



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 141 OF 2019

KENNETH KIPKIRUI MIBEL.....PLAINTIFF

VERSUS

KENYA ELECTRICITY TRANSMISSION CO. LIMITED.....1ST DEFENDANT

NATIONAL LAND COMMISSION2ND DEFENDANT

THE HON. ATTORNEY GENERAL3RD DEFENDANT

R U L I N G

1.The Court on 13th February 2020 after hearing the parties on the plaintiff’s Notice of Motion application dated 13th November 2019 for injunctive orders against the 1st defendant, and the 1st defendant’s Notice of Motion dated 29th February 2020 also seeking injunctive orders against the plaintiff, the Court gave an extempore ruling in the following terms:-

“There are two pending applications. The plaintiff’s application dated 13th November 2019 seeking injunctive relief against the defendants and the 1st defendant’s application dated 29th January 2020 also seeking an injunction against the plaintiff restraining him from preventing the 1st defendant from entering onto his parcel of land for proposes of laying high voltage power lines. The 1st defendant is prepared to make a deposit of Kshs6,970,073.25 the amount assessed as compensation by the 1st defendant. The plaintiff claims that this compensation tendered is way too low as to be reasonable . Having reviewed both applications it is clear that what is in issue is what is fair and adequate compensation to the plaintiff for use of his land to pass the High Voltage Power Lines . The Court appreciates the 1st defendant has a National duty/obligation of making power accessible to the Citizenry and they can only do that if they can develop the necessary infrastructure. This is the duty they are engaged in regard to this matter and I did not consider it would be justifiable to stall the project which is in public interest for an individual’s private interest.

The plaintiff’s interest is to obtain fair and adequate compensation for his land. What is fair and adequate compensation, the court can determine at the hearing. I do not consider there is a basis to grant the injunction sought by the plaintiff. I decline to grant one.

As regards the application by the 1st defendant . I am persuaded it is well founded and I grant the same in terms of prayers 3,4 and 5. The deposit of Kshs.6,970,073.25 to be placed in court within the next 21 days. The costs for the 2 applications shall be in the cause . to facilitate the hearing of the suit on merits, the parties are directed to comply with order 11 CPR within the next 4.5 days. The matter is fixed for pretrial directions on 16th April 2020

2. The 1st defendant deposited the sum of Kshs.6,970,073.25 on 28th February 2020 in compliance with the orders/directions of the Court.”

3. Arising from the above the plaintiff has vide a Notice of Motion dated 15th my 2020 expressed to be made under Articles 40 (3) (b) (i) & (ii), 48 and 159 (2) (a) & (b) of the Constitution; section 1A, 1B and 3A of the Civil Procedure Act moved the court for orders that:-

1. That the Kshs6,970,073.25 deposited in Court on 28th February 2020 by the 1st Defendant/Respondent pursuant to the order of this Court given on 13th February 2020 be released forthwith to the plaintiff/applicant

2. Those costs of this application be borne by the Defendants/Respondent.

4. The application was supported on the grounds set out on the body of the application and the affidavit sworn in support by the plaintiff dated 15th May 2020. The plaintiff/applicant avers that the Court upon hearing the parties on their previous applications ordered the 1st defendant/respondent to deposit the compensation of Kshs.6,970,073.25 assessed as payable by the 1st defendant to the plaintiff in Court which would then be placed in an interest earning account in the joint names of the plaintiff's and 1st defendant's counsels. The plaintiff further averred that by the injunctive order granted barring him from in any manner interfering with the 1st defendant's access into the suit land for the purposes of laying the high voltage transmission cables, the 1st defendant was also allowed absolute and unrestricted use of a way leave traversing the plaintiff's land over an area measuring approximately 4.647 acres. The plaintiff further averred that pursuant to the Court orders of 13th February 2020 the 1st defendant has entered and commenced construction and the plaintiff has consequently been deprived of possession and use of his land on the portion earmarked for the way leave.

5. The plaintiff contended that flowing from the order of the Court of 13th February 2020 the issue that remained for determination by the Court was whether the sum of Kshs6,970,973.25 tendered by the 1st defendant constituted full and adequate compensation within the meaning of Article 40 of the Constitution. The plaintiff thus averred that since the 1st defendant had full access and use of the land earmarked for the way leave in the plaintiff's land, the plaintiff should equally be allowed access to the amount deposited in court even as the issue of its adequacy is interrogated by the court. The plaintiff asserted that the 1st defendant had full access and utilization of the land and was in the process of constructing the high voltage electricity power line without any hindrance from the plaintiff and hence it was only fair and just for the plaintiff to be allowed access and utilization of the amount paid as compensation before the court determined whether or not the compensation was fair and adequate. He contended the Court could either confirm the amount tendered as compensation and/or adjust it upwards since the issue was only whether or not the compensation was adequate or not.

6. The 1st defendant/Respondent filed a relying affidavit sworn by Samuel Rambo, Senior Legal Officer of the respondent dated 3rd June 2020 in opposition to the plaintiff's application. The 1st Respondent contended that it complied with the Court order of 13th February 2020 by depositing the sum of Kshs.6,970,073.25 in Court on 28th February 2020 and that the plaintiff's instant application constituted an attempt to obtain a variation, of the said order. The 1st Respondent, averred that the plaintiff had not executed an easement in favour of the 1st Respondent which would constitute the legal framework that would facilitate the registration of the 1st Respondent's interested over the suit property and hence the release of the funds deposited in court to the plaintiff would leave the 1st Respondent exposed as compensation would have been paid without any supporting documents and could generate audit queries.

