



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 1720 OF 2002

KENYA POWER & LIGHTING CO LTD.PLAINTIFF

V E R S U S

GIMALU HEALTH ESTATE LTDDEFENDANT

R U L I N G

The Plaintiff filed suit herein by plaint dated 15th November, 2002. Its claim against the Defendant is that the Defendant, after duly giving to the Plaintiff a wayleave to enable the Plaintiff to lay an electric power transmission line across a portion of the Defendant's land, **L.R. No. 167/9**, the Defendant thereafter unlawfully obstructed the Plaintiff from laying the transmission line. The main reliefs sought are:-

1. A declaration that the Defendant is estopped from denying the Plaintiff consent, or obstructing it from entering the Defendant's land, to construct the electric power transmission line.
2. A declaration that any injury that may be caused by the laying of the transmission line to the Defendant's land (and any loss that the Defendant may thereby suffer) is a loss capable of being compensated for by a monetary award.
3. An order for assessment of any compensation payable to the Defendant for any loss or harm that may be caused to it.
4. A permanent injunction to suitably restrain the Defendant from obstructing the Plaintiff in its work of laying the transmission line across the Defendant's land.
5. An order for compensation by the Defendant for any losses incurred by the Plaintiff.

Together with the plaint the Plaintiff filed **chamber summons dated 15th November, 2002**. It sought the main order that pending disposal of the suit the Defendant be restrained from obstructing the Plaintiff in its work of laying the electric power transmission line across the Defendant's land. That application was heard *inter partes*. It was allowed in a ruling delivered on 10th December, 2002 (Rimita, J).

The Defendant has now come to court by **chamber summons dated 29th October, 2008**. It seeks three main orders as follows:

1. That the court be pleased to discharge and/or set aside the interim injunction granted on 10th

December, 2002.

2. That the Plaintiff be directed to remove from the Defendant's property any high voltage electric transmission lines passing through the Defendant's land, L.R. No. 167/9 situated at Redhill, Limuru.
3. That the court be pleased to issue an order of injunction to restrain the Plaintiff "from entering and constructing heavy power pylons, electric posts, digging up the Defendant's land...and putting heavy tension electric power cables on the land, or in any other manner interfering with the Defendant's said parcel of land....".

The application is brought under **Order 39, rules 2 and 4** of the old **Civil Procedure Rules** (the **Rules**). **Section 3A** of the **Civil Procedure Act, Cap 21** is also cited.

The grounds for the application appearing on the face thereof include:-

1. That the Plaintiff has lost interest in prosecuting this suit after obtaining temporary injunction.
2. That the Plaintiff is taking undue advantage of the fact that it is presently enjoying injunctive orders issued by the court, thus abusing the court process.
3. That the Defendant is suffering great hardship, inconvenience and financial loss due to the said injunctive order.
4. That the removal of the said transmission lines from the Defendant's property shall not cause any loss to the Plaintiff who could easily relocate them to another parcel of land.
5. That the Plaintiff is enriching itself unjustly by the Defendant's property.

A supporting affidavit sworn by one **JOAN NJOKI NDUNGI**, a director of the Defendant, is annexed to the application.

The application is opposed by the Plaintiff as set out in the replying affidavit filed on 21st November, 2008. It is sworn by one **BEATRICE MWENO**, the Deputy Manager, Legal Services, of the Plaintiff. The grounds of opposition appearing therefrom include:-

1. That it is not true that the Plaintiff is not interested in prosecuting the suit, having fixed it for hearing previously and taken other steps towards hearing.
2. That there have been negotiations between the parties towards settlement of the suit, though the negotiations, unfortunately, did not bear fruit.
3. That the Plaintiff still desires to prosecute the suit.

I have perused the record of the court. I have also considered the submissions of the learned counsels appearing, including the authorities cited.

Temporary injunctions are never meant to subsist indefinitely. They are intended to protect the rights of a litigant on a temporary basis pending disposal of the suit. A litigant enjoying such temporary injunction must demonstrate a keenness to have the suit disposed of expeditiously so that the respective rights of the parties in the subject matter of the suit may be finally adjudicated upon.

Where it is plain to the court that a litigant is no longer interested in prosecuting his suit because he is enjoying the benefit of a temporary injunction, or where the subsistence of such temporary injunction is inimical to the interests of justice, for example where it is causing grave prejudice to the other party, the court will not hesitate to discharge the injunction.

In the present case the temporary injunction in question was obtained on 10th December, 2002. That was six and half years ago. In that time the suit, which is obviously of an urgent nature, has not been prosecuted. No good reasons have been given for this inactivity.

The replying affidavit also does not contain any averment that the Plaintiff has, since it secured the temporary injunction, entered the portions of the Defendant's land comprised in L.R. No. 167/9 for construction of its transmission power line, and that it did indeed construct such power line, that having been the intended purpose of the temporary injunction.

In these circumstances I have no hesitation in holding that after obtaining the temporary injunction the Plaintiff went to sleep. It has not, over more than six years, demonstrated any keenness to prosecute its case so that the respective rights of the parties may be finally determined. It is quite clear that the Plaintiff is no longer in a hurry to prosecute its case because of the protection it is getting from the temporary injunction.

I therefore hold that the continued subsistence of the temporary injunction granted on 10th December, 2002 is now inimical to the interests of justice and is causing grave prejudice to the Defendant.

In the circumstances I will allow prayer 1 of the application by chamber summons dated 29th October, 2008. The temporary injunction granted on 10th December, 2002 is hereby discharged.

Regarding prayer 2, granting the same would amount to granting the Defendant's counterclaim at this interlocutory stage, and I decline to do so.

As for prayer 3, I hold that the same is deserved in order to preserve the *status quo* pending disposal of the Defendant's counterclaim. I will grant it as prayed.

The Defendant shall have costs of this application. It is so ordered.

There has been considerable delay in the preparation and delivery of this ruling. The same was caused by my poor state of health these last 5 years or so and is regretted.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF JULY, 2011

**H.P.G. WAWERU
JUDGE**

DELIVERED THIS 8TH DAY OF JULY, 2011