REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 127 OF 2019

PWANI OIL PRODUCTS LIMITED.....PLAINTIFF

VERSUS

1. KENYA NATIONAL HIGHWAY AUTHORITY

2. NATIONAL LANDS COMMISSION.....DEFENDANTS

RULING

1. The application for determination is the Notice of Motion dated 4th July, 2019 brought under Article 159 of the Constitution of Kenya, Order 40 Rules 1 and 2 of the Civil Procedure Rules, Section 13 (7) of the Environment and Land Court Act, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. In the application, the plaintiff/applicant seeks the following orders from this court:

1. Spent

2. Spent

3. That pending the hearing and determination of the suit herein, the respondents be restrained by way of a temporary injunction, whether by their servants, workmen, agents, employees, officers or any other person whomsoever from entering, acquiring, or in any way interfering with the applicant's possession and ownership of the property known as JOMVU MN/VI/678 and JOMVU MN/VI/696 or any part thereof including the equipment erected thereon.

4. Costs of this application be provided for.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Rajul Rameshachandra Malde, the commercial director of the applicant, sworn on 4th July 2019. The applicants case is that it is the registered owner of the properties known as JOMVU MN/VI/678 and JOMVU MN/696 ("the suit properties") and carries on business thereon. It is deposed that the applicant has erected various developments on the suit properties to assist in carrying out the business. Copies of the title deeds with respect to the said properties and photographs of the alleged developments have been annexed.

3. It is stated that following an inquiry that had been made to the applicant by the respondents on 20th November 2018 regarding acquisition of the said properties, the applicant on 13th December 2018 wrote to the respondents drawing their attention to the applicant's investment on the property. That the 2nd respondent went ahead and published section of the properties intended to be acquired by way of compulsory acquisition in the Kenya Gazette of 1st February 2019. That the 2nd Respondent subsequently served on the applicant two letters of award dated 15th April 2019 with respect to the two parcels of land. That being dissatisfied with the values awarded by the 2nd respondent, the applicant states that it followed the laid down procedure and wrote a letter dated 8th May, 2019 rejecting the award given and went ahead and conducted a valuation and revised its claim to Kshs.181,164, 406/= and communicated the same to the respondents vide a letter dated 20th June, 2019. The applicant contends that the values awarded by the respondents are not fair and are grossly inadequate. It is the applicant's case that the respondent's actions are unlawful and unconstitutional and that it stands to lose its investments valued at Kshs.182,164,406/=. The applicant avers that it is apprehensive that unless the 1st respondent is by this Honourable court, it will go ahead undeterred and enter the applicant's property for purposes of the acquisition in order to among other things, demolish the developments therein in order to pave way for the intended road expansion.

4. The 1st defendant/respondent opposed the application through a replying affidavit sworn by Daniel Mbuteti on 20th September, 2019 and filed on 2nd October, 2019. It is the 1st respondent's contention that the application is misconceived, ill advised, misplaced and ought to be

dismissed as it fails to meet the tenor, import, scope and threshold for grant of injunctive orders. The 1st respondent avers that if at all the applicant has a claim, then the recourse available is a claim for damages and not for injunctive orders. It is the 1st respondent's contention that the applicant's claim is speculative and based on misconceived apprehensions. Further, that the applicant has failed to disclose material and pertinent facts, and that public interest weighs heavily in dismissing the claim for injunctive orders.

5. The 1st respondent acknowledges engaging the 2nd respondent herein to oversee compulsory acquisition of any parcel of land that would be intended to aid in the construction of roads. The 1st respondent acknowledges that among the parcels of land that were to be compulsorily acquired were the suit properties and avers that the awards given are just and sufficient, and states that the 1st respondent can only make payments as per valuation conducted by the 2nd respondent which is the commission tasked with overseeing compulsory acquisition of private land for public use. Further, that no notice of taking possession has been issued since the 1st respondent is in the payment process, and as such the dispute before court is one of valuation.

6. The 2nd respondent filed a replying affidavit sworn by Fidelis K. Mburu 27th January 2020. It is the 2nd respondent's contention inter alia, that it made an award to the applicant upon taking into consideration the relevant provisions of the law and procedure and upon taking into consideration the representation of the applicant herein. That what is before court is a claim for money that is liquidated and damages would suffice.

7. Both the applicant and the 1st respondent filed their written submissions through their respective advocates. The court has considered the application, the affidavits and the annextures thereto and has reviewed and considered the submissions filed by the parties together with the authorities relied on. The issues for the court to determine are whether the applicant has satisfied the criteria for grant of an injunction and who is liable for costs of the application.

8. The conditions for the grant of temporary injunction were laid in the case of **Giella –v- Cassman Brown & Company Limited (1973) EA 358** as follows:

> "***First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.*** "

9. Has the applicant made out a prima facie case with probability of success? In the case of Mra0 Ltd-v-First American Bank of Kenya Limited & 2 Others (2003) KLR 125, a prima facie case was described as follows:

> "***A prima facie case in a civil application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.***"

10. In the present case there is no dispute that the applicant is the proprietor of the suit properties. It is also common ground that the respondents have expressed their intention to compulsorily acquire portions of the suit properties for public use, namely road expansion. Indeed it is not in dispute that awards have been made by the respondents to the applicant as compensation of the said parcels of land. However, the applicant rejected the awards made on allegation that its properties were grossly undervalued. On its part, the 1st respondent avers the 2nd respondent is the body mandated to make a determination on matters of valuations and that the 1st respondent can only make payments as per valuations conducted by the 2nd respondent. It is clear to me therefore, that the applicant's claim is one of valuation of the suit properties.

11. Having regard to all the material presented by the applicant and the 1st respondent, I am not satisfied that the applicant has established a prima facie case with a probability of success since it is apparent that several valuations have been undertaken. The only outstanding issue is which of the valuations should be used to compensate the applicant, whether the valuations undertaken by the applicant or the one undertaken by the 2nd respondent. The 1st respondent has stated that it remains willing and able to pay any amount deemed viable and suitable for the compulsory acquisition of the suit properties. The applicant avers that unless the orders sought are allowed, it stands to suffer irreparable injury. Irreparable harm or injury must be one that cannot be adequately compensated in damages. I have no doubt it would be possible to obtain an appropriate valuation of the suit properties for purposes of compensation. In my considered view, the applicant has not demonstrated that it is likely to suffer irreparable harm or injury. The balance of convenience, if I had doubt, would be against hindering the construction of the road, a project that is for the benefit of the wider public, especially where the respondents have undertaken to compensate the applicant. In this case, it is my view that the applicant has failed to meet the threshold for the grant of the orders sought.

12. The upshot is that the notice of motion dated 4th July 2019 lacks merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF JULY 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE