



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ENVIRONMENT & LAND CASE NO. 654 OF 2014

EDWARD SAYA MALOVI JUMA.....PLAINTIFF/APPLICANT

VERSUS

KENYA ELECTRICITY

TRANSMISSION CO. LTD.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated and filed in court on 18/12/2014 said to be brought under **Order 40 rules 1, 2** of the **Civil Procedure Rules** and **Section 63(e)** of the **Civil Procedure Act**, EDWARD SAYA MALOVI JUMA, (the Applicant), sought the following orders;

1) (spent)

2) (spent)

3) THAT pending the hearing of this suit there be an order of temporary injunction restraining the Defendant, its agents, assigns from alienating, Constructing and or in any other manner interfering with land Parcel No. S. KABRAS/BUSHU/1304 and 1827.

4) THAT the costs hereof be provided for.

2. The Motion is supported by the grounds appearing on the face and the affidavit of the Applicant also sworn on 18/12/2014.

3. The Applicant's case is that he is the registered proprietor of parcel Nos. South Kabras/Bushu/1304 and 1827, and that on 25/2/2014 he received a Notice from the Respondent followed by a visit to his parcels of land by the Respondents agents who marked the area needed for construction of a high voltage line. The Applicant asserts that he was not involved in the fixing of compensation.

4. The Applicant further states that he wrote two letters on 15/4/2014 and 30/6/2014 raising the issue of compensation, but no response was forthcoming from the Respondent. The Applicant therefore believes that the acquisition of his parcel of land is against the law, and that the proposed compensation is not just. He said that he was unaware whether the National Land Commission had set guidelines as required and that no inquiry as to compensation has been set up as required. He said that the construction of the lines is irreversible and once completed, he will lose use of the area affected.

5. Upon being served, the Respondent filed both grounds of opposition and a replying affidavit sworn on 21/1/2015. In the grounds of opposition, the Respondent has argued that the suit and application are

incompetent and that the application fails to meet the test for grant of interlocutory injunction as laid down in the case of **Giella –vs- Cassman Brown Ltd. [1973] EA 358.**

6. John Muthoka, a Registered valuer working with the Respondent, deposed that if the construction of power lines is halted by an injunction, loss will be occasioned to both the National Government and the people of Kenya since the works are being done using funds advanced by African Development Bank, and as such, the loan will continue to attract interest to the detriment of both the government and the people of this country. He also said that there is a risk that the project may not be completed on time if the orders sought are granted and other countries such as Rwanda will be affected because they expect power from these lines.

7. He further deposed that if construction is halted on this particular parcel of land, work on other parcels where there are no disputes will equally be affected as this type of work cannot be done in piece meal. Changing the route will also affect the design and may lead to redesigning the route all together leading to increase in costs.

8. The Respondent says that compensation is calculated based on the value of the land and the extent to which the owner of the land will be denied use of that land. It was further stated that once the corridor of the power lines was identified, the National Land Commission was asked to declare the area a public right of way and the affected owners notified by the National Land Commission through advertisements.

9. The Respondent states that compensation offered was determined by a registered valuer and that the Applicant's demand is disproportionate to that paid to other land owners affected in the same area.

10. Although parties had filed written submissions on their own, I directed that counsel give oral submissions which were taken on 9/3/2015. Mr. Anziya, counsel for the Applicant asked that reference to parcel No. South Kabras/Bushu/1827 both in the application and the suit be done away with since this parcel was not affected and the applicant may bring a separate suit if need be. This request though opposed, was allowed by the court.

11. Mr. Anziya submitted that the Respondent as a public body is bound by **Article 20** of the Constitution which binds all persons and state organs with regard to the Bill of Rights. He submitted that the right to own property is guaranteed by **Article 40** of the Constitution and **sub-Article 3** prohibits the State from depriving a person his property unless it is for a public purpose. Counsel argued that where there is deprivation, there must be prompt compensation in terms of **Article 40 (3) (b)** of the **Constitution**. Full compensation is also to be made. Counsels referred to **section 111** of the **Land Act**, (No. 6 of 2012), which requires that there be full and prompt payments.

12. According to counsel, the Applicant as registered owner of the land has not received payment at all. Although the Notice of acquisition was issued on 16/9/2013 by the National Land Commission on behalf of the Respondent, one and half years later, compensation has not been made which is in contravention of **Article 40 (3)** of the **Constitution** and **Section 111** of the **Land Act**. Despite non payment, counsel argued, the Respondent has moved on the land and started constructing power lines. He also says that no inquiry was done as to compensation and that the proposed payment was done by the Respondent alone without the applicant's input.

