



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 929 OF 2017

ANNE WAMBUI GATHERU.....1ST PLAINTIFF

DAVID NDIRANGU WAMBUGU.....2ND PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

CHINA COMMUNICATIONS CONSTRUCTION

COMPANY LIMITED.....2ND DEFENDANT

RULING

The application before Court for determination is the Plaintiffs’ Notice of Motion dated the 30th May, 2018 brought pursuant to Article 40 of the Constitution, Section 13(1) & (2) (b) of the Environment and Land Court Act, 2011, Section 3A of the Civil Procedure Act, Order 19 of the Civil Procedure Rules and all the other enabling provisions of the law. It is based on the following grounds which in summary is that the Plaintiffs are the legal owners of land parcels numbers KAJIADO/NTASHART/263 & 265 respectively, hereinafter referred to as the ‘suit lands’. The Respondents are relying on the uncertainty of the order given by this court on the 19th February, 2018 to continue with their activities on the suit properties even before compulsory acquisition is commenced. The Defendants have defied and continue to defy the Court Orders as if the status quo orders dated the 19th February, 2018 has no meaning or binding on them. The Plaintiffs continue to cry for justice after the order was given by this honourable court. The Defendants have continued to destroy/ disfigure the suit properties whose use has been compromised and rendered useless.

The application is supported by the affidavit of ANNE WAMBUI GATHERU the 1st Plaintiff herein where she deposes that unless the Court intervenes and issues a fresh order of injunction, the Defendants will continue to destroy/ disfigure the suit properties whose use has been compromised and rendered useless. She however admits in her supplementary affidavit that on 22nd December, 2017, the National Land Commission vide a Gazette Notice number 12526 notified them that the government intended to compulsorily acquire the suit lands. She confirms that by the time the gazettelement was done; the Plaintiffs had made a complaint to the police on the illegal trespass and threats by the 2nd Respondent. She avers that on 23rd May, 2018, the National Land Commission which is an agent of the 1st Respondent wrote a letter invoking section 120 (2) of the National Land Commission Act, seeking to compensate them, having disregarded the ongoing case and determined the amount to be paid, in defiance of the Court order issued on the 19th February, 2018. Further, in response to the said letter, the Plaintiffs’ through their advocate, informed the National Land Commission of the Court Order and the date for hearing the application dated the 30th May, 2018. She disputes the fact that the ownership of the land is in contention.

The application is opposed by the 1st Defendant who filed Grounds of Opposition where it stated that the instant application is devoid of merit and the prayers are not supported by the legal and procedural provisions of the law under which it is brought. It contends that there are already preservative orders in this matter and the Plaintiff does not disclose which specific acts of contempt are attributable to either of the Defendants and it cannot be established in the affidavit who is in contempt. It is not clear what kind of courts intervention that is sought nor the prejudice they stand to suffer. Further that if the Plaintiffs are themselves not sure of what status quo was as at 19th February, 2018, they cannot be heard to complain about any acts of contempt by the 1st Defendant.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 30th May, 2018 including the supporting affidavit and grounds of opposition, the main issue for determination is whether the Plaintiffs’ are entitled to the orders of temporary injunction pending the outcome of the suit.

The principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

I note the instant application seeks similar orders that were already canvassed in the Plaintiffs' application dated the 17th November, 2017 and determined. In the said application, the Court granted the following orders: **'(1) The parties will observe and maintain the obtaining status quo pending the hearing and determination of the suit'. (2) The costs of the application is awarded to the Plaintiffs.'**

The Plaintiffs' have filed the instant application seeking for an interpretation of the Orders of Status Quo; injunctive orders as well as an order for a site visit.

According to section 32 of the **'PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS, which provides as follows: ' During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.'**

The Order of status quo granted on 19th February, 2018 was in effect that the parties were to maintain the ongoing position at the suit lands pending the outcome of the suit.

The Plaintiffs' have further averred that the National Land Commission has already commenced the process of compulsorily acquiring their land and given them an offer for compensation. From the annexures in the supporting affidavit, it is evident the suit lands have already been gazetted for compulsory acquisition. From a perusal of the National Land Commission Letter dated the 23rd May, 2018, it emerges that the Plaintiffs' had already been extended to an offer, but they have not informed Court as to whether they have accepted it or not. On the issue of compensation, I wish to refer to section 148 of the Land Act, which provides as follows:

'(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.'

Since the process of compulsory acquisition of the suit lands has already commenced, as evident by the gazette notice as well as the letter dated the 23rd May, 2018 from the National Land Commission, I opine that it would be proper if the Plaintiffs' cooperated with the said agency and if they disagreed on the amount of compensation to be paid, then the Court can make a determination of the same.

On the question of conducting a site visit, it is my view that this can be planned based on the Court Calender and agreed upon at the Pretrial stage.

It is against the foregoing that I find the instant application dated 30th May, 2018 unmerited and dismiss it with costs.

Dated signed and delivered in open court at Kajiado t his 24th day of October, 2018

CHRISTINE OCHIENG

JUDGE