



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 699 of 2007**

**KENYA POWER & LIGHTING CO. LTD.....APPELLANT**

**VERSUS**

**TANAD TRANSPORTERS LTD.....RESPONDENT**

**R U L I N G**

1. By a notice of motion dated 29<sup>th</sup> October, 2008, said to be brought under Sections 3, 3A, 63 and 78 of the Civil Procedure Rules, Kenya Power & Lighting Company Ltd, (hereinafter referred to as the applicant), seeks the following orders:

(i) (Spent)

(ii) That the respondent whether by itself its servants and/or agents be restrained by way of temporary injunction from continuing to erect permanent structures and/or in any way continuing developing or carrying on with the ongoing developments on or over and in breach of the plaintiff's wayleaves in Eastleigh Nairobi covered by the applicant's 66Kv power overhead lines known as Jevanjee 1 and 2 and pending the hearing and determination of this application.

(iii) That the respondent whether by itself its servant and/or agents be restrained by way of an injunction from continuing to erect structures and/or in any way developing and/or otherwise interfering with the applicant's wayleaves rights over all that property known as LR No.209/7260/R or howsoever described and in breach of the plaintiff's wayleaves in rights pending the hearing and determination of the appeal herein.

(iv) That this honourable court do stay the proceedings in lower court being CMCC No.3988 of 2007 pending the hearing and determination of the appeal herein.

2. The respondent to the notice of motion is Tanad Transporters Ltd. The background to the motion was a suit which was filed by the respondent against the applicant in the Chief Magistrate's Court at Nairobi in which the respondent obtained an interlocutory order of mandatory injunction, directing the applicant to reroute and/or shift their 66Kv power line traversing the respondent's plot LR No.209/7260/R (hereinafter referred to as the suit premises), as contracted, pending the hearing and determination of the suit. The applicant is aggrieved by this order of mandatory injunction which was issued by the lower court on 13<sup>th</sup> August, 2007. The applicant has therefore lodged an appeal in this court against that order raising 6 grounds as follows:

- (i) That the Honourable Magistrate erred in law and in fact in granting a mandatory injunction pending hearing and determination of the main suit as prayed for in the respondent's application dated 16<sup>th</sup> May, 2007 which injunction was unwarranted in the circumstances.
- (ii) That the learned magistrate erred in law and in fact in not upholding that the appellant had a good defence raising triable issues.
- (iii) That the learned magistrate erred in not finding out that the mandatory injunction in itself purely concluded the main suit herein.
- (iv) That the learned magistrate erred in not taking into account entirely the submissions of the appellant.
- (v) That the learned magistrate erred in law and in fact in failing to uphold that an award of damages was sufficient in the circumstances.
- (vi) That the learned trial magistrate erred in law and in fact in failing to uphold the rules and principles of natural justice.

3. Pursuant to a notice of motion dated 14<sup>th</sup> November, 2007, brought by the applicant under Order XLI Rule 4 of the Civil Procedure Rules, Hon. Visram J granted an order on 26<sup>th</sup> February, 2008 staying execution of the ruling of the lower court issued on 13<sup>th</sup> August, 2007 pending the hearing and determination of the applicant's appeal. The applicant now contends that in complete and utter disregard to the orders of 26<sup>th</sup> February, 2008, the respondent has unlawfully and irregularly continued developing structures on the applicant's wayleave trace. The applicant maintains that the construction is posing extreme danger to the respondent, his employees and the general public at large. The applicant further contends that the continued construction by the respondent on the suit property will render the appeal nugatory and cause the applicant irreparable loss and damage, hence the application for interlocutory injunction pending the hearing of the appeal.

4. The applicant's legal officer Owiti Awuor has sworn a supporting affidavit as well as a supplementary affidavit and a further supplementary affidavit. In short the affidavits underscore the applicant's contention that the construction and development carried on by the respondent is unlawfully infringing on the applicant's wayleave lines and is posing imminent danger to persons and property on the site and the public at large. The applicant further contends that the lower court dealt only with the issue of realignment of one power line and the orders made were in respect of that power line only. The applicant further contends that the respondent's title to the suit property, contains a special condition which prevents the respondent from putting up any building that interferes with the electric wires or mains.

