



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 30 OF 2020**

**KENYA ELECTRICITY TRANSMISSION COMPANY.....1<sup>ST</sup> PLAINTIFF**

**THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARYANN SHEIKH ABDIKADIR,**

**NUH NASSIR ABDI & 120 OTHERS.....DEFENDANTS**

**FRUITFUL FARMS LIMITED.....APPLICANT**

**RULING**

What is before Court for determination is the 78<sup>th</sup> and 79<sup>th</sup> Defendants' Notice of Motion dated 24<sup>th</sup> October, 2020 and the Applicant's Chamber Summons Application dated the 13<sup>th</sup> January, 2021. The Notice of Motion application is brought pursuant to Article 50 and 159 of the Constitution, Order 42 Rule 6 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Civil Procedure Act. In the said Notice of Motion application, the 78<sup>th</sup> and 79<sup>th</sup> Defendants seek an injunction against the Plaintiff in respect to land parcel number Kajiado/Lornagusua/ 2338 pending hearing and determination of the appeal. The application is premised on the grounds on the face of it and the supporting affidavit of GITONGA WAMBUGU KARIUKI who deposes that they are aggrieved with the Ruling of this Court dated the 21<sup>st</sup> September, 2020 and filed a Notice of Appeal to that effect. They insist the Plaintiff's project will permanently change the appearance of their land. Further, there are grave illegalities in the acquisition of their land. They contend there is a real likelihood their appeal will be allowed.

The Chamber Summons Application is brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act including; Order 1 Rule 10 (2) and 25 of the Civil Procedure Rules. The Applicant seeks to be enjoined as a Defendant in this suit and granted leave to file its pleadings including Defence in this suit. The Application is premised on the grounds on the face of it and the supporting affidavit of ALI FARAH its Director where he deposes that he is a son to the 94<sup>th</sup> and 95<sup>th</sup> Defendants who are registered proprietors of land parcel numbers KAJIADO/MAILUA/1112 and 1097. He confirms that together with his brother, they are directors of Applicant, which is a family business engaged in horticultural farming. He explains that the Applicant caused the subdivision of Kajiado/ Mailua/ 1097 into several parcels being Kajiado/ Mailua/ 1836, 1837, 1838 and 1839 while Kajiado/ Mailua/ 1112 was subdivided into Kajiado/ Mailua/ 2065 including 2066 respectively. He further confirms that the 94<sup>th</sup> and 95<sup>th</sup> Defendants are therefore registered proprietors of Kajiado/ Mailua/ 1836, 1837, 1838 and 1839, Kajiado/ Mailua/ 2065 including 2066 respectively, none of which are listed among the suit properties and are resultant subdivisions of Kajiado/ Mailua/ 1112 and 1097 respectively. Further, the property is named as Sungura Farm which has a three-phase power line and a 175 Kw Diesel generator installed therein as well as four separate machine boreholes feeding water dam. He reiterates that during construction of the power lines, the Applicant shall have to stop activities on Sungura Farm due to health and safety issues which shall cause a cessation of farming for the time of construction. He denies being consulted by the Plaintiffs' and contends that this is a violation of their rights to property. Further, despite the massive investments, there have been no negotiations nor offer of compensation. He insists no inquiry has been done and that a general valuation of the properties in the area concerned cannot give a fair valuation of the suit property. He reiterates that the 94<sup>th</sup> and 95<sup>th</sup> Defendants including the Applicant commissioned Highland Valuers Ltd who returned a Valuation figure of KShs. 83, 381, 120 of all losses expected from the suit properties.

The 1<sup>st</sup> Plaintiff opposed the application and filed a replying affidavit sworn by MARY WANJOHI its Senior Land Economist where she avers that from the documents in the supporting affidavit, the Applicant is not the owner of the suit properties. She confirms that the owner of the suit properties is already enjoined in this suit as the 94<sup>th</sup> and 95<sup>th</sup> Defendants who were gazetted in the Kenya Gazette dated the 21<sup>st</sup> April, 2017 as proprietors of the suit properties. She contends that the Applicant has not provided documentation to prove that indeed there is a legal nexus between the Applicant as well as the 94<sup>th</sup> and 95<sup>th</sup> Defendants. She deposes that the Respondent is aware farming business is being undertaken on the suit properties and is thus treating the 94<sup>th</sup> including 95<sup>th</sup> Defendants as owners of the farming business. Further, that the Respondent is yet to access the suit properties to quantify damages. She avers that the Respondent is currently engaging the Ministry of Agriculture through its Department of Agribusiness to undertake the assessment and quantify the damages. She reiterates that the

Applicant has not demonstrated that it is a necessary party whose presence is necessary to enable the court effectually and completely adjudicate on this matter. Further, that the Applicant lacks locus as there is no evidence of ownership of the suit properties.

The 94<sup>th</sup> and 95<sup>th</sup> Defendants filed a replying affidavit sworn by HUSSEIN AHMED FARAH where he reiterated the Applicant's averments above.

The two Applications were canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the 78<sup>th</sup> and 79<sup>th</sup> Defendants' Notice of Motion dated 24<sup>th</sup> October, 2020 and the Applicant's Chamber Summons Application dated the 13<sup>th</sup> January, 2021. including the rivalling affidavits and submissions, the following are the issues for determination:

- Whether orders of injunction pending appeal should be issued restraining the Plaintiff from undertaking construction of the electricity transmission lines on land parcel number Kajiado/ Lornqusua//2338
- Whether the Applicant **FRUITFUL FARMS LIMITED** should be enjoined as a Defendant in this suit.

