



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 294 OF 2016

MBARAK ISLAM ABEID.....PLAINTIFF

VERSUS

RURAL ELECTRIFICATION AUTHORITY.....1ST DEFENDANT

KENYA POWER AND LIGHTING COMPANY LIMITED.....2ND DEFENDANT

RULING

1. By an application dated 3rd November 2016, Mbarak Islam Abeid, the Plaintiff herein prays for orders that:-

a. The defendants, their servants, authorised agents, employees or through anyone deriving title through them or otherwise be restrained by a temporary injunction from continuing with the erection or putting up of poles, power transmission lines, pylons and/or any other structure(s) on the property known as Subdivision No. 660(Original No. 152/2) Section IV Mainland North (“the suit property”) and/or in any manner whatsoever dealing with the said property pending the hearing and determination of the suit.

b. A mandatory injunction do issue compelling the defendants to remove the poles and power transmission lines and any other structure(s) erected on the suit property pending the hearing and determination of the suit failing which the Plaintiff be authorised to remove the same at the defendants’ expense.

2. The Plaintiff’s application is based on the grounds inter alia that:-

(a) The Plaintiff is the rightful and/or lawful owner of the property known as Subdivision No. 660 (Original No. 152/2) Section IV Mainland North (“the suit property”).

(b) In or about the year 2013, the Defendants/Respondents wrongfully entered into the suit property and have unlawfully erected poles and power transmission lines which traverse the suit property.

(c) That the aforesaid unlawful acts of the defendants are damaging and/or wasting the suit property to the detriment of the Plaintiff/Applicant as he is unable to plan for developments and to fully utilize the suit property; and

(d) The Defendants/Respondents intend, unless restrained by this Honourable Court, to continue with its acts of trespass and as a result the Plaintiff/Applicant shall suffer irreparably if the orders sought herein are not granted.

3. In a Replying Affidavit sworn by its Assistant Wayleaves Officer Stephen Magembe on 1st March 2017, the Rural Electrification Authority, the 1st Defendant herein, describes itself as a body corporate established under Section 66 of the Energy Act, 2006 charged with the mandate of accelerating the pace of electrification in the rural areas. In line with that mandate, it did identify in January 2011 various trading centres, schools and health centres within Bahari Constituency in Kilifi for electrification.

4. The 1st Defendant avers that it subsequently approached the then Member of Parliament for the Constituency and requested him to identify 5 priority projects for funding in the financial year 2011/2012. One of the areas identified by the Member of Parliament was “Mkwaju Takaungu Market-Makata Market- Dindiri Secondary School” pursuant to which a High Tension (“HT”) distribution line was constructed in mid-2011.

5. In addition, the 1st Defendant avers that sometime in 2013, pursuant to its mandate to ensure that all public primary schools in Kenya are electrified, Kaole Primary School was identified for that purpose. Upon visiting the site, it was established that the school was located within the suit property which was also inhabited by about 16 families. The said families informed the 1st Defendant that they had been living on the suit property for over 50 years.

6. Subsequently the 1st Defendant proceeded and obtained wayleave consents to extend a Low Voltage (LV) line from the existing HT line. The consents were duly signed by 3 representatives of the 3 families occupying the portions of the suit property over which the line would pass. Thereafter, the 1st Defendant proceeded to extend the Low Voltage electricity line at the end of 2013 by erecting 2 Low Voltage poles and electrified the said Kaole Primary School.

7. On its part, the Kenya Power & Lightning Company Limited, (the 2nd Defendant herein) has filed Grounds of Opposition dated 1st March 2017 in which they stated that:

“In addition to the facts deponed to in the Replying Affidavit of Stephen Magembe sworn on 1st March 2017, the second defendant will oppose the application dated 3rd November 2016 on the grounds that the plaintiff has not produced any evidence to prove that the second defendant erected the electricity line the subject matter of this suit.

8. I have considered the Application and the replies thereto. I have equally considered the various submissions and authorities made and/or placed before me by the Learned Counsels appearing for the parties herein.

9. In *Nguruman Ltd Vs Jan Bonde Nelsen & 2 Others (2014) eKLR*, the Court of Appeal re-stated the principles for the grant of an injunction as follows:-

“In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

a. establish his case only at a prima facie level;

b. demonstrate irreparable injury if a temporary injunction is not granted, and

c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

10. In *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003)KLR 125*, the Court of Appeal defined a prima facie case in civil cases in the following words:-

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

11. On the material presented before me, the plaintiff avers that he is the registered owner of the suit property. In support of his case, he has annexed a Certificate of Title to his application which indeed confirms that he was registered on 11th November 2002 as the owner of the property which measures 22.46 hectares or thereabouts. A survey map attached to the Supporting Affidavit (marked as annexure MIA 2) indicates that there are erected on the suit property power lines.

12. In reply to the Plaintiff’s assertions, the 1st Defendant concedes that it indeed constructed what it describes as Low Voltage power lines over the suit property. It is however the 1st Defendant’s case that it obtained consent to erect the lines from the inhabitants of the property who informed them, and which information the 1st Defendant believed, that the said inhabitants had occupied the land for more than 50 years.

13. Section 26(1) of the Land Registration Act states as follows:-

“The Certificate of Title issued by the Registrar upon registrationshall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.”

14. Arising from the foregoing, there is prima facie evidence that the plaintiff is the owner of the suit property unless proved otherwise under section 26(1) of the Land Registration Act aforesaid. The Plaintiff’s registration was done as we have seen on 11th November 2002 and in my mind, it is completely unbelievable if not outrageous for the 1st Defendant to have negligently and without carrying any official searches of its own, believed the alleged inhabitants of the land to be the owners thereof. As a body corporate established by law, the 1st Defendant must have had the means to properly ascertain the ownership of the suit property before embarking on the erection of the power lines.

15. As the registered owner of the suit property, the Plaintiff was an interested party and was therefore entitled to be consulted before the power lines could be erected on his land. Indeed, Section 46 of the Energy Act which creates the 1st Defendant provides as follows:-

“46(1) No person shall enter upon any land, other than his own-

a. to lay or connect an electric supply line; or

b. to carry out a survey of the land for the purposes of paragraph(9), except with the prior permission of the owner of such land.

16. In *Nguruman Ltd(Supra)*, the Court of Appeal reiterated that:-

“...in considering whether or not a prima facie case has been established, the Court does not

hold a mini trial and must not examine the merits of the case closely. All that the Court has to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title, it is enough if he can show that he has a fair and bonafide question to raise 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".

17. It is apparent from the tone taken by both Defendants herein in their pleadings that it is their case that the power lines are already in place and the plaintiff would rather accept and live with it or seek to be compensated in monetary value. It is however the plaintiff's case that the erection of the lines has interfered with his plans to develop the suit property and that he stands to suffer irreparable harm if the orders sought herein are not granted.

18. In *Kenya Breweries Ltd –vs- Washington Okeyo*(2002) EA 109, the Court of Appeal cited with approval the principles for the grant of a mandatory injunction as stated in *Vol 24 of Halsbury's Laws of England 4th Edition Paragraph 948* where it is stated that:-

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is simple and summary one which can easily be remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

19. In *Sharriff Abdi Hassan –vs Nadhif Jama Adan CA 121/2005 (2006) eKLR*, the Court of Appeal further observed as follows:-

"The Courts have been reluctant to grant a mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standard spelt out in law as stated above that a party against whom a mandatory injunction is sought is on the wrong, the Courts have taken action to ensure that justice is meted out without the need to wait for the full hearing of the entire case. That position could be taken by the Courts in such cases as those of alleged trespass to property.

20. The same Court of Appeal in the case of *Jaj Super Power Cash and Carry Ltd –vs Nairobi City Council & 20 Others CA 111/2002* stated:-

" ...This Court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrongdoer cannot keep what he has taken because he can pay for it."

21. On the material placed before me, the plaintiff has an overwhelming case that will most likely succeed at the full hearing. It is clear beyond per adventure that the plaintiff who is the registered owner of the suitland was neither consulted nor compensated when the 1st defendant erected the low voltage power lines on his land and the 2nd Defendant fed the lines with electric power.

22. Article 40 of the Constitution of Kenya provides that every person has the right either individually or in association with others, to acquire and own property of any description and in any part of Kenya. Article 40(3) thereof provides that:

"(3) The 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 in land or a 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, or just compensation to the person, and

ii. Allows any person who has an interest in, or rightover, that property a right of access to a Court of law.

23. While the purpose for which sections of the suit property was acquired may be said to be public in nature, public interest per se does not limit the rights and fundamental freedoms of an individual except as provided by law. In the matter before me the defendants have not demonstrated to this Court that the procedure set out in law, including the Energy Act itself, was followed and/or that notice was given as envisaged by law.

24. The upshot is that I find merit in the application dated 3rd November 2016 and I allow the same as prayed.

25. The Defendants are accordingly granted 45 days from the date hereof to remove the poles and power transmission lines and any other structure(s) erected on the suit property failing which the Plaintiff will be authorized to remove them at the Defendants' expense.

Dated, signed and delivered at Malindi this 22nd day of February, 2018.

J.O. OLOLA

JUDGE