



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 215 OF 2012

BETWEEN

DISA ENTERPRISES LTD.....PETITIONER

AND

KENYA POWER AND LIGHTING CO. LTD.....RESPONDENT

JUDGMENT

Introduction

1. The Petitioner's case is set out in the Petition dated 16th May, 2012 and supported by an Affidavit sworn by one, Josephine Naomi Diffu on the same date. The Petitioners also filed a Supplementary Affidavit dated 9th of August, 2012 sworn at Nairobi by the said Josephine Naomi Diffu and Submissions dated 18th December, 2012 as well as a reply to the Respondent's Submissions dated 11th March 2013. The Respondents on their part filed Replying Affidavits sworn by one, John Muriuki, a Wayleave Officer and one, Samuel Otieno Odiembo, a Registered Valuer, sworn on 6th July, 2012 and 13th November, 2012, respectively. The Respondents thereafter filed written Submissions dated 16th February, 2013.

Case for the Petitioner

2. The case for the Petitioner is that sometime in the year 1992, the Petitioner made an Application to the Commissioner of Lands requesting to be allocated land for development in Nairobi. Subsequently, it was furnished with a Letter of Allotment referenced 127580/5 dated 8th of April, 1992 and the said letter referred to the land as "**Unsurveyed Industrial Plot No. B - Dandora Nairobi**" hereinafter "*the suit land*". The Letter of Allotment detailed the acreage of the suit land, leasehold term, stand premium, annual rent, conveyancing fees, registration fees, rates, stamp duty, survey fees as well as the Special Conditions attaching to the allotment.
3. On 31st of March, 2011, the Registrar of Titles executed a Grant, pursuant to the aforesaid Letter of Allotment and the Grant that issued was registered under the **Registration of Titles Act Cap.281** (now repealed) as **Grant Number IR 130280** and **Land Reference Number 209/11620** delineated **on Land Survey Plan Number 16578**.
4. The Petitioner avers that there are certain mandatory conditions that accompanied the Letter of Allotment as well as the Grant and highlights Special Condition Number 5 of the Grant which states that: "*The land buildings shall only be used for inoffensive light industrial purposes with*

ancillary offices and stores." Special Condition Number 8 of the Grant is also referred to and it states that; *"The land shall not be used for any purpose which the Commissioner of Lands considers to be dangerous or offensive"* and it is the Petitioner's view that the only lawful use exercisable by the Petitioner on the suit land is *"industrial purposes and no other."*

5. The Petitioner alleges that sometime between the years 1999 and 2002, the Respondent trespassed on the suit land and erected massive steel pylons supporting very high voltage (132 KV) electricity transmission lines which the Petitioner contends have violated its constitutionally guaranteed right as provided for in **Articles 35, 40, 47 and 70** of the **Constitution** as well as the Statutory Provisions in **Section 45** of the **Electric Power Act**, **Section 46** of the **Energy Act, 2006** and the **Trespass Act**.
6. It is the Petitioner's further contention that the Respondent erected the said pylons without obtaining any permission from the Petitioner thus violating the Petitioner's right to protection of property. It adds that by erecting the said pylons, the Respondent has negated the use of the suit land as couched in the special conditions in the Grant and that the trace area reserved for the Respondent's transmission lines has significantly reduced the usable land of the Petitioner and this has rendered the remainder of the land useless for industrial use. The Petitioner is thus aggrieved that the Respondent has refused to pay any form of compensation to the Petitioner despite limiting and restricting its intended industrial use of the land.
7. The Petitioner also asserts that the unlawfully erected high voltage transmission lines erected by the Respondent, traverse and are suspended over the suit land and that the said transmission lines are an obvious proximate danger to the Petitioner's industrial use of the land within the meaning and application of **Section 2** of the **Electric Power Act** and **Section 2** of the **Energy Act, 2006**. The Petitioner further adds that the high voltage transmission lines are a proximate health hazard due to the high possibility of electric fire and emission of lector-magnetic fields contrary to **Article 42** and **70** of the **Constitution**.
8. The Petitioner has also urged the point that its right to fair administrative action was violated and it is its position that contrary to **Section 45** of the **Electric Power Act** and **Section 46** of the **Energy Act, 2006**, the Respondent ignored mandatory statutory duties requiring it to serve appropriate notices to the Petitioner and that despite demand for the written reasons for failure to do so, the Respondent has to date failed and refused to such written reasons for the alleged seizure of the suit land and it is the Petitioner's case that these acts amount to a gross violation of **Article 35** of the **Constitution**. That therefore its right to be heard, by the Respondent or an arbitral body, prior to the alleged unlawful acts of the Respondent, has been infringed upon.
9. The Petitioner approximates the value of the land at Kshs. 113,400,000/= and prays that the Respondent should compensate the Petitioner appropriately and now prays for the following specific orders;

"a) A declaration that the Respondent violated the Petitioner's constitutionally guaranteed right to title, possession and unrestricted use of L.R. No. 209/11620.

b) A declaration that the Respondent violated the Petitioner's constitutionally enshrined right to fair administrative action, right to information and right to a clean and healthy environment.

c) An order that the Respondent do compensate the Petitioner to the tune of Kenya Shillings One Hundred and Thirteen Million, Four Hundred Thousand Only (Kshs.113, 400,000/=) being the market value of L.R No. 209/11620

d) General damages for trespass and mesne profits

e) Costs and interest to be provided for."