As to whether orders of injunction pending appeal should be issued restraining the Plaintiff from undertaking construction of the electricity transmission lines on land parcel number Kajiado/ Lornqusua/2338

The 78<sup>th</sup> and 79<sup>th</sup> Applicants are aggrieved with the Ruling of this Court dated the 21<sup>st</sup> September, 2020 and filed a Notice of Appeal dated the 29<sup>th</sup> September, 2020. In their supporting affidavit, they insist the Plaintiff's project will permanently change the appearance of their land. Further, there are grave illegalities in the acquisition of their land. They contend there is a real likelihood their appeal will be allowed.

In line with the principles established in the case of **Giella Vs Cassman Brown (1973) EA 358**, I will proceed to interrogate whether the Applicants have established a prima facie case as against the Plaintiffs to warrant an order of injunction pending appeal.

In the impugned Ruling dated the 21<sup>st</sup> September, 2020, this Court had allowed the Plaintiff to proceed with the project of erecting transmission lines through various parcels of land including the Applicants. I note the Applicants' parcel of land had already been gazetted for compulsory acquisition vide gazette notice of 21<sup>st</sup> April, 2017. Further, the Court in its Ruling directed the parties to proceed to negotiate on the amount of compensation with the Plaintiffs and present a report to it. In the case of **Madhupaper International Limited vs Kerr (1985) eKLR** the court held that it would be wrong to grant an injunction pending appeal in circumstances where the appeal is frivolous or granting an injunction would inflict greater injustice than it would avoid. In the case of **Patricia Njeri & 3 Others v National Museum of Kenya [2004] eKLR** it was held as follows:

- “ a. An order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.*
- b. The discretion should be refused where it would inflict greater hardship than it would avoid.*
- c. The applicant must show that to refuse the injunction would render the appeal nugatory.*
- d. The court should also be guided by the principles in Giella v Cassman Brown [1973] EA 358.”*

While in the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR** the court held that: *“ The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”*

In the current scenario, this is a case for compulsory acquisition. The Applicants' property including other parcels of land had already been gazetted for creation of a wayleave. Since the acquisition was for a public utility, I reiterate the contents of this Court's Ruling dated the 21<sup>st</sup> September, 2020 and direct the Applicants to urgently engage the State so as to finalize the process of assessment of compensation and pay out of the same. Further, I note the 78<sup>th</sup> and 79<sup>th</sup> Defendants have not updated this Court on the progress of the Appeal. In the circumstance, I find that the 78<sup>th</sup> and 79<sup>th</sup> Defendants have not established a prima facie case as against the Plaintiffs to warrant the granting of an injunction pending appeal.

As to whether the Applicant **FRUITFUL FARMS LIMITED** should be enjoined as a Defendant in this suit.

The Applicant claims to be running a large-scale horticultural business on parcels of land owned by the 94<sup>th</sup> and 95<sup>th</sup> Defendants. The 94<sup>th</sup> and 95<sup>th</sup> Defendants admit that this is a family business and confirm the suit properties have since been subdivided. The Respondent contends that the 94<sup>th</sup> and 95<sup>th</sup> Defendants' suit properties have already been gazetted for compulsory acquisition. Further, the Respondent is yet to access the said properties for purposes of valuation.

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

***'(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'***

In the case of ***Joseph Njau Kingori vs. Robert Maina Chege & 3 others*** [2002]eKLR Nambuye J as she then was, provided the guiding principles to be adhered to when an intending party seeks to be enjoined in a suit: ***' When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:(1) He must be a necessary party; (2) He must be a proper party; (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff; (4) The ultimate order or decree cannot be enforced without his presence in the matter; (5) His presence is necessary to enable the Court to effectually and completely to adjudicate upon and settle all questions involved in the suit.'***

In this instance, I note the Applicant seeks to be enjoined as a Defendant in this suit as it is undertaking horticultural farming on suit properties owned by the 94<sup>th</sup> and 95<sup>th</sup> Defendants. They confirm the said properties have since been subdivided. I note the said properties had been gazetted for compulsory acquisition. Rule 3 of the Land (Assessment of Just Compensation) Rules 2017 provides for factors to be considered when assessing compensation and developments on the land is a key factor. I further note the Plaintiffs have only sought to acquire a wayleave and not the whole parcels of land. It is trite that compulsory acquisition focusses mainly on the land while developments thereon are considered during assessment of damages. Insofar as I concur with the Applicant that they have undertaken massive development on the suit properties which should be considered in valuation for compensation, I opine that the issues raised by the Applicant including subdivision of the suit properties should be presented to the Plaintiffs at the time of assessment for damages. In the circumstance, I find that the presence of the Applicant will be taken into account during inquiry to assess compensation.

In relying on the facts as presented, Order 1 Rule 10 of the Civil Procedure Rules and decisions cited above, it is evident that the Applicant does not meet the criteria set for a Defendant nor its involvement necessary to enable the court effectually and completely adjudicate upon this suit.

It is against the foregoing that I find the two instant applications unmerited and will disallow them.

Costs will be in the cause.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 22ND DAY OF MARCH, 2021**

**CHRISTINE OCHIENG**

**JUDGE**