



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 21 OF 2017

PETER MWANGI KABUE.....PLAINTIFF/APPLICANT

VS

RURAL ELECTRIFICATION AUTHORITY.....DEFENDANT/RESPONDENT

RULING

1. Vide an application dated the 25/10/18 the Applicant sought orders as follows;

a. That the Court do determine and order compensation payable by the Respondent to the Applicant for occupation and use of the portion of is property namely L.R NO LOC 9/KIRURI/60, 61,703, 2016 and 2317 (suit lands).

b. That the Respondent do pay for the application.

2. The application is based on the grounds annexed thereto and the Supporting Affidavit of the Applicant sworn on the 25/10/19. The deponent states that he filed a suit against the Respondent in 2013 where he sought interalia an order of removal of the high voltage line from the suit lands by the Respondent. That in its judgement rendered on the 15/11/18 the Respondent was found to have trespassed on the suit land and ordered the Respondent to negotiate compensation in lieu of removal of the high voltage power lines. That pursuant to the judgment he commissioned a Valuation report which established the acreage of the affected by the high voltage line and assessed the compensation in the sum of Kshs 8,410,000/-. That in February 2019 he approached the Respondent to negotiate a settlement of a way leave but the Respondent has been unresponsive.

3. The application is opposed by the Respondent vide the Replying affidavit sworn by Pauline Sewe, the Chief Legal Officer of the Respondent. Terming the application misconceived incompetent and an abuse of the process of the Court, the deponent contends that the issue of compensation is resjudicata having been determined by the Court in its judgement referred to earlier. That the Court ordered the Respondent to pay Kshs 378,000/- being general damages for trespass and the same was satisfied in full by the Respondent. It is his contention that the Court directed the parties to negotiate proper wayleave agreements/rights of way and not compensation.

4. The Respondent informed the Court that it resolved to relocate the power line from the Applicant's land which decision was communicated to the Applicant vide a letter dated the 12/11/19.

5. In addition, the Respondent averred that the issue of compensation is a new cause of action which cannot be adjudicated by way of an application or in a suit that is clearly concluded. It took issue with the validity of the valuation report contending that the report is not authentic and inadmissible under Section 106 of the Evidence Act for lack of the current practicing certificate of the valuer who prepared the report.

6. Further that the application has been brought with delay. That the application prejudices the right of the Respondent who has opted to remove the power lines but the Applicant has declined to grant it access to the suit lands.

7. Parties have filed written submissions which I have read and considered.

8. In his submissions the Applicant recounted the contents of his Supporting Affidavit and added that the Respondent has occupied the suit lands since 2009 as a result of which he has incurred massive losses in terms of use of the suit lands which loss was assessed at Kshs 8,410,000/-

9. In addition to its replying affidavit, the Respondent submitted that the application is resjudicata as the issues in respect to compensation were determined. That the Applicant cannot force the Respondent to have its electric poles on his land for him to seek compensation twice. It argued that by bringing this application the Applicant is asking the Court to sit on Appeal against its own decision. That either way the application is akin to review of the judgement through the back door which in any event does not meet the requirements set out under Order

45 of the Civil Procedure Rules.

10. On the 15/11/18 the Court delivered judgement in favour of the Applicant as follows;

a. Special damages for loss of trees in the sum of Kshs. 1,799,902/-.

b. General damages in the sum of Kshs 378,000/- for trespass.

c. The Defendant is directed to negotiate proper way leave agreements/rights of way with the Plaintiff as per the provisions of section 148 of the Land Act, 2012 and such enabling provisions of the law. This should be done within 90 days from the date of this judgment.

d. Either party has liberty to apply.

e. The Defendant shall pay the Plaintiff's the costs of the suit.

11. The gist of the Applicant's application is that pursuant to the said judgement he commissioned a valuation report in which compensation was assessed at Kshs 8,410,000/- for occupation and use of the suit lands. He added that the Respondent has declined to negotiate and hence the application.

12. The Respondent on the other hand contends that it has resolved to remove the high voltage power line from the Applicant's suit lands and what is pending is to gain access to the suit lands to carry out the exercise. That the Applicant has refused them access despite request having been made in writing.

13. In the Plaintiff sought orders for an order for permanent injunction to restrain the Defendant from trespassing on the Plaintiff's land and an order of mandatory injunction ordering the Defendant to remove the high voltage line from the Plaintiff's land. These prayers were satisfied by the order directing the Respondent to negotiate wayleave consents/rights of way with the Applicant within 90 days. The Court also allowed the Parties the liberty to apply.

14. It is borne of the record that the issue of compensation was heard and determined as seen in the judgement abovementioned. The parties commonly accept that the same has been fully satisfied. It is clear that the Court did not direct the parties to negotiate additional compensation. The Court directed the parties to negotiate way leave consents/rights of way in lieu of the removal of the power lines majorly because of the public interest the power line served along the route. This claim for compensation for occupation and use of the land in the application appears either a duplication or a separate cause of action. The cause of action premediated on compensation was heard and determined.

15. In the current scenario, a claim for further compensation as set out in this application is not available under liberty to apply. It may probably constitute a new cause of action for which evidence may have to be given.

16. The application is unmerited. It is dismissed with costs to the Respondent.

17. **It is so ordered.**

DATED, SIGNED & DELIVERED AT MURANG'A VIA EMAIL THIS 4TH DAY OF JUNE 2020.

J.G. KEMEI

JUDGE