



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 30 OF 2020

KENYA ELECTRICITY TRANSMISSION COMPANY.....1ST PLAINTIFF

THE NATIONAL LAND COMMISSION.....2ND PLAINTIFF

VERSUS

MARYANN SHEIKH ABDIKADIR,

NUH NASSIR ABDI & 120 OTHERS.....DEFENDANTS

RULING

What is before Court for determination is the 1st Plaintiff's Notice of Motion dated the 8th June, 2020; 1st Defendant's Notice of Motion dated the 26th June, 2020; 78th to 79th Defendants' Notice of Motion dated the 2nd July, 2020; and the 94th Defendant's Notice of Preliminary Objection dated the 9th July, 2020. In the 1st Plaintiff's application, it seeks a temporary injunction restraining the Defendants either by themselves or their agents or representatives from interfering with their construction works in respect to the following parcels of land: Kajiado/ Kipeto/ 3225 and 2427; Kajiado/ Dalalekutuk / 14351, 14350, 14381 and 4375; Kajiado /Ildamat /2509; Kajiado /Purko / 15, 171, 156, 118, 120, 1775, 80, 84, 73, 77, 61, 323, 57, 1902, 1901, 734, 34, 35, 24, 766, 767, 768,3, 2, 1218, 1216; Kajiado/ Lornigusua / 4856, 2875, 2810, 575, 452, 3258, 2833, 2965, 577, 578, 579, 580, 2573, 2574, 49, 34, 4935, 545, 177, 543, 1584, 1588, 1590, 1591, 4056, 4057, 4917, 79, 2679, 2678, 3513, 2676, 103, 6645, 1894, 1881, 1882, 3936, 3368, 1885, 4938, 1438, 2379, 80, 3335, 3134, 3B, 3C, 3D, 1802, 2338, 1874, 2043; and Kajiado/ Mailua/ 7, 2348, 2349, 2360, 514, 86, 1140, 1139, 1138, 2368, 1880, 1112, 1097, 3938, 32, 71, 3270, 5480, 2414, 2308, 7130, 7131, 5105, 2698, 2299, 5390, 1831, 1068, 1639, 2683, 2684, 1066, 1006, 8330, 987, 986, 5106, 976, 1041 and 5285 pending the hearing as well as determination of the suit. Further, that the County Commander Kajiado County be ordered to ensure enforcement of the orders granted and compensation for Limited Loss of Land Use offered to the Respondents as per the Schedule herein be either deposited in Court or in a Joint Interest Earning Account in the names of the Advocates for the respective parties.

The application is premised on the grounds on the face of it and the supporting affidavit of MARY WANJOHI 1st Plaintiff's Senior Land Economist where she explains the mandate of the 1st Plaintiff and states that it is currently constructing the 132 kV – Kajiado – Namanga Transmission Line. Further, that the 1st Plaintiff is also constructing the 400 kV Kenya Tanzania Transmission Line. It avers that to achieve its mandate, it negotiates with land owners to grant right of way over their land to enable them construct electricity transmission lines and in return the said land owners are compensated for limited loss of land use. She confirms that on 21st April, 2017, the 1st Plaintiff published the areas to be affected by the Isinya – Kajiado – Namanga 132 KV and Kenya – Tanzania 400 KV Transmission Lines in the Kenya Gazette vide Gazette Notice No. 3890 which advertisement contained properties to be traversed by the said power lines that included the Respondents' parcels of land. She further confirms that the properties are valued randomly and compensation is for limited loss of land use as the 1st Plaintiff does not compulsorily acquire land from the land owners but only acquires right of way over the lands as the owners retains the proprietorship of the said land. She contends that the 1st Plaintiff retained the services of a private valuer to undertake valuation of the various parcels of land affected by the power line in an effort to come up with the compensation payable to the Respondents. Further, the 1st Plaintiff also participated in the stakeholder meetings in which they discussed compensation. She claims the 125 Respondents herein rejected the valuation undertaken by Njihia Muoka Rashi Co. Ltd and on further discussions accepted the valuation carried out by the National Land Commission (NLC). Further, the 1st Plaintiff requested NLC (2nd Plaintiff) to carry out another independent valuation for purposes of computing compensation, but on being offered compensation for limited loss of land use, the Respondents rejected the offer. She avers that the 1st Plaintiff increased its offer by 5% but this was still rejected by the Respondents. Further, that some of the owners have since accepted compensation offers. She reiterates that the Respondents' parcels of land are among the remaining ones where construction ought to be completed to ensure the entire grid is up and running. Further, that no prejudice would be suffered by the Respondents since an Award for compensation can be ordered by Court.

