



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. NO 10 OF 2014
FORMERLY NAIROBI ELC NO. 1153 OF 2014

DAVID NDUATI MWANGI

ROBERT MUCHIRI MWANGI

MARGARET WANJIKU MWANGI :::PLAINTIFFS

(Suing as the legal Administrators of the

*Estate of **BETHUEL MWANGI MUTOROKI***

VERSUS

KENYA POWER & LIGHTING COMPANY.....DEFENDANT

RULING

INTRODUCTION

By their notice of motion, counsel for the plaintiffs/applicants have applied to this court for the following orders:

1. A temporary injunction to restrain the defendant and/or their agents from trespassing on the suit land reference number Ngariama/Merici/437 pending the hearing and determination of this application. It is expressed to have been brought pursuant to Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules of 2010, Sections 3A and 63E of the Civil Procedure Act and all other enabling laws.
2. An order directing as to who should bear the costs of this application.

The application is supported by the grounds set out in the notice of motion of 26th August, 2014 and there is a supporting affidavit sworn by David Nduati Mwangi.

The application is strenuously opposed by counsel for the defendant/respondent. The defendant has filed a 26 paragraphs replying affidavit.

The Plaintiff's Case:

According to the plaintiff, the defendant entered the suit land without authority and proceeded to cut down trees and thereafter erected power lines. In short, the plaintiffs allege that the defendant trespassed on their suit land. Counsel for the plaintiffs has cited many authorities in support of the application. It is important to mention that the plaintiffs are suing as the legal administrators of the estate of Bethuel Mwangi Mutoroki. It is their evidence that the deceased, was a common tenant with another tenant also deceased, whose estate is being administered by the Public Trustee of Kenya.

Defendant's Case

The defendant/respondent has opposed this application. According to the defendant, the entire suit of the plaintiff is lacking in merit and is also hopeless and unwarranted and misconceived both in law and fact. According to the defendant, the construction of the power station along Sagana Kutus Road is to supply electricity to both Embu and Kirinyaga Counties. It is also the defendant's evidence that the project is funded by the Government of Kenya.

The defendant has also stated that they have been given a go ahead by the National Environmental Management Authority (NEMA). The defendants then approached the plaintiffs to negotiate for the sale of the suit land for purposes of erecting power lines. These negotiations did not bear any fruits. According to the defendant, the plaintiffs did not object to the construction of the power lines by the defendant. It is their evidence that they followed the law in erecting the power lines on the suit land.

Issues for Determination:

Having perused the notice of motion, the supporting affidavit and the replying affidavit together with the written and oral submissions of the parties, I am of the view that the following are the issues for determination:

1. Whether or not this court has jurisdiction to entertain the matter in dispute.
2. Whether or not the plaintiffs as administrators of the estate are entitled to seek compensation from the defendant.
3. Whether or not the plaintiffs' evidence has met the threshold for the grant of a temporary injunction in terms of Order 40 of the Civil Procedure Rules of 2010.
4. Who should bear the costs of this application.

The Law Applicable:

The application is brought pursuant to Order 40 of the Civil Procedure Rules of 2010. The provisions of that order do authorize a court to issue a temporary injunction in order to preserve a status quo pending the final determination of the suit property. According to the case of *Giella v Cassman Brown & Co Ltd (1973) EA 358*, an applicant who is seeking a temporary injunction must satisfy the following requirements:

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”

Evaluation of the Evidence, Findings and the Law:

I have carefully considered the affidavit evidence of the parties, their written submissions and the

several authorities that they have cited in support of their cases. As regards the issue of jurisdiction, I find that this court has jurisdiction to entertain the suit. This is clear from **Section 13 of the Environment and Land Court Act**, which vests in the court both original and appellate jurisdiction. The provisions of the Energy Act cannot in any way take away that jurisdiction because they merely provide for regulations in respect of complaints by the affected parties.

Furthermore, the fact that the plaintiffs are common tenants or joint tenants with the owner of the property which is being administered by the Public Trustee does not take away the power of the plaintiffs as administrators of the estate of the deceased from filing and prosecuting this suit. Admittedly they are not the owners, however, as the administrators, they are in under obligation to protect the estate of the deceased, because in the end they will be required to account to the beneficiaries and the creditors.

Additionally, the issue of whether they are common tenants or joint tenants are matters that should be canvassed in the main hearing of the suit.

Based on the evidence of the affidavits, I find that the plaintiffs have met the threshold for the grant of a temporary injunction in terms of Order 40.

Verdict and Disposal Orders

In the light of the foregoing, I make the following orders:

1. A temporary injunction is hereby granted in terms of prayers 1, 2 and 3 of the notice of motion.
2. The costs of this application shall be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this ...16thday of ... December,...2014

In the presence of

M/S Ndegwa for the plaintiffs and in the absence of the defendant's counsel, Mr. Muga

Court clerk Mr. Muriithi

Right of Appeal under Order 43 explained to the parties.

J.M. BWONWONGA

JUDGE