13. The learned counsel submitted that the valuation done by the Respondent was against **Article 10** of the **Constitution** regarding public participation. He also referred to **Section 113** of the **Land Act** in that an award is prepared and taken to parties affected. It was his general view that, the law especially **Sections 111–115** of the **Land Act** were not followed in this case. Counsel submitted that even though damages could be adequate, where damage to land is alleged, the court still has power under **Order 40** of the **Civil Procedure Rules** to grant an injunction. Counsel also referred to **Section 13** of the **Environment and Land Court Act** to buttress his argument that the court has jurisdiction to grant any relief including the injunction sought herein. He urged the court to grant the application.

14. Mr. Okeyo, counsel for the Respondent, on his part submitted that the application does not meet the

threshold for grant of injunction, arguing that the applicant had not made out a prima facie case with a probability of success or shown that he will suffer irreparable damage or still that the balance of convenience tilts in his favour.

15. Counsel submitted that the applicant is complaining about the inadequacy of compensation both in the suit and the application as can be seen from the letter dated 7/5/2014, referring to the offer made to the applicant by the Respondent. Counsel submitted that the applicant was offered Kshs.679,524/= for limited use of his parcel of land but he wants Kenya Shillings Four million Five Hundred thousand (Kshs.4,500,000/=)instead.

16. Counsel further submitted that in a case such as this, where the dispute is as to how much compensation should be paid, recourse should be had to Section 148 of the Land Act (No. 6 of 2012), in that the Applicant should have filed a suit for the court to determine compensation payable.

17. It was counsel's submission that the applicant can only file a suit for determination of the amount payable but not a suit for injunction to stop acquisition of an easement. Counsel argued that even if the Applicant had established a Prima facie case, he would not suffer irreparable loss since the Respondent is in a position to pay Kshs.4,500,000/= were it to be found to be the amount payable.

18. The balance of convenience, counsel argued, tilts in favour of the Respondent since it is acting on public interest. He submitted that the Applicant's private right cannot outweigh the public interest since the power lines are meant to serve a wider public interest. Counsel relied on a number of decisions to fortify his arguments. He asked that the application be dismissed with costs.

19. I have carefully gone through this application as well as the replying affidavit and grounds of opposition filed in opposition to the application. I have also considered submissions by counsel and authorities cited. The issue for determination is whether the applicant has made out a case for grant of the injunction he seeks.

20. In his plaint, the Applicant seeks both a declaration that the acquisition of his parcel of land is illegal and an injunction. It is on the basis of this that he has moved the court for an interlocutory injunction pending the hearing and determination of the suit.

21. The Applicant is the registered owner of parcel No. South Kabras/Bushu/1304, while the Respondent is a public corporation charged with the responsibility of constructing power transmission lines for high voltage cables throughout the republic. These High Voltage lines are constructed after a plan and design has been done by Engineers and usually traverse numerous parcels of land belonging to different land owners in various parts of the country. It is in one of such cases that the power lines have been designed to pass through the Applicant's parcel of land. In this case as shown in the Respondent's Annexure "B", it involves the Lessos – Tororo 400kv Electricity transmission Line way Leave Trace traversing Nandi, Kakamega, Bungoma and Busia Counties.The Applicant as one of the people to be affected has been offered Kshs.679,525/= in a letter dated 25/2/2014 which also shows that the transmission line way leave trace traverses 60 metres wide approximately 1.36 acres of the Applicant's land parcel No. South Kabras/Bushu/1304. This award had been approved by the National Land Commission.

22. The Applicant rejected this offer terming it "Inadequate" and it is on the basis of this inadequate compensation that he has moved to court saying that the Respondent is in breach of the law by undertaking power lines construction on his parcel of land before he is fully, promptly and adequately compensated. The Applicant has also complained that he was not involved in arriving at the compensation figure of Kshs.679,525/= and has counter demanded Kshs.4,500,000/=.

23. Looking at the documents annexed both to the Applicant's affidavit and that by the Respondent, it is clear that the parcels of land to be affected were published and the owners notified. That is why the applicant was given an offer for compensation. The Applicant has not said that he knew about this from third parties. He was informed by the Respondent after the National Land Commission had published the names of the people affected and their parcels of land.

24. It is also important to point out here that this is not a compulsory acquisition as known in law but rather a way leave trace which affects the Applicant's 1.36 acres. This being the case, Section 111 to 115 of the Land Act does not apply to the applicant's case. This being a public right of way, the Section governing its creation is 143 of the Land Act through the National Land Commission. Section 143 (2) defines the public right of way as follows;

S. 143 (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, organizations, authorities and bodies to carry out their functions referred to in this Act as a way leave; or

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

And according to Section 145 sub-section 4;

"A way Leave shall authorise persons in 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 the way leave in connection with purposes of those organizations, authorities or bodies."

25. From the above provision, the respondent's agents are allowed to enter the servient land and undertake construction of power lines and indeed, construction of the power lines has either started or is about to commence.

