



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

ELC SUIT NO. 97 OF 2020 (FAST-TRACK)

MIKE KIPKEMBOI ARAP SINGOEL.....1ST PLAINTIFF/APPLICANT
KIPKARREN SEVENTH DAY ADVENTIST CHURCH....2ND PLAINTIFF/APPLICANT
SALVATION ARMY KIPKARREN.....3RD PLAINTIFF/APPLICANT
JONES MALAKWEN LAGAT.....4TH PLAINTIFF/APPLICANT
TIRONG KIMAIYO TANUI.....5TH PLAINTIFF/APPLICANT
EZEKIEL KIPKESIO MENGECH.....6TH PLAINTIFF/APPLICANT
RENISON MBWAGWA.....7TH PLAINTIFF/APPLICANT
JOHN ODHIAMBO ONYANGO.....8TH PLAINTIFF/APPLICANT
BERECK KEMONI MOTARI.....9TH PLAINTIFF/APPLICANT
NICHOLAS KIPCHUMBA.....10TH PLAINTIFF/APPLICANT
TITUS GITAU KARANJA.....11TH PLAINTIFF/APPLICANT
TONY TIMOTHY MUGAMI.....12TH PLAINTIFF/APPLICANT

VERSUS

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application by the plaintiff/applicants dated 4th November 2020 seeking for the following orders:

- a) Spent
- b) That there be interim orders of injunction restraining the defendant/respondent either by itself or through its agents, employees and/or servants from trespassing onto, demolishing structures, encroaching, alienating, wasting, fencing, placing beacons or otherwise interfering with the plaintiffs' use and quiet possession of those land parcels known as ELDORET MUNICIPALITY / BLOCK 15/1739, 1760, 2000, and 2101 pending the hearing and determination of this application inter partes.
- c) That there be interim orders of injunction restraining the defendant/respondent either by itself or through its agents, employees and/or servants from trespassing onto, demolishing structures, encroaching, alienating, wasting, fencing, placing beacons or otherwise interfering with the plaintiffs' use and quiet possession of those land parcels known as ELDORET MUNICIPALITY / BLOCK 15/1739, 1760, 2000, and 2101 pending the hearing and determination of this suit.
- d) That the costs of this application be borne by the defendant/respondent.

Counsel agreed to canvas the application vide written submissions which were duly filed.

APPLICANTS'SUBMISSIONS

Counsel submitted that the Plaintiff/Applicants are the lawful proprietors of those parcels of land known as **ELDORET MUNICIPALITY/BLOCK 15/1739**, 8th – 12th Plaintiffs), **1760** (1st, 4th – 7th Plaintiffs), **2000** (3rd Plaintiff) and **2101** (2nd Plaintiff) and attached copies of Sale Agreements as well as Letters of Allotment to show ownership status.

It was counsel's further submission that the defendant has a pipeline wayleave adjacent to the said parcels of land and in July 2020, some persons claiming to be officers from the Defendant started making claims that the Plaintiffs had encroached on the Defendant's wayleave. That in August 2020 the defendant offloaded several beacons as per the attached photographs bearing the initials of the Defendant (KPC) and intimated that they intended to fix them to mark 30 metres wayleave which would fall within the Plaintiffs' plots.

Counsel relied on the Giella Casman Brown Case on injunctions and submitted that the plaintiff has proved a prima facie case with a probability of success based on the ground that the plaintiffs are the owners of the suit parcels of land vide the sale agreements and allotment letters, the defendant's letter dated 3rd April 2008 confirming that the wayleave measures 10 meter wide as per the ground, that no evidence has been presented to justify the allegation that the suit parcels were unalienated government land at the time the pipeline wayleave was acquired and the lines installed and that no gazette notice has been annexed to prove the alleged acquisition of suit properties for the extension of the Respondent's pipeline to Western Kenya as alleged in the Replying Affidavit at paragraph 11.

Counsel therefore urged the court to find that the plaintiffs have established a prima facie case with a probability of success.

On the issue as to whether the plaintiffs will suffer irreparable harm counsel submitted that most of the plaintiffs are churches with spiritual and sentimental attachment to their church structures that the Defendant has issued threats to bring down. That the plaintiffs will not be able to be compensated by way of damages and that huge amounts of money have been spent in architectural designs among others which will be difficult to assess.

Counsel therefore urged the court to allow the application as prayed.

