



Kenya Electricity Transmission Co Ltd (K) v Hacienda Development Ltd; Kenya Power & Lighting Co Ltd (Interested Party) (Environmental and Land Originating Summons E024 of 2024) [2025] KEELC 4468 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2024**

**YM ANGIMA, J
JUNE 12, 2025**

BETWEEN

KENYA ELECTRICITY TRANSMISSION CO LTD (K) PLAINTIFF

AND

HACIENDA DEVELOPMENT LTD DEFENDANT

AND

KENYA POWER & LIGHTING CO LTD INTERESTED PARTY

RULING

A. Plaintiff’s application

1. By a notice of motion dated 18.12.2024 filed pursuant to Article 40 (3) of the [Constitution](#) of Kenya, Sections 139, 149 and 150 of the [Land Act](#), 2012 ([Act No. 6 of 2012](#)), Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 40 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law) the plaintiff sought the following orders;
 - a. Spent.
 - b. Spent.
 - c. This Honourable Court be pleased to issue a temporary injunction restraining the Defendant/ Respondent either by itself, it's agents, servants, or employees from interfering with the Plaintiff's/Applicant's construction works of improvement of the 132kv Rabai — New Bamburi — Kilifi electricity transmission line on the Defendant/Respondent parcel, Title Number 10279/II/MN situated in Mombasa County pending hearing and determination of the suit.



- d. The Mombasa County Police Commander or the Officer Commanding the Police Station ("OCS") within whose jurisdiction Title Number 10279/11/MN lies do ensure that any orders issued herein are complied with and law and order is maintained during execution of these orders.
 - e. The costs of this application be borne by the Defendant/Respondent.
 - f. The Honorable Court does issue any other orders it deems fit and just to meet the ends of justice.
2. The application was based upon the grounds set out on the face of the motion and the contents of the 2 supporting affidavits sworn by Eng. David Iraya and Johnson Muthoka on 18.12.2024. The plaintiff (KETRACO) pleaded that it was in the process of constructing the 132KV Rabai-New Bamburi – Kilifi Transmission line (the project) and had for that purpose obtained permission from the interested party (KPLC) to use its existing power wayleave passing through the defendant's Land No. 10279/II/MN (the suit property).
 3. It was pleaded by KETRACO that the Government of Kenya had entered into a contract with a contractor from Spain to execute the project which provided for payment of idling charges of between Kshs.150,000/= to 500,000/= per day for stoppage of work due to no fault of the contractor. It was contended that the defendant had wrongfully prevented the contractor from entering and executing project works on the suit property without any lawful justification or excuse with the consequence that the tax payers stood to lose a large amount of money in idling costs.

B. Defendant's response

4. The defendant filed a replying affidavit sworn by Adam Tuller on 12.02.2025 in opposition to the application. It was disputed that the project works were being undertaken on KPLC's wayleave. The defendant stated that KETRACO had opted to take a totally different route for the works and that in any event the said wayleave did not authorize the erection of high voltage power lines.
5. The defendant further stated that it was in the business of constructing affordable houses for sale and that the area to be affected by the KETRACO project was huge hence the area ought to be surveyed, valued, and compensation paid before the project could proceed.

C. Defendant's application

6. The material on record shows that the defendant filed a notice of motion dated 31.01.2025 seeking a review, variation or setting aside of the interim orders granted on 14.01.2025 pending the hearing and determination of the plaintiff's application dated 18.12.2024. It was supported by an affidavit sworn by Adam Tuller on even date. It was contended, inter alia, the order as extracted was erroneous as it did not capture the consent of the parties on that day. It was also contended that there was a mistake or error apparent on the face of the record and that if left to stand, the defendant stood to suffer what it described as "irreparable economic and financial loss".
7. The said application was opposed by a replying affidavit sworn by Johnson Muthoka sworn on 14.04.2025. He deposed that the court order as extracted was a true reflection of the interim order as granted by the court. It was also disputed that there was an error or mistake on the face of the record to warrant a review of any kind.



D. Directions on submissions

8. The record shows that when the matter came up for directions it was directed that both applications shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the defendant's submissions were filed on 15.04.2025 but the plaintiff did not file any submissions.

