



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 47 OF 2018**

**DANIEL MUEMA JOEL & 21 OTHERS.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SINOHYDRO CORP. BUILDING.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. In the Application dated 18<sup>th</sup> June, 2018, the Plaintiffs are seeking for the following orders:

***a. That the Defendants/Respondents be restrained by themselves or through their agents, servants, employees or any person acting on their behalf from entering, encroaching, trespassing, working on, constructing, using, acquiring or in any manner interfering with part or whole of all parcels of lands known as Ikutha/Mbitini/9, 10, 42, 20, 61, 35, 43, 60, 50, 54, 89, 42, 12, 13, 14, 11, 21, 387, 399, 3, 64, 18, 410, 400, 2, 29 and 5 all belonging to the Applicants until hearing and determination of this suit.***

***b. Costs of this Application.***

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that the Plaintiffs are the registered proprietors of the suit properties which the Defendants are in the process of acquiring; that the acquisition of the suit land by the Defendants is for the purpose of constructing the Kibwezi - Mutomo - Kitui - Migwani Road and that although the road was initially supposed to follow the old road, the Defendants diverted it to pass through the suit land.

3. The 1<sup>st</sup> Plaintiff deponed that the Defendants are in process of acquiring the suit land without consulting or compensating the Plaintiffs; that the process of compulsorily acquiring private land is stipulated in the Land Act and that the said process precedes the entry, acquisition and taking possession of private land.

4. In reply, the 3<sup>rd</sup> Defendant filed a Relying Affidavit in which it averred that the Plaintiffs have not produced any documents to demonstrate that they are the registered proprietors of the suit land; that the Plaintiffs do not have registrable interest in the suit land and that the public interest in the project that the Plaintiffs are seeking to stop supersedes the Plaintiffs' private rights over the suit land.

5. The Plaintiffs' advocate submitted that Article 40 of the Constitution protects the right of citizens to their properties; that the Plaintiffs are entitled to prompt payment for their parcels of land and that part VIII of the Land Act directs the Government on how it should compulsorily acquire private land.

6. The Plaintiffs' advocate finally submitted that it is only upon compensation that the Defendants can take the Plaintiffs' parcels of land and that although the Defendants have taken over the suit land, they have not compensated the Plaintiffs for the same.

7. On his part, the 2<sup>nd</sup> Defendant's Contract Manager (*the Manager*) deponed that the 2<sup>nd</sup> Defendant was involved in the construction of Kibwezi - Mutomo - Kitui - Migwani Road; that the 2<sup>nd</sup> Defendant was contracted by the Kenya National Highways Authority to construct the said road and that the 1<sup>st</sup> Defendant initiated the process of acquisition of the suit land for the said road.

8. The 2<sup>nd</sup> Defendant's Manager finally deponed that the acquisition of the suit land was duly gazetted by the 1<sup>st</sup> Defendant and that the intended construction of the road will benefit the larger public.

9. The 2<sup>nd</sup> Defendant's advocate submitted that in light of the factual position obtaining in this matter, the Plaintiffs have not met the threshold provided for an order of injunction to issue; that the 2<sup>nd</sup> Defendant is not involved in the compensation or resettling of the Plaintiffs and that in any event, the Plaintiffs have not demonstrated that they are the registered proprietors of the suit properties.

10. The 3<sup>rd</sup> Defendant's advocate submitted that the Plaintiffs have not produced any documents to show that the road under construction actually passes through the suit land; that the Plaintiffs have not quantified the loss they will suffer neither have they demonstrated that the 1<sup>st</sup> Defendant will not be able to compensate them in the event they succeed in their suit and that the impugned road will serve the entire public.

11. The Plaintiffs are seeking for an order of injunction restraining the Defendants from trespassing or constructing a road on parcels of land known as Ikutha/Mbitini/9, 10, 42, 20, 61, 35, 43, 60, 50, 54, 89, 42, 12, 13, 14, 11, 21, 387, 399, 3, 64, 18, 410, 400, 2, 29 and 5 (*the suit land*). The said order of injunction is being sought by the Plaintiffs on the ground that although the Defendants have taken possession of the land, and have commenced the process of constructing the Kibwezi -Mutomo - Kitui - Migwani Road, the Plaintiffs have not been compensated.

12. The Plaintiffs in this matter are seeking for an order of injunction restraining the Defendant from interfering or dealing with property known as Machakos/Yatta/1 until the hearing and final determination of the suit. In the case of **Kenya Commercial Finance Co. Limited vs. Afraha Education Society (2001) 1 E.A 86**, the Court of Appeal held as follows:

***“The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the Application on a balance of convenience. See Giella vs. Cassman Brown and Co. Ltd 1973 EA at page 360 Letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”***

13. In the **Nguruman Ltd vs. Jan Bonde Nielsen (2014) eKLR** case, the Court of Appeal held that if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. In **Mrao Ltd vs. First American Bank of Kenya Limited and 2 others (2003) KLR 125**, the Court of Appeal defined a prima facie case as follows:

***“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 letter.”***

14. The Plaintiffs, through the 1<sup>st</sup> Plaintiff, have deponed that they own the suit land. According to the Plaintiffs, they are entitled to prompt compensation from the 1<sup>st</sup> Defendant before the suit land can be acquired compulsorily for the purpose of constructing the Kibwezi-Mutomo - Kitui Road.

15. Indeed, the intention of the 1<sup>st</sup> Defendant to acquire the suit land, on behalf of the National Government, is manifested in the Kenya Gazette Notice No. 177 of 4<sup>th</sup> January, 2018. The gazette notice is an acknowledgement that the suit land is private land, and the owners of the same are entitled to compensation.

16. Although the Plaintiffs have alleged that they are the registered proprietors of the land, they have not exhibited any documents to show that the suit land belongs to them. Indeed, considering that the Plaintiffs are 22 in number, it is not clear to this court which Plaintiff owns which land. The failure by the Plaintiff to explain how they own the suit land, which is the crux of their claim of compensation, makes their claim for injunction weak. Indeed, having not particularized the manner in which each one of them owns the 27 parcels of land, a prima facie case with chances of success has not been established.

17. Even if the Plaintiffs had established a prima facie case with chances of success, an order for injunction would not issue because the Plaintiffs have not established the irreparable injury that they are likely to suffer that cannot be compensated by way of damages. As correctly submitted by the Plaintiffs' advocate, the Plaintiffs, upon proof that the suit land belongs to them, are entitled to prompt compensation by the 1<sup>st</sup> Defendant. That being the case, the Plaintiffs should quantify the compensation that they are entitled to and pursue the same, either in this court, or directly with the 1<sup>st</sup> Defendant.

18. Considering that the impugned road will serve the general public, the balance of convenience tilts in favour of the Defendants. The public interest for the construction and completion of the road outweighs the Plaintiffs' private interests viz-a-viz the suit land.

19. For those reasons, I disallow the Application dated 18<sup>th</sup> June, 2018. The Application is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**