



**Musembi & another v Kenya Power & Lighting Company Limited (Civil Suit 537 of 2011) [2012] KEHC 4999 (KLR) (22 March 2012) (Ruling)**

*JOHN SAFARI MUSEMBI & Another v THE KENYA POWER & LIGHTING CO. LTD [2012] eKLR*

Neutral citation: [2012] KEHC 4999 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA**

**CIVIL SUIT 537 OF 2011**

**F TUIYOTT, J**

**MARCH 22, 2012**

**BETWEEN**

**JOHN SAFARI MUSEMBI ..... 1<sup>ST</sup> PLAINTIFF**

**KAMENE KAMAU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE KENYA POWER & LIGHTING COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. It is said that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are husband and wife. The 1<sup>st</sup> plaintiff is the owner of Plot No. 142 (the suitland) on which the 2<sup>nd</sup> plaintiff operates a family business. Alongside the plaint, the plaintiffs filed a Notice of Motion dated 5<sup>th</sup> October 2011 in which they seek the following prayers-

“That the pending the hearing and determination of the suit herein an injunction does issue restraining the defendant by itself, its servants, its employees, agents and any other person whomsoever and howsoever from demolishing, threatening to demolish, disconnecting power supply, threatening to disconnect power supply and in any way whatsoever from interfering with the plaintiff’s quiet enjoyment and possession of the parcel of land Plot No. 142 of Section 1 Mainland South.”

2. Sometime in 2009 the Defendant supplied electric power to the plaintiffs Jamsa Cool Breeze Bar built on the suitland. There after (the exact time is unclear) the plaintiffs undertook extension of their premises and this attracted the Defendants attention. According to a Notice of 14<sup>th</sup> September 2011 given by the Defendant to the 2<sup>nd</sup> plaintiff, and which triggered these proceedings, the plaintiffs had infringed on a wayleave. That letter gave the 2<sup>nd</sup> plaintiff 7 days notice to pull down the structure or face forceful demolition.



3. The Defendant alleges that at the time of the supply of electricity to the plaintiffs in the year 2009, the plaintiffs had not made the offending extensions. The Defendant further alleges that structures are illegal as they were constructed prior to the plaintiffs obtaining approval from the relevant Local Authority for their construction. That the approval was obtained on or about 27<sup>th</sup> October 2011 which would be about 22 days after this suit was filed. This allegation is not denied by the plaintiff's by way of affidavit or submission.
4. The main suit will revolve around determining whether or not there is existing a lawful wayleave that has been infringed by the plaintiffs. At the stage the plaintiffs seek for an interlocutory injunction. The remedy of an injunction lies in equity. On the face of it the structures which are the subject of this dispute were constructed prior to the plaintiff receiving approval of Mombasa Municipal Council; clearly then the structures are illegal. The plaintiffs are asking this court to protect these illegal structures. This court shudders at that request as equity will not aid a lawbreaker! On this alone the court would reject the application.
5. But I may be wrong and so I will examine the application on the basis of the principles laid down in the much celebrated decision of *Giella v Cassman Brown Co. Ltd.*
6. As said earlier, two main questions will need a resolution at the main hearing and these are-
  - (a) Does the Defendant have a lawful wayleave over the suitland?
  - (b) If so, have the plaintiffs infringed on this right.
7. Some facts presented by the parties through affidavit evidence are not agreed and will only be settled upon their witnesses testifying. Others are.
8. The Defendants' main argument is that it has a 33/11/KV Substation at Likoni and there have been incoming and outgoing lines from this substation since 1976. That the lines pass over the suitland and have been there way before the plaintiffs were allocated the property on 1<sup>st</sup> November 1999. The Defendant contends that the lines are on its wayleave and that the structures erected by the plaintiffs are under the power lines and on the wayleave trace. The 2<sup>nd</sup> plaintiff makes a concession, significant in my view, in paragraphs 3 and 4 of her further affidavit sworn on 29<sup>th</sup> November 2011-
  - “(3) That in response to the contents of paragraph
9. 5 of the affidavit, I state that at the time of application and supply of electric power to the suit premises by the defendant, it is true that the voltage was indicated as 33KV but I wish to point out that from that time up to the time of service of demolition Notice dated 14<sup>th</sup> September, 2011, the 33KV power lines over our premises were without power and/or switched off.
10.
  - (4) That I state that it is only after the defendant decided to connect power to otherwise before dead lines, that it issued us with the demolition notice to misdirect the court into believing that the move was genuine. I state that it was purely in bad faith.”
11. It is therefore not contested that there were power lines (whether live or dead) passing over the suitland even before the plaintiffs erected the extensions. For this reason I cannot say that the plaintiffs have established a prima facie case. I am in doubt when the Plaintiff says that the Defendant has no right of wayleave. Although this doubt can be dispelled at the main hearing it is significant at this interlocutory stage.



12. Are the plaintiffs likely to suffer irreparable loss if the injunction is not granted? The plaintiffs themselves give the answer to this question in prayer (c) of the plaint which reads;

“in the alternative and without prejudice to (a) and (b) above, an order for compensation in favour of the plaintiffs by the Defendant at the prevailing market rates.”

13. This is an acknowledgement that the plaintiffs’ loss, if proved, can be adequately compensated in monetary terms. It is not suggested that the Defendant is not in a position to pay whatever damages may be ordered in favour of the plaintiff.

14. This court would still decline to grant the application on the test of balance of convenience. The plaintiffs, at their own risk, put up a structure under an existing power line. This court is told by the Defendants, and it accepts, that the structures pose a danger to the public at large as the overhead power lines are live. The court will not make an order whose effect is to imperil the public.

15. For the reasons given the application dated 5<sup>th</sup> October 2011 is hereby dismissed with costs to the Defendants. The order of 13<sup>th</sup> October 2011 maintaining status quo is hereby discharged.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MARCH, 2012.**

**F. TUIYOTT**

**JUDGE**

**DATED AND DELIVERED IN OPEN COURT IN THE PRESENCE OF:-**

Omwenga for Applicant

Umara for Respondent

Court clerk - Moriasi

**F. TUIYOTT**

**JUDGE**