7. The Court in making the orders that it did on 13th February 2020 was satisfied that indeed the 1st defendant /respondent had a public duty to ensure electricity was made available to the citizenry in all parts of the country. The 1st defendant/respondent in carrying out that mandate was through the auspices of the National Land Commission, the 2nd respondent, required to make compulsory acquisitions of such land as may be required for their purposes. In regard to the suit property compensation was assessed at Kshs6,970,073.25 which was tendered to the plaintiff. The plaintiff rejected the compensation as being too low. That is what precipitated these proceedings where the singular issue will be the adequacy of the quantum of the compensation. There is no expectation that the compensation will be lower than Kshs.6,970,073.25 tendered by the plaintiff. The amount can either be confirmed and/or enhanced by the Court.

8. Under article 40 (3) of the Constitution a person may not be deprived of his property or any interest in land unless such property is required for public purpose and even then such person must be paid in full promptly, just compensation for such property. Article 40 (3) of the Constitution provides as follows:-

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

9. The plaintiff/applicant has a right to challenge the quantum of the compensation awarded. Whether or not the Court is the proper forum and/or whether the amount of compensation awarded was adequate are matters for determination at the trial. What is undeniable is that part of the plaintiff's land was required for public purpose and consequently the plaintiff was entitled to have prompt and just compensation paid to him for the land required for use by the 1st defendant, which is a public entity.

10. The plaintiff appreciates the transaction is not complete since he does not accept the compensation awarded as final and adequate but he nonetheless seeks an order authorizing the release of the compensation tendered and deposited in Court since the 1st defendant has taken possession and occupation of the land it required and is in the process of constructing the high voltage power lines. The plaintiff is not opposed to the Power lines being laid through his land but is insistent that he must be fairly compensated for the land that he will not be able to optimally utilize owing to the Power lines traversing through the land. The plaintiff has invoked the Court's inherent power to do justice under the provisions of section 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya.

11. The 1st defendant's concern appear to be that if the amount deposited as compensation is released to the plaintiff and the plaintiff has not executed an easement for the way leave the 1st Respondent will remain exposed in the sense that they will hold no security for the

disbursed funds.

12. I have considered the arguments put forth by the applicant in support of the application and the 1st Respondent's replying affidavit. It is a fact that power lines for transmission of electricity will be constructed through the plaintiff's land and this process has commenced courtesy of the court's order of 13th February 2020. The plaintiff is not opposed to the laying of the Power lines but has contested the adequacy of the compensation sum tendered. The Court ordered this amount to be deposited in Court and the 1st defendant obliged by making the deposit which permitted them to have unhindered access to the plaintiff's land. My view is that the compensation amount of Kshs.6,970,073.25 deposited in court will ultimately form and become part of the compensation that will be paid to the plaintiff. The amount may either be confirmed as adequate and/or will be enhanced should the court after the trial find and hold that the amount was not fair and/or adequate compensation. To the extent that the amount deposited will invariably form part of the compensation to be made to the plaintiff, there is merit to have the money paid out to the plaintiff to mitigate against any dilution of the money either through depreciation, inflation or other factors that could affect the money market.

13. However since the 1st Respondent will, if the money is released to the plaintiff, have parted with the money intended to be compensation for utilization of the plaintiff's land, the plaintiff will as a corollary be required to give something in return. Notwithstanding that the suit has not been finally determined there is no issue whether or not the Power line will be laid through the plaintiff's land. The Court in injunctioning the plaintiff from interfering with the 1st Respondent's entry and construction of the power line on the portion of the plaintiff's land surveyed for the purpose, the court duly authorized the construction of the line notwithstanding that the question of the compensation payable had not been settled. Thus if the amount deposited as compensation was released to the plaintiff, the 1st defendant/respondent would require to have some comfort that the plaintiff will not turn around and require them to remove the power lines. The court in situations such as in the present matter retains inherent intrinsic residual Power and authority to do justice to the parties or to ensure any injustice is not visited on any party.

14. Section 3A of the civil procedure Act provides :-

3A Nothing in this Act shall limit or otherwise affect the inherent Power of the court to make such orders as may be, necessary for the ends of justice or to prevent abuse of the process of the Court.

15. In the present matter, I need to balance the interests of the plaintiff and those of the 1st defendant. The plaintiff deserves to have fair and just compensation paid to him for his land which the 1st defendant requires to utilize for a public purpose. The plaintiff challenges the compensation awarded as inadequate but is not opposed to use of the portion of his land designated for the purposes of constructing high voltage Power Lines. I am satisfied it is right and proper to order the release of the amount of Kshs.6,970,073.25 to the plaintiff but having regard to the concerns expressed by the 1st respondent, such release of the amount deposited in court as compensation has to be on terms that the plaintiff executes an easement for a way leave in favour of the 1st defendant/ Respondent. To the extent that the deposit will be released to the plaintiff without any restriction the ends of justice demand that the plaintiff does in turn execute an easement in favour of the 1st defendant/respondent .

15. It is therefore my determination that upon the plaintiff executing an instrument of easement in favour of the 1st defendant/respondent, the sum of Kshs.6,970,073/25 deposited in court on 28th February, 2020 by the 1st defendant/respondent will be released to the plaintiff unconditionally on account of compensation payable to him. That disposes of the plaintiff's application dated 15th May 2020. The cost of the application will be in the cause.

16. Orders accordingly.

Ruling dated signed and delivered at Nakuru virtually this 29th day of July 2020.

J M MUTNGI

JUDGE