Case for the Respondent

10. The Respondent admits that a Letter of Allotment was issued to the Petitioner on 8th of April, 1992 but contends that the same was for an unsurveyed plot and it is its contention that the letter of allotment did not create any rights for the Petitioner but was merely an offer made by the Government to the Petitioner. The Respondent relies on the decisions in Dr. Joseph N.K. Arap Ng'ok –vs.- Justice Moiyo Ole. Keiwua & 4 others Court of Appeal (Nairobi) 60/97 (unreported); Wreck Motor Enterprises vs. The Commissioner of Lands CA 71 of 1997; Kenya Hotel Properties Ltd vs. Willesden Investments Ltd (2009) KLR 126; Gachuhi vs. Mzee HCCC Eldoret 10 of 2003 and Philfma Farm Produce & Supplies vs. The Attorney General Petition 194 of 2011 all which address the issue of the value and import of a Letter of Allotment.
11. The Respondent affirms that the electric power line forming the subject of the complaint in the Petition is the main line from Olkaria Power Station to the Dandora Sub-Station in Nairobi which was constructed in 2002. It further states that prior to the construction of the electric line, it inspected the path which the line was to follow and also sought consents from the owners of the lands in its path. That its surveyors obtained survey plans from the Department of Survey which indicated the exact path and route to be followed by the electric power line down to Dandora sub-station.
12. The Respondent argues that the property known as L.R. No. 209/11566 is about 200 metres from the Dandora Sub-Station and during the period 2000 to 2002, the Respondent was certain that it was unallocated Government land as a title document had not issued for the same. The Respondent further adds that the said electric power line was roughly following the line of the river which runs along the boundary of the suit land and the line does not at all pass over the Petitioner's land as alleged.
13. The Respondent also urges that a wayleave of 20metres on either side of the electric power line was required for safety purposes and the persons who were in occupation of area at the time, widely believed to be squatters, agreed to move their structures which were within that 20m wayleave. The Respondent therefore contends that the argument by the Petitioner that there are other wayleaves that are wider than this particular one is also misguided and it is the Respondent's further submission that the width of a wayleave is determined by the line or lines to be constructed within it as well as the size of the line and the voltage involved.
14. Further, that the Respondent through its surveyors also caused to be printed an aerial view of the area using Google Maps with various boundaries being delineated in different colours for purposes of clarity and it affirms that the electric power line is not on the property of the Petitioner but runs along it and adjacent to the river.
15. The Respondent contends that because the Petitioner was not the owner of the suit land at the time the electric power line was erected along the suit land, then the Petitioner had no right to receive notice of construction of the electric transmission line under **Sections 44 to 46** of the **Electric Power Act** then in force (**Act 11 of 1997**) and that in any event, the Petitioner only took title to the suit land on 31st of March, 2011 subject to the easements existing at the time as envisaged by **Section 8** of the **Transfer of Property Act** and therefore the allegations of trespass on the part of the Respondent is unfounded.
16. The Respondent also alleges that the Petitioner has not informed the Court that in fact there are squatters on the suit land whose presence the Respondent believes has a direct diminishing effect on the value of the land and the Respondent therefore adopts the view that the Petitioner's real problem may be the presence of the squatters on the property. The Respondent further adds that a wayleave of 20 metres on either side of the line will still leave between 100m - 120m of the length of the suit land available to the Petitioner and therefore the complaint that the electric power line has made the plot worthless and that the same should be compulsory acquired by the Respondent

cannot be sustained.

17. Overall, it is the Respondent's position that the Petitioner has failed to demonstrate that its fundamental rights and freedoms as provided for in **Articles 35 (1), 40, 42, 47 and 70** of the **Constitution** have been infringed and the Petition should be dismissed with costs.

Determination

18. From the matters reproduced above, it is not denied that prior to 31st March 2011, the Petitioner only had a Letter of Allotment to the land in dispute. It is in fact admitted that the land was previously unsurveyed but had been set aside for industrial purposes.

“Does a letter of allotment accord one a proprietary interest? In the case of Joseph N K Arap Ng'ok vs. Justice Moijo Ole Keiuwa and 4 Others Civil Application No. Nai 60 of 1997 the Court of Appeal held that:

“It is trite that such title to landed property can only come into existence after issuance of [a] letter of allotment, meeting the conditions stated in such a letter and actua issuance thereafter of [a] title document pursuant to provisions in the Act under which the property is held.”

