



**REPUBLIC OF KENYA**

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

**E & L. NO. 107 OF 2019**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED.... PLAINTIFF**

**VERSUS**

**KIBOTU LIMITED.....DEFENDANT**

**RULING**

This ruling is in respect of two applications dated 18<sup>th</sup> September and 29<sup>th</sup> October 2019 respectively brought by the plaintiff/applicant and the defendant respondent seeking for the following orders:

a) Spent.

b) That pending the hearing and determination of this application inter partes this Honourable Court be pleased to issue a temporary injunction restraining the respondents either by itself, their agents, servants and /or personal representative from interfering with the construction works of the applicant and its contractor on parcels of land NO. NANDI/SONGOR/SONGOR/BLOCK 2/12 AND 18 by denying the plaintiff and its agents/contractor access to the said parcels.

c) That the County Commander in charge of Nandi County be directed to ensure enforcement of the orders granted by this Honourable Court.

d) That pending the hearing and determination of this suit this Honourable Court be pleased to issue a temporary injunction restraining the respondents either by itself, their agents, servants and /or personal representative from interfering with the construction works of the applicant and its contractor on parcels of land **NO. NANDI/SONGOR/SONGOR/BLOCK 2/12 & 18** by denying the plaintiff and its agents/contractor access to the said parcels.

e) That this Honourable Court be pleased to order that the proposed compensation for loss of land use pleaded in the plaint to the respondent in respect of parcels of land **NO. NANDI/SONGOR/SONGOR/BLOCK 2/12 & 18** of land being Kshs. 5,159,448.00 be deposited in the joint interest earning account in the names of the advocates for the parties pending the hearing and determination of this suit.

f) That the costs of this application be provided for.

This application was brought under certificate of urgency and the court gave temporary orders restraining the respondent from interfering with the construction works pending the hearing of the application inter partes.

The applicant was ordered to serve the application within 7 days for inter partes hearing. On the day of the hearing the respondent filed an application dated 29th October 2019 seeking for the following orders:

a) Spent.

b) That this Honourable Court be pleased to issue conservatory Orders restraining the Plaintiff from wasting the Defendants land and further trespass onto the suit parcel of lands pending the hearing and determination of this application inter-parties.

c) That the Court be pleased to discharge/set aside the Orders of injunction issued on 18<sup>th</sup> September 2019 or be stayed pending the determination of the application dated 18<sup>th</sup> September,2019.

d) That the cost of this Application be provided for.

Counsel agreed to canvass both applications by way of written submission. I will therefore start with the application dated 29<sup>th</sup> October 2019 seeking for setting aside or discharging the orders issued on 18<sup>th</sup> September 2019.

Counsel for the Respondent /applicant submitted that the plaintiff alleged that it is constructing the Olkaria-Lessos-Kisumu Transmission line which intends to pass through the defendant parcel land known as **SONGOR/SONGOR BLOCK 2/12 & 18** taking a corridor covering approximately 21 .5 acres which is a big portion of land intended to be acquired by the plaintiff.

Counsel submitted that the defendant is the registered owner of land L.R **SONGOR/SONGOR BLOCK 2/12 & 18** measuring approximately over 500 acres and that the plaintiff obtained a temporary injunction restraining the defendant from interfering with the construction works on the suit parcel of land on 18<sup>th</sup> September 2019

It was Counsel's submission that upon issuance of the above mentioned order, the Plaintiff entered the defendant's land after one month of the order and committed acts of waste by creating roads through the land, slashing of the sugarcane and digging deep trenches of which the defendant filed a counterclaim against the plaintiff on the basis that the plaintiff misrepresented facts in obtaining the order dated 18<sup>th</sup> November, 2019, trespassed on the defendant's land and that it has not paid the defendant any single penny as compensation which is a legal requirement in cases of expropriation.

Counsel listed the following issues for determination by the court:

- a) Whether an injunction should be issued against the plaintiff for destroying the defendant's land and property.
- b) Whether the order of 18<sup>th</sup> September 2019 authorized entry and destruction of property.
- c) Whether the orders 18<sup>th</sup> September 2019 should be discharged.
- d) Whether the plaintiff has acquired any enforceable rights over the defendant's land.

On the first issue as to whether an injunction should issue against the plaintiff for destroying the defendant's land and property, Counsel relied on the principles of injunctions as enunciated in the case of **GIELLA VERSUS CASSMAN BROWN** (1973) EA 358 and as was reiterated in the case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others** CA No.77 of 2012 (2014)eKLR where the Court of Appeal held that;

*"in an interlocutory injunction application the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, all any doubts as to b, by showing that the balance of convenience is in his favour.*

*These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. it is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"*

Mr. Mwetich submitted that the defendant has a prima facie case and relied on the case of **MRAO LTD VERSUS FIRST AMERICAN BANK OF KENYA LTD (2003) EKLR** in which the Court of Appeal gave a determination on a prima facie case. The court stated that :

*"... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

Counsel therefore submitted that the defendant has a legal right to the property as established under Article 40 of the Constitution of Kenya 2010 as it is the registered proprietor of the property and has beneficial interest.

On the issue of irreparable harm, Counsel submitted that the defendant will suffer irreparable injury if the plaintiff is not restrained. He relied on the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) EkLr** in which the court stated;

*"irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.*

Mr. Mwetich submitted that the plaintiff has already entered upon the suit land and is already destroying it by slashing sugar cane and digging deep trenches using mechanical excavators which is causing irreparable harm. Counsel further relied on the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) EKLR** which defined the concept of balance of convenience as :

*'The meaning of balance of convenience ill favor of the plaintiff' is that if an injunction is not granted and the Suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the*

*balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.*

*In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”*

Further that the inconvenience the defendant is suffering is greater compared to that of the plaintiff and a lot of damage to the defendant's sugarcane and digging of trenches. Counsel cited the case of **Robert Mugo Wa Karanja v Ecobank (Kenya ) Limited & ano.[2019] EKLK** where the court in deciding on an injunction application stated;

*‘circumstances for consideration before granting a temporary injunction under order 40 rule 1 of the Civil Procedure Rules requires a proof that any property in dispute in a suit is in a danger of being wasted, damaged or alienated by any party of the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property; the court is in such situation enjoined to a grant a temporary injunction to restrain such acts....”*

On the issue as to whether the order of 18<sup>th</sup> October 2019 should be discharged, Counsel the defendant has every right to move the court under Order 10 Rule 7 of the Civil Procedure Rules 2010 which provides that.

*"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto b) any party dissatisfied with such order. "*

It is the defendant's submission that this honorable court be pleased to discharge the order dated 18<sup>th</sup> September 2019 as the order was issued on the basis of misrepresentation of facts by the plaintiff and secondly, that the plaintiff has used the injunction order issued by the court oppressively to circumvent the requirements of the law on acquisition of land by the state or state agency. Further that the plaintiff only purported to enter the defendant's land for first time on 23<sup>rd</sup> September 2019 and started massive destruction on the land of which the defendant has attached photographic evidence to this effect.

Mr. Mwetich submitted that a party seeking equitable remedy like an injunction order must be honest and candid. Counsel relied on the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd another, (1990) eKLR** where the court stated that;

*“to succeed in an application of injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction.”*

Counsel therefore urged the court to discharge the orders as they were obtained without full disclosure of the facts and the plaintiff has used it to waste the suit land. Counsel also cited the case of **Ochola Kamili Holding Limited vs Guardian Bank Limited (2018) eKLR** where the court while commenting on the behavior of a plaintiff after an injunction stated.

*"The court is alive to the fact that interlocutory injunction, being an equitable remedy, would be discharged upon being shown the person's conduct with respect to matter pertinent to the suit does not meet the approval of the court which granted the orders which is the subject matter and especially where a party upon getting injunction orders sits on the matter and uses the orders to the prejudice of the opponent. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination but not to oppress another party nor should an injunction be used to economically oppress the other party...Or to deny justified repayment of outstanding loan. That once such a post-injunction behaviors is exposed it would in my view be a ground to discharge an injunction because the order obtained would be an abuse of the purpose for which the injunction was granted. No court would allow its orders to be used to defeat the ends of justice”*

On the issue as to whether the order of 18<sup>th</sup> September 2019 gave a right of entry into the defendant's land to commit acts of waste and destruction, Counsel submitted that the injunction was a temporary one and did not allow the plaintiff to enter the defendant's land and consequently destroy it or to build permanent structures on the suit land. That the plaintiff is upsetting the status quo.