In the 1st Defendant's application dated 26th June, 2020, he seeks for the Court to set aside or vary the orders made on 8th June, 2020 in relation to his land parcel number Kajiado/ Kipeto/ 3225. The application is premised on the summarized grounds that the said parcel of land

did not form part of the purported gazetted properties published in Gazette Notice No. 3890 on 21st April, 2017. Further, that the 1st Plaintiff has not adhered to the due process of law to create a wayleave on the 1st Respondent's land. He contends that land parcel number Kajiado/ Kipeto/ 2427 was not gazetted by the 1st Plaintiff. The Application is supported by the affidavit of NUR NASSIR ABDI where he reiterates his claim above and insists, he had not been given proper notice of intention to acquire the suit land and neither has the suit property being gazetted for the creation of a right of way (Electricity Way Leave). He terms the Court Order illegal and unfair. He confirms severally writing to the 1st Plaintiff informing him of the irregularity in which they want to acquire the suit land. Further, upon receipt of the said letters, the 1st Plaintiff confirmed his land had not been gazetted. He reiterates that the 1st Plaintiff failed to disclose to Court that his land had not been gazetted prior to obtaining the Court Order on 8th June, 2020.

In the 78th to 79th Defendants' Notice of Motion dated the 2nd July, 2020 they seek a stay of execution of the orders of the Court granted on 8th June, 2020 and setting aside of the said orders in its entirety. The Application is premised on the grounds on the face of it and the supporting affidavit of GITONGA WAMBUGU KARIUKI the Managing Director of Dupoto Farms Ltd where he deposes that the orders granted by the Court on 8th June, 2020 were premature as it is only upon Grant of Easements over the suit property that an injunction sought could issue. He insists the 1st Plaintiff failed to disclose material facts to the Court prior to obtaining an injunction. He confirms that the 1st Plaintiff issued them with a Letter of Offer and they declined the same as the said offer was unreasonably low. Further, that a subsequent meeting was held on 6th February, 2020 between the 1st Plaintiff and the 78th as well as 79th Defendants to discuss the issue of valuation of their properties including compensation. He contends that various correspondence were exchanged and the 1st Plaintiff is yet to inform them of the outcome of the comparative analysis. He avers that the delay in the project can only be attributed to the 1st Plaintiff. He reiterates that there is no actual construction works being undertaken. They further filed a replying affidavit sworn by GITONGA WAMBUGU KARIUKI to oppose the 1st Plaintiff's application where they reiterated the contents of their supporting affidavit dated 2nd July, 2020. They claim the 1st Plaintiff deliberately removed the critical pages of the Resettlement Policy Framework. They contend that the 1st Plaintiff started the valuation exercise of the suit properties even before the project design was complete. Further, from the Valuation Report submitted by the 1st Plaintiff emanating from the 2nd Plaintiff, none of the 78th and 79th Defendants properties are captured therein.

The 1st Defendant opposed the 1st Plaintiff's application and filed a replying affidavit sworn by NUR NASSIR ABDI where he denies being served with any notice purporting express intention of the 1st Plaintiff to create a right of way over land parcel number Kajiado/ Kipeto/ 3225. Further that his parcel of land Kajiado/ Kipeto/ 3225 was not gazetted in the Kenya Gazette Notice No. 3890 (Volume CXIXX No. 51) published on 21st April, 2017. He contends that the random valuation undertaken by the 1st Plaintiff will not ascertain the value of all affected properties. He further denies being invited to participate in any stakeholder meetings at any public inquiry to enable him make any representations and/or objections in respect to the project. Further, he denies participating in any purported valuation of his land by messrs Njihia Muoka Rashid or the 2nd Plaintiff. He was surprised to receive a Letter of Offer from the 1st Plaintiff expressing intention to compensate him for loss of use of his land Kajiado/ Kipeto/ 3225. He confirms the 1st Plaintiff sent contractors to carry out excavation on his land. He reiterates that the 1st Plaintiff failed to make full and frank disclosure when it sought for an injunction. He claims to have contracted a licensed surveyor who returned a value of Kshs. 16 million for the current value of two acres. Further, he has been offered Kshs. 1, 936,053 as compensation of limited use of his land to create a wayleave and insists the purported award is illegal, invalid and non-binding.

