



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO. 40 OF 2003

JOSEPH NJUGUNA GACHOKA & 3 OTHERS..... PLAINTIFFS

VERSUS

KENYA POWER & LIGHTING CO. LTD. DEFENDANT

RULING

This application is brought by way of a Chamber Summons dated 21st January 2004. It is brought under Section 3A of the Civil Procedure Act and Order XXXIX Rules 1, 2, and 12. In it the applicants seeks orders for

1) Injunction to restrain the Respondent, Kenya Power & Lighting, Company from entering the Applicants lands or laying electric wires thereon or stringing wires over the said lands or carrying out any works connected therewith.

2) That the O.C.P.D. Kiambu Police Division assists in Enforcing the orders

3) Costs.

The lands in question are NDUMBERI/NDUMBERI/2501, NDUMBERI/NDUMBERI/1874 and NDUMBERI/NDUMBERI/1695 which each of the Applicants owns by virtue of copies of Title Deeds annexed to the application.

Briefly, the grounds on which the application is founded are

1) No agreement between the Applicants and the Respondent

2) No agreement as to amount of compensation

3) That the threatened action constitutes a violation of the Applicant's constitutional protection against deprivation of property without compensation and contrary to the provisions of the Electric Power Act 1997 and in contravention of the Constitution of Kenya.

The application is supported by an affidavit of the 1st Plaintiff Josephat Njuguna Gachoka sworn on 21st January 2004. A challenge has been raised to the three plaintiffs joint suit which challenge, in my view touches on the first Defendant's Affidavit sworn in a representative capacity. In my view, common questions of law and fact would arise if the three Applicants were to file separate suits in terms of Order 1 Rule 1 of the Civil Procedure Rules. I have taken note of the fact that in the draft minutes of a meeting between the Representatives of Tinganga/Ndumberi Region and K.P.L.C., annexed to the Affidavit which minutes were no doubt drawn by the Respondents, the 1st plaintiff is a recognized representative of

Ndumberi area. In the circumstances the objection on ground of misjoinder is overruled.

The Affidavit in support of the application contains 24 paragraphs whereas the Replying Affidavit has 15. Both parties presented lengthy oral arguments for and against the merits of the application and the relief sought. A summary of each side's case is as follows: -

The Applicants aver that the Respondents approached them sometime in 1998 seeking their permission to pass electric power lines over their pieces of land. The Applicants agreed to the request in the belief that the proposed venture was to public good, due appreciation being given to the benefit electricity would bring to the area. The request was oral and the Applicants believed that the proposed power lines were single domestic lines. The said lines were to be only 10 meters into the Applicants land. They claim they were shocked to see the Respondents encroaching from neighbouring plots where they had already put up huge high voltage metal towers/pillions which would result in lines hanging deep into their lands instead of the agreed 10 metres. The parties had all along not agreed on any compensation although there was a mutual understanding that adequate compensation would be arranged. Efforts to arrive at mutually acceptable figure have not borne any fruit to date. The Defendants however continued with their advances towards the plaintiffs pieces of land and prior to this action being brought they were very close. Hence the Application for an injunction to stop their advances and possible entry.

The Respondent company on the other hand says that the injunction sought seeks to bar the Respondent from executing its statutory mandate under the Electric Power Act 1997 and would have the effect of halting an almost complete power line project. They claim that the plaintiffs have signed agreements granting them way leave through their land. They concede that compensation is payable and that offers have been made which the Applicants have refused to accept. The Applicants challenge the validity of those agreements which are the Respondent's standard form agreements which the Respondent presented to the Applicants and the latter signed. I have seen copies of the said agreements and have noted that the same are blank as to the amount of compensation, distance or situation of the lines inside the land and also as to the particulars of the plots.

They bear the Applicants signatures but not that of the Respondent. They are also blank in the space where there should have been an alignment and designation of the electric power line referred to in the agreement.

Without going deep into the arguments the following things are clear.

- 1. Both parties accept that the provision of electric power is of public benefit***
- 2. That the Ol Karia Dandora Power Line Project is beneficial to not only the Applicants but othe r citizens***
- 3. The power lines must, of necessity, pass through people's lands.***
- 4. Such land owners must be compensated for such use.***

The Applicants willingly offered their plots for the purpose when approached by the Respondents. I note that there lacked consensus at that time of as to what sort of power lines were envisaged and also the amount of compensation to be paid. The Applicants believed the Respondents intended to put up ordinary domestic power lines which they considered not much of a nuisance. The Respondents however had in mind the huge pillions or towers. It is immaterial that the agreement alluded to by the Applicants is oral. The conduct of the parties does confirm the existent of a contract but conditional upon payment of compensation. Were I to hold that there was no consensus ad idem between the parties, then it would follow that any agreement between the parties is void ab initio. I will refrain from making a holding in that direction purely on the basis that this is a matter of national interest and that the Applicants are not, in principle, opposed to the project. They only desire that they be compensated adequately for the use of their property in accordance with the law.

According to the Applicants, the Respondents, with the help of police and local administration, have forcibly entered neighbouring plots and commenced the work, in the absence of compensation or mutual agreement to that effect. I consider such action contrary to the intentions of the parties and offending the spirit of the law which requires that land owners be compensated in the case of entry into their land for public use.

The parties herein have entered negotiations with the hope of arriving at a mutually acceptable amount of compensation. It is not a matter of the Respondent offering the Applicants a figure for them to accept as suggested in paragraph 7 of the Replying Affidavit. From the evidence on record one cannot help concluding that the Respondents high handedness and stiff-necked attitude has frustrated the negotiations. That the Respondents hold a mandate to execute statutory duties does not entitle them to arbitrarily enter into private land to execute those duties without the consent of the parties. Being a corporate body does not accord them a higher standing before the law than the Applicants. They must abide with the provision of the law and treat citizens as equal partners in issues of national interest.

As land owners threatened with arbitrary entry and use of their property, I find that the Applicants have a prima facie case as against the Respondents. The erection of the power lines in their land will be a permanent feature and for safety reasons the Applicants must restrict as much as possible their use of the portions contributed towards the power project, in other words are known as "the Trace" areas. From the draft agreement it is quite clear that the plot owners will normally assign certain rights and privileges over the trace to the Respondent company. They will have no say thereafter as to whether the lines remain or be removed.

I find it dishonest for the deponent of the Replying Affidavit to say in paragraph 9 that the laying of the lines will not interfere with farming activities or to suggest that no prejudice will be suffered since the Applicants' land is not being acquired. The Respondent's draft agreement proves otherwise. That "pillions" are not being erected is subject to proof to the satisfaction of the Applicants who have not been shown the specifications or plans in regard to the proposed works. For them to assume responsibility for the existence of the power lines their fears must be allayed. The only way this can be done is by letting them know the exact risk they are taking and compensating them adequately. It is a known fact that electric cables constitute a lethal weapon and their very existence on ones land, particularly in the rural areas, is a clear risk. Although I find that there is a basis for the orders sought, I do not consider it in the interests of justice to grant the same in view of the fact that the proposed action is one of national interest and to the public good. I will however exercise my discretion and give the parties two months within which to resume their negotiations and arrive at a mutually acceptable amount of compensation, as well as a mutual understanding as to the nature of the works to be executed. A consent order can thereafter be recorded in court even by way of a mention in the event that a settlement is arrived at before the expiry of the period of two months.

Pending the outcome of the said negotiations the Respondent shall remain temporarily enjoined from entering or carrying out any works on the Applicants' land. Costs in cause.

Delivered and Signed at Nairobi this 27th day of February 2004.

M.G. Mugo,

Ag. Judge