It was Counsel's submission that the right of entry onto the defendant's land would only have been possible had the plaintiff obtained a mandatory/positive injunction which is not the case herein. Counsel relied on the case of **Shepherd Homes Limited Vs Sandahm (1971) 1 CH 34 where Megarry J. Stated;**

*“it is plain that in most circumstances a mandatory injunction is likely, other things being equal to be more drastic in its effects than a prohibitory injunction. At the trial of the action the court will of course grant such injunctions as the justice of the case requires but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted even if it is sought in order to enforce a contractual obligation’*

Counsel further cited the case of **Nation media Group & 2 others vs John Harun Mwau (2014) eKLR** where the court of Appeal stated:-

*‘It is trite law that for an interlocutory mandatory injunction to issue an applicant must demonstrate existence of special circumstance. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted.*

*Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.'*

On the last issue as to whether the plaintiff has enforceable rights on the defendant's land, counsel submitted that Section 40(3) the Constitution of Kenya 2010 provides an exception to the right to own and acquire and property outlined in section 40 (1) of the Constitution. It states.

*"State shall not deprive a person of property of any description or of any interest in or right over property of any description, unless the deprivation;*

*(a) Results from an acquisition of land or an interest on land or conversion of an interest in land or title to land in accordance with chapter five or;*

*(b) Is for a public purpose or in the public interest and is carried out in accordance with this constitution and any act of parliament that:-*

*(i) requires prompt payment in full, of just compensation to [he person,• and*

*(ii) allow any person who has an interest over that property a right of access to a court of land.*

Mr. Mwetich submitted that the plaintiff can therefore only acquire a right of entry upon the defendant's land after the payment of prompt and adequate compensation. The plaintiff has not paid such compensation and therefore does not have any legal right to enter the defendant's land. Counsel cited the case of **Kamau versus Kamau KLR EA 105** on acquisition of easements where the court stated that,

*"How are easements created? At common law only by Deed and will .... At equity however if there is an agreement whether under seal or not to grant an easement for valuable consideration, equity considers it as granted between the parties and persons taking with notice and will either decree a legal grant to restrain a disturbance by injunction".*

Counsel further cited the case of **Everlyne College of Design Vs Director of Children's Department & AG Constitutional Petition No.228 of 2013**, where Majanja J. stated in his judgment that;

*I would once again emphasise that a finding of unlawful acquisition referred to in article 40(6) of the constitution must be through a legally established process and not by forcefully occupation of the property by the state institutions or by preventing a person from enjoying the incidents of ownership of property;*

Counsel therefore urged the court to discharge the orders issued on 18<sup>th</sup> September 2019.

### **Plaintiff Respondent's Submissions**

Counsel submitted that the Plaintiff/Respondent had earlier moved the Court on 18<sup>th</sup> November, 2019 for injunctive Orders against the defendant, when the court granted interim Orders against the Defendant, from interfering with the construction works on the suit property. Counsel submitted that the Plaintiff herein did comply with the said Orders.

Counsel submitted on the principles laid down by DR. SPRY's book on equitable remedies 6<sup>th</sup> edition LBC page 447 where he stated thus interlocutory injunctions concern with:

- a) The maintenance of a position that will more easily enable justice to be done when its final order is made and
- b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

Counsel relied on the case of **National Commercial Bank Ltd V Olint Corporation 2009 IV/r 1405**. where the Privy Council stated that the purpose of interlocutory injunction is to improve the chance of the court being able to do justice after a determination of the merits at the trial.

Mr. Ochieng that the interim Orders as issued and extended on 7<sup>th</sup> October, 2019 were granted after the Plaintiff had demonstrated to Court that they were deserving of the said Orders and it was just and convenient for the Court to grant the said Orders in the interim. Counsel relied on the case of **St Patricks Hill School Ltd v Bank of Africa Kenya Ltd [2018] eKLR** that it has unfettered discretion to discharge or vary or even set aside an injunction order if the ends of justice so demand, or if the injunction does not serve the ends of justice it was intended to serve when it was issued. The material and relevant question is whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain.

It was Counsel's submission that the Defendant's main grounds for discharge of the Orders granted to the Plaintiff, as evidenced in the application and affidavit in support of the application, is that the Plaintiff has entered the suit properties without a wayleave and compensating the Defendant. Counsel also submitted that from the Pleadings before Court, the Plaintiff remains keen to justly compensate the Defendant, and has sought in the substantive suit an assessment of just compensation payable to the Defendant.

Mr. Ochieng further submitted that the injunctive and conservatory Orders as sought by the Defendant/Applicant, are inconsistent with the Law and are meant to obstruct construction of the power lines, and the Defendant is trying to circumvent liability under Section 185 of the Energy Act, 2019 which provides that ;

*"A Person who without reasonable cause hinders, obstructs or interferes with the exercise by a licensee with regard to an energy infrastructure, or by the servants or agents duly authorized in writing of any such licensee, of any right of entry upon land conferred by this Act for the Purpose of laying and connecting, or repairing, inspecting or removing, an energy infrastructure commits an offence and shall, on conviction, be liable to a fine not exceeding five hundred thousand shillings for each day or part thereof that the obstruction occurs or continues*

That Order 40 Rule 6 of the Civil Procedure Rules, 2010 allows a party who is affected by an injunction to apply to court for its discharge, variation or setting aside. It provides; *"Where a suit in respect of which an interlocutory injunction has been given is not determined within period of twelve months from the date of grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."*

Counsel therefore urged the court to dismissed the defendant's application and confirm the application for injunction as prayed.

### **Analysis and Determination**

The plaintiff herein filed an application for temporary injunction to restrain the defendant from interfering with the construction works of power lines by the contractor. The same was heard under certificate of urgency and a temporary order granted whereby the plaintiff was directed to serve the application within 7 days for inter partes hearing.

When the matter came up for hearing Counsel for the defendant requested for time to file a response to the application and meanwhile the interim orders of injunction were extended.

Counsel for the defendant filed the current application for discharge of the orders on the ground that the plaintiff had misrepresented facts and had used the order to waste and damage the defendant's land. He therefore urged the court to discharge the orders on those grounds.

The issues for determination are as to whether the defendant is entitled to the orders of discharge of the injunction and whether the plaintiff has used the order granted as a ticket for entry into the defendant's land and committed acts of wastage and destruction.

It is trite law that Order 10 Rule 7 of the Civil Procedure Rules 2010 which provides that.

*"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto b)' any party dissatisfied with such order. "*

It is therefore within the defendant's right to apply for the discharge but the applicant must also give reasons why the order should be varied, set aside or discharged. The defendant/applicant has applied for conservatory orders restraining the plaintiff from wasting the defendant's land and further trespass. The principles to be satisfied in granting of a conservatory order was expressed by Justice Onguto J. (as he then was) in the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** are as follows

*"In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order."*

Further the Supreme Court of Kenya also rendered itself on conservatory orders in the Case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others eKLR** as follows:

*"Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes"*

The question whether the applicant has demonstrated a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger he will suffer prejudice. From the submissions of Counsel and perusal of the proceedings I find that no real danger has been demonstrated to warrant the discharge of the orders earlier granted. The court cannot ascertain when the photographs annexed to the affidavit in support of the application were taken, whether it was before or after the orders of injunction were granted.

As stated in the above Supreme Court case it is trite law that "Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of

irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the applicants case for orders of stay."

I am of the same view that conservatory orders are of a public law connotation to facilitate ordered functioning with public agencies. Counsel submitted on compulsory compensation of land and gave the meaning of easements. The annexure CO1 shows that there was an advertisement by the National Land Commission for acquisition of wayleaves for Olkaria –lessos- Kisumu 400KV transmission line project.

It is also trite law that the compensation to land owners is for a limited loss and not outright purchase as a party only acquires wayleave for the power line with restrictions on the use of the land under the wayleave which are that no construction of structures or planting of trees/crops that maturity exceed 12 feet in height. It should also be noted that what is being undertaken by the applicant is not compulsory acquisition as known in law but rather a wayleave trace which is governed by section 143 and 145 of the land Act.

Section 143 provides that

143. Power of the Commission to create public rights of way

(1) Subject to and in accordance with this section and section 146, the Commission may, create a right of way which shall be known as public right of way.

(2) A public right of way may be—

a right of way created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions, referred to in this Act as a wayleave; or

(c) a right of way created for the benefit of the public, referred to in section 145 of this Act as a communal right of way.

