



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 594 OF 2014

TOM MBUCHO VOHY.....PLAINTIFF

VERSUS

KENYA ELECTRICITY TRANSMISSION CO. LTD.....DEFENDANT

RULING

The plaintiff brought this suit on 15th May, 2014 claiming that he was the registered owner of two parcels of land known as Kajiado/Olchoro-Onyore/ 5365 and Kajiado/Olchoro-Onyore/ 5633(hereinafter referred to as “the suit properties”) on which the defendant had expressed an intention of creating away-leave for its Suswa-Isinya 400 KV transmission line project. The plaintiff claimed that the defendant had offered him Kshs.327, 654.60 as compensation for the portions of the suit properties that it intended to acquire for that purpose.

The plaintiff averred that he had made plans to undertake various projects on the suit properties at a cost of Kshs.7,522,861.12 and had engaged quantity surveyors, civil engineers and mechanical engineers to prepare the necessary plans and documents for the projects. The Plaintiff averred that he rejected the defendant’s offer for compensation because there was no indication on how the defendant had arrived at the amount of compensation that it had offered to the plaintiff. The plaintiff averred that the compensation offered by the defendant was arbitrary, unjust and contrary to Article 40 of the Constitution. The plaintiff averred that he had purchased the suit properties for family settlement and that the same had intrinsic and unquantifiable value. The plaintiff also averred that the suit properties were situated on prime location compared to the other parcels of land in the neighbourhood and that their layout was also unique. The plaintiff averred that due to the defendant’s intended acquisition of the portions of the suit properties, he was not going to sub-divide the suit properties for the purpose of the developments he intended to undertake thereon.

The plaintiff sought a permanent injunction to restrain the defendant from trespassing on or in any way adversely interfering with the suit properties. The plaintiff also sought an order compelling the defendant to pay reasonable compensation before continuing with the construction of the said electricity transmission line, general damages and costs of the suit.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 12th May, 2014 seeking a temporary injunction restraining the defendant from interfering with the suit properties pending the hearing and determination of the suit. The application was supported by the affidavit of the plaintiff sworn on 12th May, 2014 in which the plaintiff reiterated the contents of the plaint that I have highlighted above. The plaintiff contended that the defendant had no right to interfere with the suit properties without reasonable compensation. The plaintiff averred that he would suffer irreparable loss and damage if the injunction was not granted.

The plaintiff’s application was opposed by the defendant through a replying affidavit sworn by its company secretary, Duncan Macharia on 9th June, 2014. The defendant admitted that it was constructing the 400KV Suswa – Isinya transmission line. The defendant stated that as its usual practice, it had approached the owners of land through which the said transmission line was to pass with the help of the area chief with the aim of entering into negotiations with them for the purposes of acquiring way-leaves to facilitate the passage of the said National Grid. The defendant averred that the plaintiff was one of the land owners whose parcel of land was to be affected by the said transmission line. The defendant averred that only L.R No. Kajiado/Olchoro-Onyore/5633 (“Plot No.5633”) was to be affected and that it entered into negotiations with the plaintiff to acquire a portion of the said parcel of land for the purposes of away leave for the said line. The defendant averred that following a valuation exercise that was carried out by its land economist, it offered the plaintiff compensation in the sum of Kshs.327,654.60 for a portion measuring 0.546 acres that it intended to acquire. The defendant averred that it was not expected to pay to the plaintiff any other monies apart from what was assessed to be due to him. The defendant contended that the application was unnecessary because it was not going to forcefully take the plaintiff’s property.

The defendant accused the plaintiff of going ahead to engage professional services in a bid to develop the suit properties while he was aware of the negotiations between the defendant and the previous owner of the suit properties for it to acquire away leave through the same. The defendant averred that the plaintiff was engaging in this exercise with a view to exhort money from the defendant. The defendant accused the plaintiff of attempting to unjustly enrich himself. The defendant averred that the plaintiff had not established a prima facie case against it and had also failed to demonstrate that damages would not have been an adequate remedy.

On 12th June, 2014, the court made an order for the maintenance of status quo the effect of which was that the defendant was restrained from interfering with the plaintiff's possession and occupation of the suit properties pending the hearing and determination of the suit. When the matter came up on 17th December, 2015, the defendant's advocate informed the court that the defendant had re-routed its electricity transmission line from the plaintiff's parcels of land and as such the substratum of the plaintiff's suit was no longer in existence. He urged the court to mark the suit as settled. The court gave the plaintiff's advocate time to take instructions on the issue.