19. The presumption I am making is that by the time the Grant for L.R.No.209/11620 was issued, the Petitioner had actually met the conditions elsewhere set out above but it is unclear when they were met. In any event, the Letter of Allotment was issued on 8th April 1992 and one of the conditions contained in it is that unless all payments in respect of stand premium, rent from 1/4/1992 to 31/12/1992, stamp duty etc was made within 30 days, the offer to grant the land would lapse. Notwithstanding the above facts, Letter of Allotment does not confer any proprietary interest in Land and Majanja, J correctly expressed the law in **Philma Farm Produce & Supplies & 4 Others vs The Attorney General & 6 Others** (supra) when he stated as follows;

“The Petitioner's claim is grounded on two letters of allocation of the suit properties. These letters do not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract”. (Emphasis mine)

I am in agreement with the learned Judge and further, it is also not in dispute that the electric power lines erected by the Respondent were said to have been so erected between 1999 and 2002. As at that time, there is absolutely no evidence placed before me that the Petitioner had acquired any proprietary interest in the suit land which could be protected as claimed. How can there be trespass onto land in which the Petitioner has no proprietary interest and in fact in which it had no title to

20. The Grant dated 3rd March 2011 was issued pursuant to the provisions of The Registration of **Titles Act, Cap.281** (now repealed) and **Section 23** thereof provided as follows;

“(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.”

21. The above was the law at the material time and Kimondo, J. in Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR had this to say on whether a Letter of Allotment amounts to title to land;

“... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property”

The learned Judge was right as the same position had also been expressed by the Court of Appeal in Ng'ok vs Ole Keiwua above and also in Wreck Enterprises (supra).

Of interest also is that one of the conditions attached to the Grant is the following;

“Is the President or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains telephone or telegraph wires and electric mains of all descriptions whether overhead or underground and the Grantee shall not erect any buildings in such a way as to cover or interfere with any existing alignments of main or service pipes or telephone or telegraph wires and electric mains.”

22. The point is that one of the special conditions made for the issuance of the Grant is that the Petitioner would not put up any buildings in such a manner as to interfere with existing electric mains. The buildings according to the Grant were to be for *“inoffensive light industrial purposes with ancillary offices and stores.”*

23. It is also admitted by the Petitioner that it has actually not erected any buildings and in any event it could only do so subject to existing electric lines which it admits were erected long before it obtained any proprietary interest to the land. Where then is the trespass, mistake or unlawful action by the Respondent? I see none.

24. In any event, the Respondent has given a credible defence that the electric lines are not on the Petitioner's land and that the wayleave of 20 metres on either side of the line will leave between 100 – 120 metres of the length of the plot for use by the Petitioner. I have also seen credible evidence that the land is partly occupied by squatters and that is where the Respondent's real problem lies. The Respondent has confirmed that the squatters agreed to move from the wayleave area and at the time of movement, the land was unsurveyed Government land which contention is borne out by the facts placed before me.

25. It must also be noted that this is not an ordinary civil litigation but a Petition on alleged violation of fundamental rights. A party so claiming must not tender such evidence as to make that claim a mere statement but must clearly show what violation he has suffered.

26. In the instant case, the evidence tendered points to no more than an attempt to invoke the Constitution to benefit financially from the Respondent's actions which are wholly lawful.

27. But having established the legal position of the parties, is there any infringement on the rights of the Petitioner?

I have firmly held that the Respondent's actions were within the law and as such no notice of any kind was required to be issued to the Petitioner and therefore its right to fair administrative action as protected by **Article 47** of the **Constitution**, **Section 45** of the **Electric Power Act** (repealed) and **Section 46** of the **Energy Act, 2006** have not been infringed. The Petitioner's prayer that his rights under **Article 40** (or even **Section 75** of the **Repealed Constitution**) have been infringed cannot succeed as the Petitioner has also failed to demonstrate how this right has been infringed.

28. The Petitioner also claims that its rights under **Articles 35, 42** and **70** have been infringed. I must reiterate that although the Constitution, 2010 and emerging jurisprudence would seem to point to a

less strict demand on what a Petitioner should lay before the Court, he who claims infringement/threat/violation of his constitutional rights and invokes the jurisdiction of this court must demonstrate with some measure of particularity the allegations and the manner in which they were infringed. See **(Matiba vs. The Attorney-General Misc. Application No. 666 of 1990)**. I am afraid that the Petitioner has failed to meet this threshold. A close look at the pictorial evidence tendered by the Respondent marked "JM1", "JM2" and those annexed to the Affidavit of Samuel Odiembo at pages 10 and 11, indicates that the steel pylons were erected along the boundary line of the suit land and the allegation of encroachment on the suit land or that the erection of the pylons have significantly reduced the usable land of the Petitioner and thus has rendered the balance of the land unfeasible for industrial use, indeed, would be very far-fetched. The Petitioner's evidence in that regard is wanting and cannot assist its case.

29. Having held as I have done above, the prayer for damages for violation of constitutional rights cannot survive in a vacuum and therefore that prayer cannot be granted.

30. In the end, the Petition before me is without merit and is hereby dismissed with costs to the Respondent.

31. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene - Court clerk

No appearance for Petitioner

Mr. Fraser for Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE