisions of the Physical Planning Act and the Environmental Management and Co-ordination Act as to Environmental impact Assessment (EIA).

(d) A cancellation of any EIA licence issued to the Defendants/Respondents for the proposed High Voltage Electricity Power Sub-station on land parcel Kitale Municipality/Block 15/Koitogos/3115 in Naisambu area in Kitale in Trans-Nzoia in County.

(e) Costs of the application.

5. The application was brought under the provisions of section 50 of the Environment Management and Co-ordination Act of 1999, the Environmental impact Assessment and Audit Regulations of 2003, section 63 of the Civil procedure Act Cap 21 Laws of Kenya and Order 40 procedure Rules of 2010 and all other enabling provisions of the law. The applicant contends that the respondents intend to commence construction of a High Voltage electricity Power sub-station at Naisambu area on LR NO Kitale Municipality/Block 15/Koitogos/3115 which adjoins his land and that the parcels are separated by a barbed wire fence.

6. The applicant contends that he resides on the land adjacent to the one owned by the first respondent and that he resides on his land where he also keeps livestock. He further contends that as Governor of Trans-Nzoia County, he is expected to host a number of dignitaries visiting the County and those paying a courtesy call on him.

7. The applicant contends that the respondents have assembled machinery on the site and intend to commence construction without complying with Environmental Management and Co-ordination Act (EMCA) as regards Environmental impact Assessment (EIA), EIA Licence or Public participation of stakeholders.

8. The applicant depones that he has been advised by experts that High Voltage Power Stations and sub-stations such as the proposed one are known to have significant negative environmental hazards and other impacts which will affect him. The applicant further contends that the proposed construction of a Power sub-station is out of tune with the physical planning of Kitale and land use in Naisambu area which is predominantly residential area.

9. The applicant's application is opposed by the first respondent through a replying affidavit sworn by its legal officer Antony M. Kiarahu on 22/1/2014. The first respondent contends that the applicant's application does not meet the threshold required by law for issue of injunctive relief sought.

10. The first respondent contends that it looked for a suitable plot which it purchased from Seroney Kennedy Kipkemei at Kshs.46,000,000/=. An Environmental and Social impact Assessment Project (ESIA) was carried out for the proposed site. An Environmental impact Assessment licence was received from National Environment Management authority (NEMA).

11. A project implementation team held several consultative meetings with both the applicant and his deputy over the subject matter. A report by the project implementation team was duly prepared. The first respondent contends that the project is of great significance not only to the people of Trans-Nzoia but also the adjoining counties of West Pokot, Nandi and Uasin Gishu and should therefore not be stopped by injunction as a lot of money has been expended on the project.

12. The second respondent opposed the applicant's motion through grounds of opposition filed in court on 21/1/2014 where it raised the following grounds;-

(a) The motion is fatally defective, bad in law and an abuse of the process of this Honourable court.

(b) The application is without merit and an abuse of the process of this Honourable court.

(c) The applicant is not the registered proprietor of Land Parcel No. Kitale Municipality Block 15/Koitogos/3115 on which the alleged construction is being done.

(d) This Honourable court lacks jurisdiction to determine the dispute herein.

(e) The applicant has failed to satisfy the conditions for granting orders for injunction.

13. The reliefs which the applicant seeks in this application are basically the same ones sought in the plaint. The advocates for the parties herein agreed to have the application determined on the basis of written submissions. The applicant is seeking an injunction to stop the construction of the power sub-station which is to be constructed at Naisambu area where his home is. Basically the applicant contends that the said power sub-station is being put up without following the provisions of the EMCA Act.

14. The issue for determination are as follows:-

(a) Does this court have jurisdiction to entertain this matter?

(b) Has the applicant demonstrated to the court that he is entitled to reliefs he is seeking in the notice of motion?

15. On the issue of jurisdiction, the second respondent raised it its grounds of opposition. The advocate for the second respondent did not address the issue of jurisdiction in his submissions. I do not therefore know in what sense the court lacks jurisdiction. I expected the counsel for the second respondent to expound on what he meant by lack of jurisdiction. This is an application mainly seeking for injunction orders and the court has jurisdiction to entertain applications for injunctions. I take it that since the counsel for second respondent did not address the issue of jurisdiction, he abandoned the same. The constitution and the Environment and Land court Act confers jurisdiction upon this court to entertain applications of this nature. I therefore hold that I have jurisdiction to entertain the matter herein.

16. The applicant is seeking for an order that before the hearing of the application, he be given copies of Environmental impact Assessment Study Report and Environmental impact Assessment licence. This prayer appears to have been overtaken by events. The applicant had filed this application under certificate of urgency. There were no ex-parte orders given. The application was served for hearing inter-partes. If the applicant had expected to get an order that he be served with the documents before the hearing of the application, the same has clearly been overtaken by events. In any case if it is the documents he wanted, the same are in possession of his counsel as the copies of the two documents are attached to the replying affidavit of the first respondent.

17. The applicant seeks a declaration that the defendant/Respondents violated the provisions of the Physical Planning Act and the Environmental Management and Co-ordination Act as regards Environmental impact Assessment. This is the same prayer which the applicant seeks in the main suit. The same therefore cannot be addressed at this interlocutory stage.

18. The applicant is also seeking cancellation of Environmental impact Assessment Licence issued to the first respondent. This is the same prayer he is seeking in the main suit. This prayer cannot be addressed now in any case the applicant has not shown on what basis he wants the licence cancelled.

19. On the issue of whether the applicant is entitled to an injunction, the principles for grant of injunctions are now well settled. They were laid down in the famous case of Giella -vs- Cassman Brown & Co. Ltd 1973 EIA 358. Firstly an applicant must show Prima facie case with a probability of success. Secondly,

an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. Thirdly when the court is in doubt, it will decide the application on the balance of convenience. A prima facie case in a civil application as the present one was defined by the Court of Appeal in the case of Mrao Limited -vs- First American Bank of Kenya Limited & 2 others as follows;-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

20. In seeking to determine whether the applicant has established that he has prima facie case with probability of success, I have to consider the application by the applicant. A close reading of the applicant's application is that he was contending that the project which the defendants are carrying on was done without following the EMCA Act. The EMCA Act provides for what is to be done before a project such as the one which will be carried out by the first respondent is undertaken. The applicant contended that there was no Environmental impact Assessment carried out; that there was no Environmental impact and social Assessment done and that there was no public participation. When the applicant was served with a replying affidavit by the first respondent showing that they had met the requirements of the EMCA Act, he now turned round to start faulting the process followed.

21. Whereas the applicant contended that he had not been consulted, it turned out that he was indeed consulted but that he expressed misgivings over the whole project and told those who went to see him that he was going to have his day in court. The residents of Naisambu were consulted. Questionnaires were given out and the same were filled and they were annexed to the affidavit of the Legal Officer of the first respondent. The Environmental Social Impact Assessment report was duly prepared as required. An Environmental Assessment licence was given by NEMA as required.

22. The applicant contends that the building of the station will expose him to Electromagnetic Fields. He says he was so advised by experts who include his lawyer. The applicant never placed any material before the court to show that such projects pose danger to people. The project is being carried out on a 20 acre piece of land. The applicant's land is 10 acres. The applicant did not attempt to demonstrate how far the project is from his home. It is common knowledge that sub-power stations pose risk to people living within 60 metres from the power sub-station. There is no danger for people living outside the 60 metres. I do not think that the first respondent will put up the project very near to the residence of the applicant. They have 20 acres. The project has been given a go ahead by NEMA.

23. The potential risks enumerated in the Environmental impact Assessment report annexed to the first respondent's replying affidavit are risks which majorly affect those undertaking the project. They are not risks open to people outside the area where the sub-station is being constructed.

24. The applicant was economical with the truth. He pretended to be unaware that there was public participation. A number of institutions were consulted and gave their views. The residents of Kibomet location were contacted and they gave the project a go ahead. The applicant's deputy gave the project a go ahead saying that the same will go a long way to stabilize power in Trans-Nzoia and spur development. The applicant was approached for his views but he said he was going to court. He cannot therefore turn round and say that he was never consulted. An injunction is an equitable remedy. Those who seek it should not try to hide certain material facts for to do so will disentitle one to the same when the truth comes out.

25. The burden was on the applicant to show that he has a prima facie case with probability of success. He has not shown that he has any case with probability of success. The applicant too has not demonstrated that he will suffer injury which will be irreparable. The applicant merely said that he had been advised by experts that projects such as the one being undertaken pose health hazards. There was no material placed before the court to substantiate that. The applicant should have placed before court even a journal showing any article authored on the risks posed by projects as the one which is being put up. Experts cannot advise without supporting their opinion. It does not help the applicant to merely say that

he has been advised without more. I find that the applicant has not demonstrated that he will suffer irreparable injury if the injunction is not granted.

26. The project which is to be undertaken is a multi million project. Already purchase of land has taken 46,000,000/= of Tax-Payers money. The project is of great significance to the people of Trans-Nzoia. It will help increase the power and spur development. The balance of convenience therefore tilts in favour of the respondents. I find that the applicant's applicant has failed the test of principles for grant of injunction. The same is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of May, 2014.

E. OBAGA

JUDGE

In the presence of Professor Sifuna for applicant and Mr Barongo holding brief for Mr Simiyu and Mr Nyamwange for 1st and 2nd respondents respectively. Court Clerk Kassachoon.

E. OBAGA

JUDGE

28/5/2014