When the matter came up on 4th October, 2016 for mention, the parties recorded a consent marking the suit as withdrawn and the issue of costs to be agreed on by the parties or to be determined by the court. The parties were given time to agree on the issue of costs. On 31st July, 2017 the court was informed that the parties had failed to agree on costs and the matter was set down for mention on 15th November, 2017 for the parties to address the court on the issue. When the matter came up on 15th November 2017 Ms. Kiguatha appeared for the plaintiff while Mr. Wandati appeared for the defendant. On behalf of the plaintiff, Ms. Kiguatha submitted that the plaintiff was entitled to the costs of the suit. Counsel submitted that costs is at the discretion of the court and that the withdrawal of the suit does not disentitle the plaintiff to costs unless it is shown that the plaintiff was at fault in bringing the suit. In support of this submission, counsel relied on the case of Morgan Air Cargo Ltd. v Evrest Enterprises Ltd. (2014) eKLR. Counsel submitted that due to the defendant's conduct, the plaintiff had no alternative but to bring this suit. She submitted that the defendant attempted to acquire a portion of the suit properties for away leave but it failed to agree with the plaintiff on compensation. Counsel submitted that the plaintiff found the compensation offered arbitrary, inadequate and unjust. Counsel submitted that even when it became clear that the parties could not agree on compensation, the defendant acting with impunity entered the suit properties and started making markings thereon. Counsel submitted that this was an indication that the defendant was determined to proceed with its project on the suit properties without compensation. Counsel submitted that demands upon the defendant to cease the said activities were ignored making the filing of this suit inevitable. The plaintiff's counsel submitted further that it took this suit for the defendant to re-route its power transmission line from the suit properties. Counsel submitted that with the re-routing of the transmission line, the reliefs the plaintiff had sought herein became untenable and this is what informed the decision to withdraw the suit. Counsel submitted that the plaintiff had lost use of the suit properties between 2013 and 2016 when negotiations were going on between him and the defendant over compensation.

In his submissions in reply, Mr. Wandati advocate for the defendant denied that the defendant re-routed its transmission line because of this suit. The defendant's counsel submitted that the defendant decided to re-route the line away from the suit properties because it failed to agree with the plaintiff on compensation. Counsel submitted that the defendant did not stop the plaintiff from using the suit properties when negotiations over compensation were ongoing. Counsel submitted that the defendant had only expressed an interest in acquiring a portion of the suit properties subject to compensation and had at no time issued threats to the plaintiff or attempted to acquire the suit properties forcefully. Counsel submitted that like the plaintiff, the defendant had also incurred costs in defending the suit.

Counsel submitted that costs follow the event and that since this suit was withdrawn before hearing, there was no judgment on the basis of which it can be said that the plaintiff won the case and the defendant lost. Counsel submitted that the defendant re-routed its transmission line at a cost which should also be considered. In conclusion, counsel submitted that in the circumstances of the case, each party should bear its own costs.

I have considered the parties' respective submissions on the issue of costs. It is common ground that this suit was withdrawn before hearing. It is also common ground that costs are awarded at the discretion of the court. It is settled law that the discretion of the court has to be exercised judiciously. In exercising its discretion, the court has to consider the circumstances of the case and the relevant law. I am in agreement with the plaintiff that the withdrawal of the suit *per se* did not disentitle him to the costs of the suit. However since the suit was not heard, the plaintiff had a duty to demonstrate that the suit was brought as a result of the fault on the part of the defendant and that the withdrawal of the suit was informed by the interest of justice. As I have stated earlier, the plaintiff's application for interlocutory injunction was not heard on merit. When the application came up, the court ordered that the status quo be maintained. The court did not decide one way or the other on the merit of the application. The suit was thereafter withdrawn without a hearing. Again, the court did not have an opportunity to interrogate the plaintiff's claim against the defendant to be able to form an opinion on whether it had merit or not. I am satisfied with the reasons given by the plaintiff for withdrawing the suit. I am however not convinced that the plaintiff has demonstrated the defendant's fault to the extent that would justify this court condemning the defendant to pay the costs of the suit. I find allegations of wrong doing made against the defendant unsubstantiated.

I have perused the case that was cited by the plaintiff in support of his submissions. The facts of that case are distinguishable. In that case, judgment was entered for the plaintiff by consent and it was only the issue of costs that was left for the court to determine. The court in that case had no difficulty in finding that the plaintiff had substantially succeeded in his claim against the defendant and as such was entitled to costs. That is not the case here. In this case, there was no judgment for either party. Taking all factors into account, the order that commends itself to me to make in this case is for each party to bear its own costs. It is so ordered.

Delivered and Dated at Nairobi this 5th Day of June 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Kathungu for the Plaintiff

N/A for the Defendant

Catherine Court Assistant