5. In support of the application, counsel for the applicant relied on the following authorities:

- (i) ***Civil Application No. Nai 209 of 2003 Wilfred Koinange vs Glad-Ak finance Ltd & Another.***
- (ii) ***Civil Application No. Nai 161 of 1988 Githunguri vs Jimba Credit Corporation Ltd.***
- (iii) ***Civil Application No. Nai 155 of 2005 Malde Transporters Ltd vs Bashir A. Mohamed & Another.***
- (iv) ***Civil Application No. Nai 152 of 2005 Donholm Raisi Stores vs Barclays Bank Ltd & Another.***
- (v) ***Civil Application No. Nai 312 of 2005 Hatchings Biermer Ltd vs Barclays Bank Ltd & Another.***
- (vi) ***Civil Application No. Nai 310 of 2003 Stephen Kanini Wangondu vs Kobil Petroleum Ltd.***

6. The application was opposed through a replying affidavit and a further affidavit, both sworn by Musa Said Hassan, who is the managing director of the respondent. It is contended that the applicant is

attempting to introduce issues which were not in dispute in the primary suit and therefore not issues in the pending appeal. It is maintained that the appellant never raised any counterclaim in the primary suit to have the respondent stopped from any form of construction. It is maintained that the pending appeal is only dealing with the issue of the mandatory injunction compelling the applicant to reroute its power line and there is no issue of building in dispute and the construction by the respondent cannot affect the validity or continuity of the appeal. It was maintained that there was an order issued by Bosire J on the 14<sup>th</sup> November, 2007 staying the rerouting of the lines. It was further maintained that the application was based on misrepresentation and a lack of candid exposition of the relevant facts regarding the rerouting and the imminent risk allegedly posed by the construction. The respondent maintained that contrary to the applicant's denials, the respondent accepted the conditions laid down by the applicant for the rerouting of the power line and duly made the required payments. The respondent further maintained that there was no indication that the quotation from the applicant was for only one power line. It was contended that the Local Authority duly approved the desired translocation of the power lines, as did the Ministry of Lands and Settlement.

7. The respondent maintained that if the injunction is granted and the construction is stopped it will suffer heavy losses as the project is a capital intensive project and the contractor is already on site. Regarding the drawings exhibited by the applicant for the rerouting of the power line the respondent maintained that the same related to Plot No.209/12555 or 12565 none of which related to the respondent's property which was LR.209/7260/R. It was maintained that the applicant was not coming to this court with clean hands. The Court was urged to distinguish the authorities cited by the applicant's advocate as they all related to the principles governing an application for stay of execution under Rule 5(2)(b) of the Court of Appeal Rules.

8. Although the applicant's motion is said to be brought under Section 3A, 63 and 78 of the Civil Procedure Rules, it is evident that that is an error as those are substantive provisions of the Civil Procedure Act. In effect, the applicant is invoking the inherent jurisdiction of the court to make orders to prevent the ends of justice from being defeated. However, the applicant appears to have lost sight of Order XLI Rule 4(6) of the Civil Procedure Rules which states as follows:

***“Notwithstanding anything contained in sub-rule 1 of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”***

Therefore, this court as an appellate court has express jurisdiction to grant orders of temporary injunction pending the hearing of an appeal and it is not therefore necessary for the court to revert to its inherent jurisdiction. The question is, under what circumstances will the court grant such an order of interlocutory injunction pending the hearing of an appeal? The answer is that the principles remain the same as those stated in the old celebrated case of ***Giella vs Casman Brown & Co Ltd [1973] EA 358***. i.e. the applicant must show a prima facie case with a probability of success, secondly, the interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, and thirdly, if the court is in doubt it will decide the application on the balance of convenience.

9. In this case, the matter before the court being an appeal, the applicant has to satisfy this court that *prima facie*, his appeal is arguable and has a probability of success. This requires a critical examination of the memorandum of appeal which has been put forward by the applicant with a view to forming an opinion (without pre-empting the appeal) as to whether the appeal is arguable and has probability of success. In this case, the respondent's suit before the trial magistrate was for specific performance of an agreement allegedly entered into between the applicant and the respondent for the rerouting of 66Kv overhead power line traversing the plaintiff's plot No. LR.209/7260/R for a consideration of Kshs.856,153/= or in the alternative judgment for Kshs.856,153/= together with interest until payment in full. The applicant's response to the respondent's claim was denial in the first instance, and without prejudice to the denial, it was contended that if any consideration was agreed as alleged, then no such consideration was ever received or receipted as alleged by the respondent. It was further contended that

the respondent's suit was defective and misconceived.

10. In the notice of motion dated 16<sup>th</sup> May, 2007 filed by the respondent in the lower court the respondent sought “*an order of mandatory injunction directing the defendant to reroute and/or shift their 66Kv power line traversing the plaintiff's plot No.LR.209/7260/R in Eastleigh Nairobi as contracted pending the hearing and determination of the suit.*” It was contended that the respondent made the necessary payment in accordance with the agreement, and that the applicant having duly accepted the payment it was legally bound to reroute the power line.

11. In response to the motion, the applicant's legal officer one Allan Owiti, filed an affidavit challenging the respondent's proof of ownership. He swore that the land purported to be the respondent's plot (suit property) is and was originally part of the applicant's wayleave trace, and therefore the applicant had legal rights over the suit property, prior to the acquisition of the suit property by the respondent. The applicant further maintained that the orders sought by the respondent being permanent in nature could not issue at the interlocutory stage and that in any case the application did not meet the mandatory legal requirements.