The 94th Defendant's Notice of Preliminary Objection dated the 9th July, 2020 is premised on the following grounds that orders of injunction cannot be issued against a registered owner of a property; section 144 of the Land Act on application for wayleave was not adhered to; Orders of injunctions cannot be granted where statutory provisions were not adhered to, to wit: Section 171, 172, 173, 174 and 175 of the Energy Act; an Injunction cannot supersede an order for grant of Easement and by virtue of section 133C (6) of the Land Act, the Court lacks jurisdiction to hear and determine this matter.

The 94th and 95th Defendants filed their Grounds of Opposition dated the 7th July, 2020 against the 1st Plaintiff's Application wherein they stated that the 1st Plaintiff failed to disclose material facts to the court that it had not started construction; their land Kajiado/ Mailua/ 1112 and 1097 had not been valued by the 2nd Plaintiff; Order of injunction cannot issue against a registered owner of land; they deny being invited to any sensitization meeting nor notice for creation of a wayleave; and that the 1st Plaintiff has made misrepresentations as they rejected the Letters of Offer and were not paid any sums.

The 7th, 17th, 19th, 27th, 28th, 30th and 33rd Defendants opposed the 1st Plaintiff's application by filing a replying affidavit sworn by Dr. Titus Tukero Naikuni where he deposes that as Project Affected Persons who are pastoralists' farmers solely dependent on livestock keeping as their main source of livelihood, they are the ones adversely affected by the project. He denies that any negotiations were undertaken with the land owners and explain that they only received letters dated 11th October, 2019 indicating the area of affected land taken by the transmission lines corridor. Further, no negotiations on the value of the compensation of the land was conducted. He insists the value of Kshs. 1.2 million assigned to Purko land is too low. Further, that they engaged independent surveyors who valued their land between Kshs. 6 million and Kshs. 8.5 million. He contends that the 1st Plaintiff utilized an independent private valuer indicating that there were no improvements on the affected lands which fact is erroneous. He avers that none of the factors in the Resettlement Policy Framework were considered instead the 1st Plaintiff used the 30% blanket compensation on all parcels of land. Further, that the 1st Plaintiff used double standard while conducting valuation of the land depicting high discriminatory standards. He contends that the 1st Plaintiff failed to make just, adequate and prompt payment in full as fair compensation to the 24 Respondents. Further, the 1st Plaintiff failed to adhere with requirements for creation of a public right of way and wayleave. He reiterates that the process has locked out public participation for purposes of sensitization and consensus building. He further insists that no negotiations were held but confirms a meeting was held on 11th October, 2017 where none of the resolutions arrived at were acted upon. Further, that Valuation Report from the 2nd Plaintiff dated the 19th September, 2019 is erroneous as it offers an extremely low and unreasonable value of land. He admits that they rejected the 5% increment by the 1st Plaintiff and deny knowledge of any land owner who has accepted any compensation. He confirms that they are not opposed to the project but are aggrieved by the irregular manner in which the value of land was determined for purposes of compensation.

The 34th and 42nd Defendants opposed the 1st Plaintiff's application and filed a replying affidavit sworn by DANIEL LEMOMO

MATUNGE where he deposes that the 1st Plaintiff has not complied with the elaborate and mandatory Constitution and Statutory provisions and procedures as they were never invited to a stakeholder's forum at any public inquiry; they were denied an opportunity to make presentations; they have never been invited to participate in a valuation process; 1st Plaintiff seems to be conducting the compulsory acquisition process without full disclosure including transparency and failing to offer prompt as well as full compensation as per the valuation reports. He insists that the 1st Plaintiff's Resettlement Policy Framework 2010 is a 2010 to 2011 document drawn to suit its mandate but requires a review. He confirms that they received Offer Letters and responded promptly rejecting the said offers. Further, the 1st Plaintiff failed to consider their Valuation Reports. He contends that the random valuation undertaken that came up with a blanket rate is unreasonable, unfair and unlawful.

