



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1048 OF 2014

JOSEPH WATHUA KIGWI.....PLAINTIFF/APPLICANT

VERSUS

KENYA POWER COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 5th August 2014. It is brought under Section 5(1) of the Way leaves Act, Article 40 of the Constitution of Kenya, Order 40 rules 1(a), 2, 3, 10, Order 51 Rules 51 of the Civil Procedure Rules, Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders:-

(1) Spent

(2) Spent

(3) That a temporary injunction do issue restraining the defendant by itself, its agents, servants and/or any other person whomsoever form encroaching upon, trespassing onto, remaining thereon and/or in any way whatsoever interfering with, erecting electric poles onto all that parcel of land known as LR Numbers 18697/4 and 17564/101 situated at Thika Municipality pending the hearing and determination of this suit.

(4) That the defendants do remove all electricity poles deposited upon all that parcel of land known as LR Number 18697/4 and 17564/101 pending the hearing and determination of this suit.

(5) That the defendants, its servants, agents and/or employees be restrained from interfering whatsoever with the plaintiff/applicant's quiet enjoyment, use, possession and occupation of the suit property pending the hearing and determination of this suit.

(6) That the OCS Thika Police station be directed to assist and ensure compliance by the defendant/respondent.

3. The grounds are on the face of the application and are listed as in paragraph 1 to 10.

4. The application is supported by the affidavit of Joseph Wathua Kigwe, the plaintiff/applicant sworn on the 5th August 2014.

5. Upon being served, the defendant/respondent entered appearance and filed a preliminary objection. No replying affidavit was filed on its behalf.

6. On 22nd November 2017 it was agreed that the application be disposed of by way of written submissions. By 19th June 2018 only the plaintiff/applicant had filed his submissions.

7. It is the plaintiff/applicant's case that he was not served with any statutory notices as required under Section 144(4) of the Land Act.

8. I have considered the Notice of Motion, the affidavit in support and the annexures. I have considered the preliminary objection, the written submissions of counsel for the plaintiff/applicant and the authorities cited.

The issues for determination are:-

(i) Whether the plaintiff's/applicant's applicant meets the threshold for grant of temporary injunction.

(ii) Who should bear costs?

9. The principles were set out on the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358.**

10. In the Case of **Mrao Limited vs First American Bank of Kenya Limited [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case.

I am guided by the above authorities.

11. It is not in dispute that the plaintiff/applicant is the registered owner of the suit properties. It is his case that he was not served with any statutory notices as required under Section 144 (4) of the Land Act. The defendant/respondent was given an opportunity to set the record straight as to whether the said statutory notices were served but they neglected to file any responses.

12. As to the preliminary objection filed by the defendant/respondent, I am guided by Article 159 (2) (d) of the Constitution. The fact that the defendant/respondent is not properly described cannot be said to be fatal to the plaintiff's case. This is an error which can be cured by an amendment.

13. I find that the plaintiff/applicant has shown that he has a prima facie case with a probability of success at the trial. In **Kenleb Cons Limited vs New Gatitu Service Station Limited & Another [1990] KLR 557** Bosire J (as he then was) held that:

“to succeed in an application for 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 show he has a right, legal or equitable, which requires protection by injunction”

I am satisfied that the plaintiff/applicant deserves this kind of protection.

14. I also find that the plaintiff/applicant has demonstrated that he will suffer irreparably if those orders are not granted as he has developed the property. He has established a sentimental attachment over it by erecting a residential home. If the defendant/respondent is allowed to unlawfully trespass and encroach, the loss suffered will not be able to be compensated by way of damages.

15. I also find that the balance of convenience tilts in favour of the plaintiff/applicant whose right to ownership is enshrined in Article 40 of the Constitution.

16. In conclusion I find merit in this application and grant the orders sought namely:-

(a) That a temporary injunction be and is hereby issued restraining the defendants by itself, its agents, servants and/or any other person whomsoever from encroaching upon, trespassing onto, remaining thereon and/or in anyway interfering with, erecting electric poles onto all that parcel of land known as LR Numbers 18697/4 and 17564/101 situated at Thika Municipality pending the hearing and determination of this suit.

(b) That the defendant/respondent do remove all electricity poles deposited upon all that parcel of land known as LR Numbers 18697/4 and 17564/101 pending the hearing and determination of this suit.

(c) That a temporary injunction be and is hereby issued restraining the defendant/respondent, its servants, agents and/or employees from interfering with the plaintiff's/applicant's quiet enjoyment, use, possession and occupation of the suit property pending the hearing and determination of this suit.

(d) That the OCS Thika police station is hereby directed to assist and ensure compliance by the defendant/respondent.

(e) The costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18TH day of OCTOBER 2018

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L. KOMINGOI

JUDGE