26. It is also clear that compensation has been offered but the applicant says it is inadequate, raising the question of how much the applicant should be paid for use of his land. My understanding of the applicant's grievance is that it is really on the amount payable and not the creation of a way leave on his land.

27. Has the Applicant made out a case for grant of an injunction? I do not think so. Although he is the owner of the land, the Applicant has not shown that he will not be compensated. An offer has been made which shows the willingness by the Respondent to pay, but the Applicant has not shown why he thinks that offer is inadequate. For the applicant to succeed he must show that he has a prima facie case. In the case of ***Mrao Ltd. –vs- First American Bank of Kenya Ltd. & 2 Others [2003] KLR 125*** a prima facie case was defined thus;

"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."

What the learned judges of Appeal were saying in that decision was that an applicant must show through evidence presented to the court that he has a chance or probability of success not that he will eventually succeed.

28. In the case of ***Nsubuga and Another –vs- Mutawe [1974] EA 487, Mustafa, JA.*** alluded to the above principle when he stated at page 491 as follows;

"As regards the conditions for the grant of an interlocutory injunction, I think they are now well settled in East Africa. I would refer to the decision of this court, *Giella –vs- Cassman Brown [1973] EA 358*,...Briefly two of the main ones are (1) the applicant must show that he has a probability of success and (2) that unless the injunction is granted, the applicant would suffer irreparable damage which cannot be adequately

compensated for by an award of damages. As regards the First point, that of probability of success, the plaintiff had not, on the evidence adduced, shown how he could succeed let alone probably succeed.”

29. On the first point, the Applicant has not shown that he would succeed let alone probably succeed. The applicant has relied on Article 40 (3) of the Constitution which provides as follows;

Art. 40 (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)

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.”

30. Parliament enacted the Land Act through which the process of acquisition of the way leave was commenced and the Applicant and others notified. Compensation has been offered but the Applicant has declined to take it. The Applicant cannot come to this court and claim that he has not received full compensation and seek to halt the construction of power lines. What there is now is a dispute as to how much he should be paid, but not that the law has been breached. The way leave is also being acquired for public interest in accordance with Section 145 of the Land Act; moreover the applicant has access to court by virtue of Section 148 of the Land Act. As at now that is where the Applicant should fall back to. I am satisfied that the Respondent has complied with the requirements of Article 40 (3) (b) of the Constitution. I am also satisfied that the Applicant was notified and that the requirement for public participation under Article 10 of the Constitution does not mean that everybody including those not affected should participate in the process of acquisition of way leaves. As long as the owner of the land is informed, that suffices.

31. As regards the second point that of irreparable damage, it is difficult to understand how the Applicant will suffer irreparable damage that cannot be adequately compensated. The Respondent has said that the Applicant’s property was valued at Kshs.679, 525/= for the limited use of 1.36 acres of the suit property. The Applicant has rejected this saying that it is inadequate, and has instead demanded Kshs.4,500,000/=. However, he has not shown the basis for this figure or how it was arrived at.

32. Given the stance taken by the Applicant, it is obvious that a dispute has arisen in terms of Section 148 of the Land Act; Section 148 (1) of the Act provides as follows;

S.148. (1) “Compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.”

33. It is clear from the above Sub-section that any compensation on a private land should be based on a valuation by a registered valuer. The Applicant has not shown how the figure of Four million Five Hundred Thousand (Kshs.4,500,000/=) he demands was arrived at. Even then, Section 148 (5) is more important as far as the Applicant’s agitation is concerned. It provides;

S. 148 (5) “If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay

compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.”

34. Clearly, the Applicant has a way out of his situation but has not utilized it properly. The disagreement as to the amount of compensation can be determined by the court but the applicant has not deemed it fit to move that way. The applicant has also not shown that even if the amount for compensation were to be determined at Kenya shillings Four Million Five Hundred thousand, (Kshs.4,500,000/=) the Respondent would not be able to pay that amount. The law allows compensation for damaged crops, trees or buildings. The Applicant has not therefore satisfied the second point for consideration in an application for grant of an injunction that he would suffer irreparable loss that cannot be adequately compensated by an award of damages.

35. On the balance of convenience, I do not think it favours the applicant. The Project is aimed at adding more electricity to the National grid consequently, more connectivity to the people of Kenya. This means more Kenyans will benefit and if compared to the Applicant's private interest, the public interest outweighs the private interest. This is a trans boundary project which will benefit both the people of Kenya and Uganda making the balance of convenience tilt more in favour of the public than the private interest of the Applicant. The project is also being financed by a multinational financier and if halted, it will lead to more costs and will delay more power supply to people of this country.

36. In the circumstances of this case, I am not satisfied that the applicant deserves the orders sought. Consequently, the application dated 18/12/2014 is declined and is dismissed with costs.

Dated and delivered at Kakamega this 5th day of May, 2015

E. C. MWITA

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