



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 551 OF 2018

JARED OKONGO MANYIBE.....1ST PLAINTIFF

ANTONY OMARIBA.....2ND PLAINTIFF

PETER NYAKUNDI.....3RD PLAINTIFF

(Being the officials of Embakasi Youth Jua Kali Self Help Group)

- VERSUS-

KENYA POWER & LIGHTING COMPANY.....1ST DEFENDANT

NAIROBI COUNTY GOVERNMENT.....2ND DEFENDANT

RULING

The plaintiffs brought this suit against the defendants on 20th December, 2018 seeking the following reliefs;

1. A permanent injunction restraining the defendants from interfering with the peaceful enjoyment of plot in Saika West Estate, Mowlem Ward, Embakasi.
2. A declaration that the plot owners in L.R No. 209/9560, 9562, 9563 and 9564 are the legal owners of the said plots and the relevant authorities issuing ownership titles should issue the same to the said plot owners.
3. Costs of this suit.
4. Any other relief the court may deem fit to issue against the defendants.

Together with the plaint, the plaintiffs brought an application by way of Notice of Motion dated 20th December, 2018 seeking the following orders;

“2. That a temporary order of injunction be and is hereby issued restraining the 1st and 2nd defendants from entering, interfering and demolishing the plaintiffs'/Applicants' buildings at Saika/Mowlem Ward in Embakasi within Nairobi county pending the hearing and determination of this application.

3. An order of injunction be and is hereby issued restraining the 1st and 2nd defendants by themselves, their servants or agents from entering, interfering and demolishing the plaintiffs'/Applicants' buildings at Saika/Mowlem Ward in Embakasi within Nairobi County which consists of permanent houses/structures pending the hearing and determination of this application.”

The application that was supported by the affidavit of the 1st plaintiff, Jared Okongo Manyibe was brought on the grounds that the plaintiffs were allocated plots on L.R No. 209/9563 by the 2nd defendant which plots they had developed and occupied for 20 years without any objection from the defendants. The plaintiffs contended that the 2nd defendant had confirmed their ownership of the said plots and had been receiving land rent from them while the 1st defendant had connected electricity to the premises. The plaintiffs contended that the 1st defendant had issued them with a notice to remove their permanent buildings from the said plots failure to which the same would be demolished.

In his affidavit in support of the application, the 1st plaintiff stated that the plaintiffs were members and officials of Embakasi Youth Jua Kali Self Help Group which had 146 members. He stated that the Nairobi City Council the predecessor of the 2nd defendant allocated to Embakasi Youth Jua Kali Self Help Group (“the group”) L.R No. 209/9562 which the group sub-divided and sold portions thereof to its members. He stated that the members of the group did not encroach on the said parcel of land but were allocated the same. The 1st plaintiff stated that the members of the group took possession of the said plots and constructed permanent buildings thereon. He stated that at no time were they warned that their developments were on electric supply line wayleave corridor. The 1st plaintiff stated that the notice that was served upon members of the group by the 1st defendant on 17th December, 2018 demanding that they demolish their buildings that were alleged to be on electric supply line way leave corridor came as a surprise to them. He stated that members of the group had been in occupation of the plots in dispute for 20 years and that their occupation was not something which the 1st defendant just discovered following an inspection that was carried out on 1st November, 2018.

The 1st plaintiff stated that the defendants knew of their occupation having supplied water and electricity to their premises. He stated that the 2nd defendant had been collecting land rent from members of the group for the plots which they occupy and as such the plots could not be on the electric supply line wayleave corridor as claimed by the 1st defendant. The 1st plaintiff stated that members of the group had invested heavily on the plots in dispute and as such they stood to suffer huge losses if the orders sought were not granted. The 1st plaintiff annexed to his affidavit among others; a list of members of the group, a sketch map of the land occupied by members of the group, ownership certificates that were issued by the group to its members, a notice that was addressed to the members of the group by the 1st defendant, photographs of the buildings marked for demolition by the 1st defendant, applications for electricity supply, electricity bills, water bills, application for water supply and receipts for ground rent payment.

