



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 538 of 2011

KENYA POWER & LIGHTNING CO. PLAINTIFF/APPLICANT

V E R S U S

OMAR ABUBAKAR ALI.....1ST DEFENDANT/RESPONDENT

JUMA MGANGA 2ND DEFENDANT/RESPONDENT

JAMES MUTHINJA 3RD DEFENDANT/RESPONDENT

BEN KARUGA 4TH DEFENDANT/RESPONDENT

RULING

1) The Plaintiff has sued the four Defendants and seeking the following prayers-

“(a) A mandatory injunction compelling the Defendants by themselves, their servants, agents and/or employees to demolish all the illegally erected permanent and/or temporary structures directly under the high and low voltage power supply lines on the road reserve along Shelly Beach Road and on the access road abutting plot numbers MMS/BLOCK 1/240 and MMS/BLOCK 1/241.

(b) A permanent injunction restraining the Defendants by themselves, their servants, agents and/or employees from further erection and/or construction of any illegal permanent and/or temporary structures under the high and low voltage power supply lines on the road reserve along Shelly Beach Road and on the access road abutting plot numbers MMS/BLOCK 1/240 and MMS/BLOCK 1/241.”

2) Simultaneously with filing of the suit the Plaintiff has through an application dated 6th October 2011 sought the following orders of injunction-

“1. Spent

2. Spent

3. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves, their agents, servants and/or employees and/or any other person or otherwise from using, building, constructing and/or erecting any structures and/or undertaking any form of development on the road reserve and/or access route abutting plot numbers MMS/BLOCK 1/240 and MMS/BLOCK 1/241 pending the interparties hearing and determination of this suit.

(4) That this Honourable Court be pleased to issue a mandatory injunction compelling the Defendants by themselves, their agents, servants and/or employees to demolish and or pull down the illegal temporary and/or permanent structures and/or premises constructed and/or any other

developments undertaken on the road reserve and/or access route abutting plot numbers MMS/BLOCK 1/240 and MMS/BLOCK 1/241 pending the interparties hearing and determination of this suit.”

- 3) Only the 1st Defendant entered appearance, filed Defence and responded to the application. Interlocutory judgement was on, 24th July 2012, entered against the 3rd and 4th Defendants. For some reason, although a request for judgement was filed against the 2nd Defendant on 13th April 2012, the request has not been acted upon by Court.
- 4) In an affidavit sworn by Joseph Ndegwa on 6th October 2011, the Plaintiff complains that the Defendants have erected permanent and temporary structures under high and low voltage electricity power lines. That these structures are built on a road reserve along Shelly Beach road abutting plot Numbers MMS/Block 1/240 and MMS/Block 1/241. To that affidavit is attached a cadastral map of the Likoni area showing the position of the overhead and submarine power lines.
- 5) Attached also to Mr. Ndegwa’s affidavit is a letter of 28th December 2010 from the District Officer Likoni is addressed to ‘**All Developers near/next to YWCA Gate**’. In that letter the District Officer raises a concern about construction of illegal structures built on the road reserve or under high voltage electricity lines. This seems to corroborate the account of the Plaintiffs witness that there are illegal structures under high and low voltage electricity lines. That evidence was bolstered by the photographic evidence of the illegal developments. There is then the plan which shows that there is an overhead line running along a road reserve above Plot 240 on one side and 241 on the other.
- 6) That is the evidence that confronted the Defendant. The 1st Defendants replying affidavit is a short one. I have looked at it. The Defendant fails to challenge the evidence of the Plaintiff directly. Although stated in the Defence that he had obtained all necessary approvals and consents for the construction of the structures, the Defendant has not demonstrated that its structures have the sanction and approval of the Local Authority.
- 7) As said earlier the 3rd, 4th and 5th Defendants never filed any responses at all.
- 8) Given the above evidence I would hold that, on a prima facie basis, the Plaintiff has established that the Defendants have breached its wayleave traces. They have constructed structures under electricity lines. This Court is told that this infringement poses a danger to the users of the illegal structures as the overhead lines are live. In addition the structures impede the Plaintiff’s access to the lines for purposes of inspection, repair and maintenance. The danger that these structures would portend to human life cannot in my view be compensated by way of pecuniary damage.
- 9) I am persuaded that the Plaintiff has met the first two conditions in **Giella –Vs- Cassman Brown & Co. Ltd (1973)EA 358**. There is a prima facie case with a probability of success and a likelihood of loss that cannot be compensated in damages. The Court will grant the prohibitory injunction without much ado.
- 10) The Plaintiff seeks a second prayer of a mandatory injunction. The Plaintiff would have to do more so as to bring itself to the high threshold set for grant of the mandatory injunction. Our Courts have embraced the test as set out in the high-water mark decision of **Locabail International Finance Ltd –Vs- Agroexport & Others [1986]1 ALL ER 901** in which the holding of the Court was-

“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 once or where the injunction was directed 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.”

12) From the pleadings and evidence of the Plaintiff the Defendants commenced the construction of some of the illegal structures in December 2010 and at least one in June 2011. It was not until 6th October 2011 that the Plaintiff filed suit. The Plaintiff has not explained why it took 10 months to react. In the absence of some explanation, the Court is unable to say that the Plaintiff acted promptly. This works against it. I am not entirely persuaded that the Plaintiff has made out a case for the issuance of such a drastic order as a mandatory injunction at this stage of the proceedings. The Court needs to be satisfied, after a trial, that it should order for the demolition of these structures.

13) The upshot is that I allow prayer 3 of the application of 6th October 2011. Prayer 4 is declined. The Plaintiff shall have costs of the application.

Dated and delivered at Mombasa this 6th day of December, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Kiarie for Plaintiff

No appearance for Defendants

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**