The 35th, 37th, 38th, 39th, 40th, 41st, 43rd, 44th, 45th 46th to 51st, 53rd to 64th, 74th to 76th, 80th, 81st to 86th, 88th to 93rd and 96th to 144th Defendants opposed the 1st Plaintiff's application and filed a replying affidavit sworn by MELTON MEOLI OLE MOOKE and SIMON PASUA OLE KAANTO where they admit being affected by the project. They deny engaging or negotiating with the 1st Plaintiff on the fair value of the affected parcels of land with a view to determine what amounts to just compensation. They contend that the 1st Plaintiff has never held any inquiry to hear and determine the Respondents' claims for compensation for the proposed compulsory acquisition of interests (wayleave) on the Respondents' land. They aver that instead of conducting inquiry as prescribed by law, the 1st Plaintiff arbitrarily, opaquely, unreasonably, unprocedurally and unlawfully assigned a blanket average value of Kshs. 800,000/= per acre for all Respondents. Further, the above valuation was arrived at by the Plaintiffs' without giving the Respondents' an opportunity to present their claims as relates to the area of land affected, value thereof, prevailing markets and the valuations presented. They insist it is not practical for all the parcels of land to have the same value. Further, the current value range from KShs. 2.5million to KShs. 6.5 million depending on the exact location. They explain that there is no difference between their area and DALALEKUTUK Section, where the Plaintiffs' assigned a blanket rate of KShs. 4.2 million per acre and this is discriminatory.

The 1st Plaintiff filed a replying affidavit sworn by MARY WANJOHI where she reiterates its claim above and insists it gave notices to the affected parties and made offers. She explains that the enjoyment of easement and analogous rights do not include the right to exclusively acquire/possess the land. She insists the valuation of parcels of land affected by the wayleave was undertaken. Further, that the Defendants rejected the 1st Plaintiff's offer without any basis of a valuation report to support their claim and their actions are aimed to frustrate the 1st Plaintiff in performing its mandate.

The Parties canvassed the respective applications and Notice of Preliminary Objection through written submissions.

Analysis and Determination

Upon consideration of the aforementioned Notice of Motion applications, Notice of Preliminary Objection, rivaling affidavits, Grounds of Opposition and respective parties' submissions the following are the issues for determination:

- Whether the 1st Plaintiff is entitled to the orders of temporary injunction pending the outcome of the suit.
- Whether the ex parte orders granted on 8th June, 2020 should be varied and or set aside.

It is not in dispute that the Defendants are the respective proprietors of the aforementioned parcels of land. It is further not in dispute that the Plaintiffs' have sought to compulsorily acquire portions of the respective parcels of land for purposes of creating a wayleave to construct Transmission lines. It is further not in dispute that except for the 1st Defendant, the rest of the Defendants' parcels of land were gazetted on 21st April, 2017 for purposes of compulsory acquisition of portions of their land to create a wayleave corridor. What is in dispute is the Defendants' contention that the Plaintiffs' have not adhered to the proper legal process of compulsorily acquiring portions of their land to create a wayleave corridor for the Isinya Kajiado Namanga 132 KV and Kenya Tanzania 400 KV as per the various legal provisions in the Land Act. Further, that the ex parte orders of injunction granted on 8th June, 2020 were unlawful, illegal and unprocedural as the Respondents are absolute proprietors of the aforementioned parcels of land, had rejected the 1st Plaintiff's offers and no Easement Agreements are in place.

In line with the principles established in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**, I will proceed to interrogate if the 1st Plaintiff has established a prima facie case to warrant the orders sought. In the first instance as to whether the 1st Plaintiff has established a prima facie case with probability of success, I wish to refer to the case of **Mrao V First American Bank of Kenya Ltd & 2 others (2003)KLR 125** where the Court defined a prima facie case to mean a case where based on the facts as presented a Tribunal can conclude there exists a right that has been infringed. In the current scenario, the Plaintiffs' are public entities who sought to compulsorily acquire the Defendants' parcels of land for purposes of creating a wayleave corridor. Upon perusal of annexure 'MW1' which is a Gazette notice dated the 21st April, 2017, I note that except for the 1st Defendant, all the Defendants' parcels of land were gazetted by the 2nd Plaintiff and the title of the said notice indicated that those parcels of land were affected by the wayleave corridor for the Isinya Kajiado Namanga 132 KV and Kenya Tanzania 400 KV. At the bottom of the said gazette notice, parties were advised on where their plans were to be inspected. This in essence means that all the remaining Defendants were well aware that their parcels of land were affected by the wayleave. Majority of the Defendants have confirmed receiving offers from the 1st Plaintiff but rejected the same contending that they were too low and discriminative. They further claim that there was no proper public participation before the said Letters of Offer were presented upon them.