E. Issues for determination

9. The court has perused the two applications on record, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the main issues which arise for determination herein;
 - a. Whether the defendant has made out a case for review, variation or setting aside of the interim orders made on 14.01.2025.
 - b. Whether the plaintiff has made out a case for the grant of an interim injunction.
 - c. Who shall bear costs of the 2 applications.

F. Analysis and determination

a. Whether the defendant has made out a case for review, variation or setting aside of the interim orders made on 14.01.2025

10. The court has considered the material and submissions on record on this issue. It would appear from the defendant's grievance was that the terms of the consent were not properly or accurately captured.
11. The material on record does not reveal the existence of any consent on the material date. None of the parties present during the virtual session alluded to the existence of such consent. In fact, the defendant's advocate who appeared on the material date vehemently opposed the extension of any interim orders. The court finds that the correct position on the proceedings of 14.01.2025 is as deposed in the replying affidavit sworn by Johnson Muthoka on 14.04.2025.
12. The court finds no evidence of an error on the face of the record since the extracted order seems to be in line with the terms of Order No. 2 of the plaintiff's notice of motion dated 18.1.2.2024. As a result, there is no justification to review, vary or set aside the interim injunction for the reasons advanced by the defendant.
13. The court has noted that from its written submissions the defendant has taken the view that the interim injunction was erroneously granted by the court and that the court should have granted as status quo order insisted. The defendant then proceeded to cite some cases where other courts opted to grant a status quo order instead of an interim injunction. If the defendant's position was that the court was wrong in granting the interim injunction then the appropriate remedy would be an appeal to a higher court but not a review.

b. Whether the plaintiff has made out a case for the grant of an interim injunction

14. The principles for the grant of an interim injunction were summarized in the case of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 as follows;
 - a. First, the applicant must demonstrate a prima facie case with a probability of success at the trial.



- b. Second, an injunction will not normally be issued unless the applicant might otherwise suffer irreparable loss or injury.
 - c. If the court is in doubt as to the second principle, it shall decide the application on a balance of convenience.
15. There is some credible material on record to show the existence of power wayleave passing through the suit property. There is also some material to show that KPLC granted KETRACO written permission for construction of the project through its wayleave. The defendant has claimed that KETRACO deviated from the agreed wayleave. The court is of the view that the alleged deviation can only be conclusively investigated and determined at the trial. Needless to state that should KETRACO deviate from the wayleave then it stands the risk of making monetary compensation at the appropriate time. The court is thus of the view that the plaintiff has satisfied the first principle for the grant of an injunction.
16. The court has considered the material on record in relation to the second principle on irreparable loss. It has been held that irreparable loss or injury is that which cannot be adequately compensated by an award of monetary damages. The court has considered the nature of the project being undertaken by KETRACO. The court has no hesitation whatsoever in holding that monetary compensation cannot be adequate compensation for loss of utilities. The court is satisfied that the plaintiff has satisfied the second principle as well. Since the court is not in doubt on the second principle, it shall not be necessary to consider the third principle on balance of convenience.

c. Who shall bear the costs of the 2 applications

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. In the case of *Giella v Cassman Brown & Co. Ltd* (supra) it was held that proper order to make where an application for injunction is allowed is for costs to be in the cause but against the applicant where the application is rejected. As a result, the plaintiff's application shall be allowed with costs in the cause whereas the defendant's application for review shall be dismissed with costs.

G. Conclusion and disposal orders

18. The upshot of the foregoing is that the court finds merit in the plaintiff's application for interim orders whereas it finds no merit in the defendant's application for review. As a consequence, the court makes the following orders for disposal of the matter;
- a. The defendant's notice of motion dated 31.01.2025 is hereby dismissed with costs.
 - b. The plaintiff's notice of motion dated 18.12.2024 is hereby allowed in terms of orders Nos. 3 and 4 thereof with costs in the cause.
 - c. The matter is hereby fixed for pre-trial directions on 09.07.2025.

Orders accordingly.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 12TH DAY OF JUNE, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. are Kariuki for plaintiff

Ms. Kinuva for the defendant

Mr. Ododa for the interested party