The plaintiffs’ application was opposed by the 1st defendant through a replying affidavit sworn by Major (Rtd.) Geoffrey Kigen on 18th July, 2019. In the affidavit, the 1st defendant averred that it had the mandate of transmitting, distributing and supplying electric energy in Kenya. The 1st defendant averred that it had extensive power supply network. The 1st defendant averred that in order to undertake its mandate, it had acquired way leaves to enable it to erect power lines. The 1st defendant averred that it had wayleave reserves or corridors of various sizes depending on the voltage of the power line and that the reserves were for the purposes of ensuring the safety of the public and its operations. The 1st defendant averred that it had a wayleave on Mowlem/Saika/Matopeni area along Kangundo Road which cuts across L.R Nos. 209/9560, 209/9561, 209/9562, 209/9563, 209/9564 and 209/9958 some of which the plaintiffs claim to occupy. The 1st defendant averred that it acquired the said wayleave on 17th September, 1966 for the construction of electricity supply lines in the area. The 1st defendant averred that since the acquisition of the said wayleave, it had never had any issues with the same until recently when the plaintiffs illegally began to encroach on the wayleave corridor by putting up unapproved structures thereon. The 1st defendant averred that once a wayleave is acquired by the 1st defendant, the wayleave corridor is not supposed to be put into any other use that may interfere with the 1st defendant’s operations. The 1st defendant averred that the plaintiffs had contravened the requirement of noninterference with a way leave corridor by building structures on the way leave corridor in dispute that has 220 KV, 132 KV and 66 KV power lines. The 1st defendant annexed to its replying affidavit; survey maps and plans showing the power lines on the wayleave corridor in contention and GPS Maps and photographs showing the extent of the encroachment by the plaintiffs on the said wayleave corridor.

The 1st defendant averred that the electricity supply lines passing over the way leave corridor in question were of very high voltage and that the plaintiffs’ structures were lying too close to the electricity cables which prejudiced public safety. The 1st defendant averred that there was need for the situation to be rectified. The 1st defendant averred that as a result of the said encroachment by the plaintiffs on the wayleave corridor, the 1st defendant’s ability to transmit, distribute and retail quality and reliable electricity to its customers had been affected. The 1st defendant averred that it was due to the foregoing that it gave the plaintiffs a notice on 14th December, 2018 to remove the illegal structures along the said wayleave corridor failure to which the same be demolished at their cost. The 1st defendant averred that the structures put up by the plaintiffs on the wayleave corridor in dispute not only pose a danger to the area residents in the event of electrical accident but also deny the 1st defendant the ability to maintain its power supply lines or build new ones to extend the already existing network. The 1st defendant denied that the offending structures were built 20 years ago. The 1st defendant averred that the fact that some of the structures had been connected to electricity was a nonissue since the connections were carried out following a government directive to the 1st defendant to connect electricity to people living in all areas including informal settlements.

The 1st defendant averred that the plaintiffs had not placed before the court any evidence showing that they owned the portions of land where the structures in dispute were situated. The 1st defendant averred that even if the plaintiffs had proved that they owned the said parcels of land, their rights would still have been subject to the 1st defendants’ wayleave easement. The 1st defendant averred that the plaintiffs had not established valid grounds for the grant of the temporary injunction sought.

The plaintiffs’ application was heard by way of written submissions. The plaintiffs filed their submission on 5th March, 2020 while the 1st defendant filed its submissions on 17th June, 2020. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit and the written submissions on record. What is before the court is an application for a temporary injunction pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, that was cited by the 1st defendant, it was held that an applicant for an interlocutory injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be

protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ... All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