The Land Act makes provisions in instances where compulsory acquisition is to be undertaken and stipulates that in absence of a consensus on the amount of compensation, the Court can adjudicate on the same. In this instance, the 1st Plaintiff sought for an injunction to bar the Defendants' from interfering with construction of wayleave on the respective parcels of land. Some Defendants have contended that without a Grant of Easement, the Court is barred from granting an injunction. However, in this instance, I beg to differ with these averments as it is trite that once the state or designated state agency has issued a notice in the Kenya Gazette of their intention to compulsorily acquire private

property for public utilities, the principles enshrined in the doctrine of eminent domain kicks in and private rights are thereby extinguished. Further, it is trite that after gazettelement, the State is expected to provide just and prompt compensation in line with the Constitutional principles. From the averments of all the Defendants herein, the 1st Plaintiff had already notified all the Defendants except the 1st Defendant of its intention to acquire their land, made offers but the same was rejected as being too low. Based on the facts before me and in relying on the above cited judicial authorities, I find that the 1st Plaintiff has indeed established a prima facie case against all the Defendants except the 1st Defendant.

As to whether the 1st Plaintiff will suffer irreparable harm that cannot be compensated by way of damages. I note all the Defendants except the 1st Defendant's parcels of land were gazetted on 21st April, 2017 for compulsory acquisition to create a wayleave. The 1st Plaintiff has already made offers to the Defendants which have since been rejected. Further, the intended transmission lines are for public interest and the 1st Plaintiff claims the project is delaying. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that **'...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.'**

In relying on this decision, I find that it is indeed the 1st Plaintiff that continues to suffer irreparable harm since the project is being delayed. Further, since the Defendants will eventually be compensated for loss of use of their respective parcels of land which have already been gazetted, I see no reason why the said project should be delayed because of disputes in compensation. I find that the damages they portend to suffer will actually be compensated for once they reach a consensus on the right amount.

On the question of balance of convenience, I wish to make reference to the case of **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** where Mativo J observed as follows: **'As for the balance of convenience, I reiterate what I stated above, "the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. [20]The court will seek to maintain the status quo in determining where the balance on convenience lies."**

Based on the facts as presented and in associating myself with the aforementioned decision, I find that the same indeed tilts in favour of the 1st Plaintiff to be allowed to proceed with the project as parties await to be adequately compensated.

It is against the foregoing that I find the 1st Plaintiff's application merited and I will allow it save for the land owned by the 1st Defendant which was not gazetted for compulsory acquisition to create a wayleave. I further direct that the 1st Plaintiff proceeds to engage all the parties herein and negotiate with all the respective owners of the parcels of land herein on the just compensation of their respective portions which will be affected by the wayleave, within 90 days from the date hereof, failure of which the Court will proceed to set the suit down for hearing for purposes of assessing the same. Since the 1st Defendant's parcel of land was not gazetted for compulsory acquisition, I will proceed to allow his application and set aside the orders made on 8th June, 2020 in relation to his land parcel number Kajiado/ Kipeto/ 3225.

As for the 78th to 79th Defendants' Notice of Motion dated the 2nd July, 2020, based on my findings above, I will decline to allow the said application. Further, as for the 94th Defendant's Notice of Preliminary Objection, I note that the issues being raised therein touch on compulsory acquisition which process had already commenced with the gazette notice dated 21st April, 2017 and the remaining issues are on compensation which will be dealt with at the full hearing. I hence find the said Notice of Preliminary Objection unmerited and will disallow it.

Costs of the Applications and the Notice of Preliminary Objection will be in the cause.

Dated Signed and Delivered via email this 21st Day of September, 2020

CHRISTINE OCHIENG

JUDGE