12. In his ruling of 13<sup>th</sup> August, 2007, the trial magistrate found that the applicant received a total sum of Kshs.856,153/= from the respondent as payment for rerouting the applicant's 66Kv power line traversing the respondent's property. The trial magistrate rejected the issue of ownership raised by the applicant as an afterthought. The trial magistrate found that the respondent had established a clear case. He therefore issued the order of mandatory injunction which was sought.

13. I have perused the memorandum of appeal filed by the applicant, and the record of appeal including the pleadings and the submissions which were made before the trial magistrate. The order made by the trial magistrate on 13<sup>th</sup> August, 2007 required the applicant to reroute the 66Kv power overhead line traversing the respondent's plot. The main issue which will arise at the determination of the appeal is whether the mandatory injunction issued by the trial magistrate was an interlocutory order pending the hearing of the suit, or whether it was a final order which if complied with would have the effect of prematurely preempting the main suit, and if so, whether the trial magistrate had jurisdiction to determine the suit conclusively at the interlocutory stage. *Prima facie* these issues are arguable and the appeal has a probability of success on those issues.

14. The applicant maintained that unless the orders of interlocutory injunction which it is seeking is granted, the appeal might be rendered nugatory, and not only the respondent but even 3<sup>rd</sup> parties are likely to suffer loss and damage as a result of the danger posed by the construction on the applicant's wayleave trace. It is evident that the applicant did not file any counterclaim in the lower court regarding the infringement of its wayleave rights. Thus, infringement of the applicant's wayleave rights was not an issue raised in the lower court. Nevertheless, at the time the respondent filed the suit in the lower court there was no question of infringement of the wayleave rights. Indeed, the respondent appeared to have acknowledged the applicant's rights. This is evident by the respondent's attempts to enter into an agreement with the applicant for the rerouting of the overhead power line, and the respondent's efforts to have the agreement enforced by the court. The request made by the respondent to the applicant for rerouting of the power line was for purposes of facilitating the development on the suit property which had been approved by the City Council. This was a clear recognition by the respondent of the fact that it would not be safe for the development to proceed whilst the overhead 66Kv power line remained where it was. The trial magistrate granted the mandatory injunction to have the overhead power line rerouted. That order has not been executed as the order was stayed by this court.

15. Pursuant to a consent between the parties, this court conducted a *locus in quo* hearing on the 13<sup>th</sup> November, 2008, during which it was noted that there were two 66Kv power overhead lines traversing the respondent's property and that there was a double storied construction going on almost below the 66Kv overhead line which was on the eastern side, and there was also construction going on partly under the 66Kv power line running across on the western side. It was also noted that the overhead power line on the western side also passed right across the double storied construction and would pose a danger

unless rerouted. Construction work was also noted on the extreme western side which was not affected by the two 66Kv overhead lines. At the site the parties were generally not agreed as to whether the agreement was for rerouting of both overhead power lines, or the power line on the western side only. Parties were also not agreed on how the power line was to be rerouted.

16. From the site visit, it became apparent that the respondent has commenced the development of the suit property while the 66Kv overhead power line is yet to be rerouted. It is clear that the ongoing construction pose a serious risk to persons and property in view of its proximity to the two existing 66Kv overhead lines running across the respondent's property. The ongoing construction and the existing power lines cannot co-exist. It was evident from the site visit that the development undertaken by the respondent is a very expansive development which is likely to result in losses if the conclusion of the development is delayed. Nevertheless, there is danger to life and property, not just of the parties involved in this suit, but even the public at large. Moreover, the costs that may arise from any delay in the development can easily be assessed. The balance of convenience is therefore in favour of resolving the issue of the rerouting of the power lines before the development can continue.

17. For the above reasons I grant the interlocutory injunction as per prayer (3) of the applicant's notice of motion dated 29<sup>th</sup> October, 2008 on the following terms:

- (i) The applicant shall file an appropriate undertaking duly signed under the applicant's seal, within 10 days from the date hereof, as to payment of damages which may arise as a result of the interlocutory injunction.
- (ii) The record of appeal which has already been filed shall be duly served on the respondent and the applicant shall take appropriate action to facilitate the speedy disposal of the appeal.
- (iii) If the appeal is not disposed off within 9 months from today the order for interlocutory injunction shall be discharged unless otherwise extended by this court.
- (v) Costs of the application shall be in the appeal.

Those shall be the orders of this court.

Dated and delivered this 19<sup>th</sup> day of January, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Miss Ochieng H/B for Okeyo for the appellant/applicant

Mungla for the respondent