It is on the foregoing principles that the plaintiffs' application falls for consideration. From the material before me, I am not satisfied that the plaintiffs have satisfied the conditions for granting the orders sought. I am not satisfied that the plaintiffs have established a prima facie case against the defendants with a probability of success. To start with, it is not clear why the plaintiffs sought orders of injunction against the 2nd defendant. It was not disputed that the notice that gave rise to the suit and the application before the court was issued by the 1st defendant. The plaintiffs have not shown that the 2nd defendant did anything wrong. As against the 1st defendant, the plaintiffs' case is that the 1st defendant had threatened to demolish their buildings and other structures on L.R Nos. 209/9660, 209/9562, 209/9563 and 209/9564. The plaintiffs have not demonstrated that they own any of these parcels of land either individually or as a group. I have perused the notice dated 14th December, 2018 that was issued to the residents of Mowlem, Saika and Matopeni areas along Kangundo Road. The notice concerned encroachment on 220KV, 132KV and 66KV power line wayleave corridor. The notice called upon the residents who had put up structures on the wayleave corridor to remove the same failure to which the 1st defendant would remove the structures at the cost of those who had put up the same. There is no evidence that the 1st defendant intended to arbitrarily demolish the buildings put up by the plaintiffs on the parcels of land aforesaid. The notice is very clear that the structures that were targeted were those on high voltage power line wayleave corridor. It was not disputed that it is illegal to encroach on electric supply line wayleave corridor.

The 1st defendant has demonstrated that a number of residents of Mowlem, Saika and Matopeni areas along Kangundo road have encroached on electric supply line wayleave corridor in the area and put up structures thereon which is not only a danger to themselves and the general public but also interferes with the activities of the 1st defendant along the said electric supply line. The plaintiffs have not persuaded me that the notice by the 1st defendant complained of was illegal. The plaintiffs have not challenged the evidence placed before the court which shows that buildings have been constructed under high voltage power lines. The plaintiffs have not shown that the 1st defendant intended to demolish buildings which were not on the wayleave corridor. I am in agreement with the 1st defendant that the fact that some of the structures put up under electric power lines have been connected with electricity does not make them legal. The same applies to the fact that some of the structures have been connected to water supply and the owners are paying land rent to the 2nd defendant. In any event, there is no evidence that any of the structures were approved by the 2nd defendant.

I have said enough to show that the plaintiffs have not established a prima facie case. On whether the plaintiffs stand to suffer irreparable harm which cannot be compensated in damages, again the same has not been proved. As I have observed above, no evidence has been placed before the court showing that the plaintiffs' own the parcels of land on which the structures said to be threatened with demolition are situated. In the absence of a title, I am unable to see the plaintiffs' possible loss beyond the costs of the structures. It has not been suggested that the 1st defendant would not be able to compensate the plaintiffs for the structures they have put up on what the 1st defendant has claimed to be a wayleave corridor in the event that the 1st defendant carries out the threatened demolition and the plaintiffs prove at the trial that the said structures were not on the wayleave corridor and that the same were demolished illegally.

Having come to the conclusion that the plaintiffs have not established a prima facie case and that the plaintiffs do not stand to suffer irreparable harm if the orders sought are not granted, it is not necessary for me to consider the balance of convenience. If I was to consider the same, I would have found that it favours the 1st defendant. The 1st defendant has a statutory mandate to transmit, distribute and supply electric energy to the public. The 1st defendant requires the way leave corridor that has been encroached on by the plaintiffs to enable it discharge that mandate. In the circumstances of this case, public interest served by the 1st defendant must prevail over private interests of the plaintiffs. Furthermore, the structures put up under high voltage power lines pose a danger not only to the plaintiffs but also to the general public in case of electrical accident. It would be in the public interest that the source of that danger be removed. The balance of convenience would therefore be against the granting the orders sought.

In conclusion, I find no merit in the plaintiffs' Notice of Motion application dated 20th December, 2018. The application is dismissed with costs to the 1st defendant.

Delivered and Dated at Nairobi this 29th Day of October, 2020

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ondieki for the Plaintiffs

Mr. Rono for the 1st Defendant

Ms. Ndonga for the 2nd Defendant

Ms. C. Nyokabi-Court Assistant