REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 474 OF 2017

KENYA ELECRICITY TRANSMISSION COMPANY…..PLAINTIFF/APPLICANT

VERSUS

LPETON LENGIDI….....1st DEFENDANT/RESPONDENT

DANIEL LEJOON NLENGIDI….....2nd DEFENDANT/RESPONDENT

WILLIAAM LCHADA LENKIDI.....3rd DEFENDANT/RESPONDENT

LESAUTI LENKIDI….....4th DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 22nd November 2018 brought under Article 159 of the Constitution, Section 80 of the Civil Procedure Act, Order 22 Rules 25 and 52, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules where the Applicant seeks for the following orders.

a. Spent……

b. Spent……

c. That this Honourable Court be pleased to review and set aside the Judgement and Decree delivered on the 29th October, 2018 directing the Plaintiff to pay a total sum of Ksh 7,728,198/- to the Defendants.

d. That this Honourable Court be pleased to review its Judgement delivered on the 29th October 2018 by retracting the sum award of Ksh 7,728,198/- and substituting it with the sum of Ksh 2,520,927/-

e. That this court be pleased to direct the Land Registrar Nyahururu to register an easement against the title Number Samburu /Poro B/274, 215, 132 and 142 in consideration of the aforesaid compensation.

f. That the Applicant be at liberty to apply for further orders and /or directions as the Honourable court may deem just to grant.

d. That costs of this application be provided for.

2. The said application is supported by the grounds set on the face of the application as well as on the sworn affidavit of Johnson Mothoka the Applicant's Senior Manager, Way leaves Acquisition.

3. In response to the said application the Respondents filed their replying affidavit on the 10th December 2018.

4. On the 17th December 2018, by consent, parties agreed to dispose of the application by way of written submissions wherein leave was granted to the parties to file and serve their written submissions within 14 days.

5. Whereas the Respondents filed their written submissions on the 11th January 2019, the Applicant on the other hand filed their written submissions on the 21st February 2019, both parties herein filing their submissions out of time and without leave of court.

6. I have considered the said submissions to which I will summarize the same as herein under.

Applicant's submissions.

7. It was the Applicant's submission that they sought the above orders as there was error on the face of the record caused by an omission or arithmetic mistake in the judgment which made the conclusion of the said judgment inconsistent with the analysis and testimonies given at the hearing.

8. That the court while appreciating the value of the compensation and concept of limited use of land, had failed to apply the impact of the transmission lines on the properties and went ahead to order for compensation at a full value of the suit which thus amounted to an outright purchase of the suit land.

9. The Applicants relied on the decided case of **Skool Enterprise Limited vs Housing Finance Company of Kenya Limited & 3 Others [2017] eKLR** in support of their submission that there was an error on the face of the court record.

10. It was further the Applicant's submission that the court having ordered that the Respondents be compensated for loss of limited land use, that an easement ought to be registered to reflect the said position as was decided in the case of **Kenya Electricity Transmission Company Limited vs James Kinoti M'twerandu [2028] eKLR**.

Respondent's Submission

11. The Application was opposed by the Respondents who submitted that the matters which had been raised in the said application had been considered by the court in its judgment and therefore were not ground for review as is provided for under Order 45 of the Civil Procedure Rules.

12. The Respondents, while relying on their replying affidavit filed on the 10th December 2018, framed their issued for determination as follows;

a. Whether the court pegged the compensation payable to the Defendants at 30% of the value of an acre.

b. Whether there was an omission on the need to have an easement registered against the certificate of title as an encumbrance in exchange for compensation awarded.

c. Whether the grounds raised in the Notice of Motion can be canvassed in an application for Review.

13. On the first issue, it was the Respondent's submission that the court did not peg its finding that the compensation was for loss of use of land was pegged at 30%, the Applicant having admitted in evidence that they did not produce any valuation report supporting this percentage. On the other hand the Respondent had produced expert reports showing the acreage of the land to be affected by the way leave, which reports were uncontroverted.