RESPONDENT'S SUBMISSIONS

Counsel gave a brief background the case and stated that between the year 1991 and 1993 the Defendant/ Respondent, a wholly owned State Corporation whose mandate is to transport refined petroleum products from Mombasa to hinterland, acquired wayleaves/easements on various parcels of land, including the suit properties, for purposes of laying its pipeline network across the country.

That the pipeline wayleaves/easements acquired by the Defendant/ Respondent are 30meters in width throughout the country which were acquired to provide adequate space for the construction of white petroleum products pipelines together with ancillary apparatus for operational, repair and maintenance requirements, future expansion, and to give adequate space for maneuverability during response to emergencies.

It was counsel's submission that at the time of acquiring the defendant pipeline wayleave over the suit property, the suit properties were unalienated government land and had not been allotted to any individual, and as such Defendant/ Respondent has constructed two high pressure white petroleum pipelines and transports highly flammable petroleum products through the pipelines within the said wayleaves.

Counsel further submitted that the first pipeline was laid between the year 1990 and 1993 while the second pipeline was laid between the year 2010 and 2012 and that the Plaintiffs acquired the suit properties through allotment letters and/or sale agreements all obtained after the year 1990 of which to date, none of the Plaintiffs has been issued with a Certificate of Lease.

Mr. Rop submitted that the properties so acquired by the Plaintiffs were subject to overriding interests that subsisted and affected the land at the time of the said acquisition of which the defendant's 30 meter pipeline wayleave/easement comprised an overriding interest. Further that by a letter dated 3rd April 2008 the Defendant granted an approval to the 2nd Plaintiff/ Applicant to lay a water pipeline in response to their request dated 31st March 2008. The said approval clearly outlined the conditions to be met when laying the water pipeline.

Counsel submitted that the Plaintiffs have erected churches and other structures within the 30-meter wayleave thus posing a high risk to the pipelines beneath, the surrounding environment, life and property and that on 2nd September 2020, the Defendant/ Respondent issued a notice to the Plaintiffs to immediately cease the encroachment activities within the wayleave. That the Defendant's/Respondent's wayleave is an overriding interest over the suit property and could not be extinguished upon subsequent adjudication, registration, transfer or change of ownership.

It was counsel's submission that the Defendant's/ Respondent's pipeline wayleave is a public right of way created for the benefit of the public before the suit property was allocated to the Plaintiff. Counsel cited the provisions of Section 143(2)(a) (3) and (4) of the Land Act which states that:

"A public right of way may be —

(a) a right of way created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions, referred to in this Act as a way leave,

(3) A public right of way shall attach to and run with the servient land in respect of which it has been created and shall be binding on all owners from time to time of the servient land, any manner they are occupying the land, whether under a land or a derivative right

thereof, or under customary law or as a successor in title to any such owner or as a trespasser.

(4) A way leave shall authorize persons in the employment to or who are acting as agents of or contractors for any of the organizations, authorities and bodies to enter on the servient land for the purpose of executing works, building and maintaining installations and structures and inseting all such works, installations and structures on the servient land and to pass and repass along the way leave in connection with purposes of those organizations, authorities or bodies.

Mr. Rop therefore submitted that the Defendant's/ Respondent's actions are within the law in that it has a responsibility to protect the right of way from any form of encroachment that will interfere with its pipeline system. The protection entails maintenance of the infrastructure, patrols and surveillance, marking the wayleave for purposes of keeping away potential trespassers and encroachment activities.

Counsel also relied on the provisions of section 28 (i) of the Land Registration Act, 2012 which states as follows:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register —

...(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law."

Counsel also cited S section 138 of the Land Act which provides that:

“ . . .an easement burdens the servient land and runs with the land for the same period of time as the land or lease held by the grantor who created that easement.

Mr Rop relied on the case of **Kenya power and lightning Company v. Mosiara Trading Co. LTD 2016 eKLR** where the court held that

“It is evident that the Plaintiff applied for a public right of way or wayleave in 1953 and the same was granted. The Defendant’s Grant is therefore subject to that public right of way (wayleave). The Defendant has a duty to safeguard that wayleave. Though the defendant has right over the suit property, that right can be defeated by operation of laws. In the instant case by creation of public right of wayleave under Section 143(1) of the Land Act and the fact that the grant is subject to easement and conditions contained in the grant.”

Counsel therefore urged the court to find that the plaintiffs have not met the threshold for grant of injunctions as their allotment has been defeated by operation of the law.

ANALYSIS AND DETERMINATION

This is an application for temporary injunction to stop the respondent from undertaking any activities on the wayleaves area on the suit properties. The issues for determination are as were established in the **Giella vs Cassman Brown Co. Ltd 1973] EA 358** . A party seeking for orders of injunction must establish that he or she has a prima facie case with a probability of success, whether the applicant will suffer irreparable harm and where the balance of convenience lies.

The applicants have produced documentary evidence in terms of sale agreements and allotment letters which have been disputed by the respondent on the ground that by the time they got the allotment letters the respondent had already gotten the wayleaves and that the suit land was unalienated government land.

Section 28 of the Land Registration Act provides;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register: -

- i. Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected constructed or laid in pursuance or by virtue of any power conferred by any written law;

Section 138(3) of the Land Act provides;

(3) Unless an easement has been created for specific period of time which will terminate at a fixed date in the future or on the happening of a specific event in the future or on the death of the grantor, the grantee or some other person named in the grant, an easement burdens the servient land and runs with the land for the same period of time as the land or lease held by the grantor who created that easement.

Section 143(2), (3) and (4) of the Land Act provides;

(2) A public right of way may be—

- (a) a right of way created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organisations, authorities and bodies to carry out their functions, referred to in

this Act as a wayleave; or

(b) a right of way created for the benefit of the public, referred to in section 145 of this Act as a communal right of way.

(3) A public right of way shall attach to and run with the servient land in respect of which it has been created and shall be binding on all owners from time to time of the servient land, any manner they are occupying the land, whether under a land or a derivative right thereof, or under customary law or as a successor in title to any such owner or as a trespasser.

(4) A wayleave shall authorize persons in the employment to or who are acting as agents of or contractors for any of the organizations, authorities and bodies to enter on the servient land for the purpose of executing works, building and maintain installations and structures and in setting all such works, installations and structures on the servient land and to pass and re-pass along that wayleave in connection with purposes of those organisations, authorities or bodies.

It is the respondent's mandate to protect the right of way from any form of encroachment that will interfere with the pipeline system. This essentially means that the respondent is under a duty to protect everyone from harm's way including the plaintiffs due to the high risk and the inflammable nature of the contents that pass through the pipeline.

The applicants should also note that their rights to the suit lands are subject to the overriding interests and the public right of wayleave. In the case of Kenya Power & Lighting Co. Ltd v Kipevu Inland Container EPZ Ltd [2018] eKLR (supra) the court held;

"The defendant's possession and use of the suit property is subject to the public right of way or wayleave. The defendant has duty to safeguard that wayleave."

On the issue whether the applicant will suffer irreparable harm, the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) eKLR** described irreparable harm as follows:

"irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

The applicant claims that the developments on the suit property are worth kshs. 120,000,000/-. Further that there are architectural designs worth a lot of money. This alone indicates that the damage can be compensated by way of damages as they are quantifiable.

On the issue of balance of convenience, the above case also describes a balance of convenience

"The meaning of balance of convenience will favour of the plaintiff is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer."

In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting"

In the case of in **Suleiman vs. Amboseli Resort Limited (2004) 2 KLR 589** Ojwang J (as he then was) rendered himself as follows:

...Traditionally on the well-accepted principle, the Court has had to consider the following question before granting Injunctive relief (i) is there a prima facie case with a probability of success (ii) does the Applicant stand to suffer irreparable harm if relief is denied (iii) on which side does the balance of convenience lie" Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers of Interlocutory Injunctive relief, should always opt for the lower rather than the higher risk of injustice. Although the Court is unable at this stage to find that the Applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the Applicant irreparable harm if his prayers for injunctive relief are not granted and in those circumstances the balance of convenience lies in favour of the Applicant rather than the Respondent. There would be a much larger risk of injustice if the Court found favour of the defendant, than if it determined this application in favour of the Applicant".

The court will look at whose side the balance of convenience would pose a lower risk in orders to grant an order of injunction and not cause injustice and hardship. The applicants can be compensated by way of damages if any but the respondents on the other hand cannot be compensated in the event that the pipeline bursts or there is an accident. The pipeline already exists on the wayleave. The 4th applicant was already compensated for the construction of the first pipeline through the District Commissioner's Office.

I have considered the application, the submissions and find that the respondents will suffer irreparable harm as the injunction will interrupt the safe transportation of petroleum products which are highly inflammable. The application is therefore dismissed with costs to the respondents.

DATED and DELIVERED at ELDORET this 13TH DAY OF JULY, 2021

M. A. ODENY

JUDGE