Sub section 4 provides that:

"A wayleave shall authorize persons in the employment to or who are acting as agents of or contractors for any of the organizations, authorities and bodies to enter on the servient land for the purpose of executing works, building and maintain installations and structures and inseting all such works, installations and structures on the servient land and to pass and re-pass along that wayleave in connection with purposes of those organizations, authorities or bodies".

The question is, has the plaintiff gone beyond the order of injunction that had been granted to restrain the defendant from interfering with construction works. Was the plaintiff already on site or it entered after the grant of the injunction? Has the plaintiff complied with the terms of the order and is the plaintiff within the law as per the provisions of the Land Act on wayleaves.

The court has to look at these provision to establish that the plaintiff was within the law and the right of wayleave for the construction of the power lines. The other issues of compensation will come at the full trial of this suit as at stake is whether the court should discharge the injunction orders or confirm them pending the hearing of the main suit.

Section 148 of the Land Act deals with compensation in respect of public right of way.

Compensation in respect of public right of way

(1) Subject to the provisions of this section, compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.

(2) Compensation relating to a wayleave or communal right of way shall not be paid to a public body unless there is a demonstrable interference of the use of the land by that public body.

(3) Damage caused as a result of the creation of a wayleave shall include any preliminary work undertaken in connection with surveying or determining the route of that wayleave, and whether the trees, crops or buildings so damaged were included in the route of the wayleave as delineated in the order of the Cabinet Secretary.

(4) The duty to pay compensation payable under this section shall lie with the State Department, county government, public authority or corporate body that applied for the public right of way and that duty shall be complied with promptly.

(5) If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.

The above sections gives a party a right to move to court if he or she is not satisfied with the process and if there is any delay in the negotiations or assessment of the amount for compensation for the wayleave granted. Both parties are in the right forum as the court is given powers under section 149 to enforce public right of way. This means that all is not lost as the both parties are at the seat of justice.

Interlocutory injunctions are meant to preserve the substratum of the suit pending the hearing and determination of the suit. The grant of interlocutory injunctions is not meant to occasion prejudice to any party. In this particular case the defendant would be able to be compensated by way of damages if the court finds that the plaintiff did not deserve the grant of the injunction. The damages can be quantified and I notice that the defendant has filed a counterclaim seeking for aggravated general damages for trespass to the land and damage to the crops, general and punitive damages for nuisance and disturbance. These are monetary in nature which can be granted if the defendant's counterclaim succeeds.

The other issue that is relevant to this case is whether the plaintiff obtained the interlocutory orders of injunction by non-disclosure of material facts and misrepresentation of facts. The fundamental principles of non-disclosure of material facts that an applicant must adhere to are as follows:

- a) The Applicant is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge,
- b) The duty of disclosure therefore applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries.
- c) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which the application is made and the probable effect of the order on the defendant, and (c) the degree of legitimate urgency and the time available for the making of the inquiries.
- d) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the Judge in the application.
- e) The question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
- f) Finally, it is not every omission that the injunction will be automatically discharged

It should be noted that the issue of non-disclosure of material facts to the court is indeed a serious issue which may warrant a court to set aside or vary interlocutory injunctive orders. In the current case I do not find that the plaintiff suffered from non-disclosure of material facts. The defendant did not state the material facts that were not disclosed.

Having said that I find that it would be in the interest of justice to order that the order of injunction to be in place pending the hearing and determination of the suit. The court finds that the discharge or varying of the injunction orders would not be appropriate at this time. I also order that the plaintiff complies strictly with the order of injunction and not engage in acts that would degrade the suit land pending the hearing and determination of the suit.

This is a matter that would benefit from negotiation and meditation if the parties are willing to engage. I also order that the Plaintiff do deposit Kshs. 5,159,448.00 in a joint interest earning account in the names of the advocates of the parties within 30 days failure to which the order lapses. Parties to comply with order 11 within 30 days.

**DATED and DELIVERED at ELDORET this 18<sup>TH</sup> DAY OF DECEMBER, 2019.**

***M. A. ODENY***

***JUDGE***

**RULING** read in open court in the presence of Mr.Tororei holding brief for Mr.Mwetich for Defendant/Applicant and in the absence of Ochieng Opiyo for the Plaintiff/Respondent.

MS. Towett – Court Assistant