14. Further that the court had stated that the criteria it had applied for the compensation was the average of the figure proposed by both parties upon which it had applied it discretion under section 148(5) of the Land Act.

15. On the second issue, and while relying on the decided case of **Caltex Oil (Kenya) Limited vs Rono Limited [2016] eKLR,** the Respondents submitted that since this relief was not pleaded by the Applicants, the same could not be awarded by the court.

16. It was the Respondents submission on the third ground that the court in its judgment had considered all the issues raised in the present application to which effect there was no error disclosed on the face of it. That matters already canvassed by the trial court could only be good grounds for an appeal and not a review as in the present case. They relied on the case of **National Bank of Kenya Limited vs Ngungu Njau [1997] eKLR** in support of their submissions.

Analysis and determination.

17. I have considered the application, the affidavit on record, and submissions by counsel as well as the law concerning applications for review and setting aside of a judgment.

18. I find that the mattes for determination as;

a. Whether the court can review its decision.

b. Whether there was a mistake or error apparent on the face of the record

c. Whether the court can order for registration of an easement against the title Number Samburu /Poro B/274, 215, 132 and 142 in consideration of the compensation.

19. The provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules stipulates as follows:

Section 80 of the Civil Procedure Act provides;

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

20. Order 45 Rule 1 of the Civil Procedure Rules on the other hand provides as :

Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

21. From the reading of the above provisions of the law, the same give discretion to the court on application by an aggrieved party, to make "**such order thereon as it thinks fit".** In terms of **Order 45 Rule 1,** any person who is aggrieved by an order or a decree may ask the court that made the order or issued the decree to review it if he can demonstrate that he has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. The court will also review its decision if it finds some mistake or error apparent on the face of the record. Finally, it is open to the court to review its decision if it finds any other sufficient reason to do so.

22. From the Applicant's application and submission, I find that there was no material from which I can conclude that there was discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree was passed or the order made.

23. On the mistake or error apparent on the face of the record, the Court of Appeal in **Muyodi V. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243** explained it as follows:

"In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal."

24. The Court had accorded no particular definition for an error apparent on the face of the record, stating that it would vary with each particular case. But in an earlier Tanzanian decision in the case of **Chandrakhant Joshibhai Patel V R (2004) TLR, 218**, it was held that an error stated to be apparent on the face of the record:

'...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions".

25. On this question too, I find no mistake or error in the decision of the court delivered on the 29th October 2018.

26. The applicant in their application has also sought for orders directing the Land Registrar Nyahururu to register an easement against the title Number Samburu /Poro B/274, 215, 132 and 142 in consideration of the compensation it had awarded the Respondents.

27. This suit was first filed in the High Court of Kenya sitting in Meru on the 19th July 2017 before it was subsequently transferred to this court. In the said suit, the Plaintiff/Applicant had sought for the following orders:

i. An assessment of just compensation payable to the Defendants.

ii. Permanent injunction against the Defendants either by themselves, their agents, employees from interfering with the works of the Plaintiff and attacking the servants and agents of the Plaintiff on the suit properties.

iii. In the alternative, Judgment against the Defendants for the losses incurred by the Plaintiff due to the disruption of the construction of the power lines

iv. Cost of the suit.

28. In the decided case of **David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR the court of Applea held that:**

> *Courts are normally bound by the pleadings of the parties so as to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.*

29. The proposition was expressed as follows by the former Court of Appeal for Eastern Africa in ***Gandy v Caspar Air Charters Ltd [1956] 23 EACA, 139:***

> *"The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given"*

30. From the above it therefore follows that issues for determination in a suit generally flow from the pleadings. To this effect therefore a trial court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Parties were confined to their pleadings.

31. It is therefore clear for the Applicants pleadings and prayers sought, that the relief for an order to register an easement against the title Number Samburu /Poro B/274, 215, 132 and 142 in consideration of the compensation was not pleaded and therefore cannot be awarded at this stage.

32. In conclusion, I find that the Application herein lacks merit and is hereby dismissed with costs to the Respondents.

Dated and delivered at Nyahururu this 7th day of May 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE