



**REPUBLIC OF KENYA**

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

**ELC PETITION NO. 1 OF 2018**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 40, 42, 47, 48, 50, 60, 61, 64, 70, 159, 160 AND 165 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 1(1) & (2),**

**GOLDEN LANE LIMITED.....PETITIONER**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION**

**COMPANY LIMITED.....1<sup>ST</sup> RESPONDENT**

**MUSOONTU LAMAIYA.....2<sup>ND</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Petitioner’s Notice of Motion dated the 22<sup>nd</sup> January, 2018 brought pursuant to Order 40 rule 1, 2, 3 & 4 of the Civil Procedure Rules and all the other enabling provisions of the law. The application is based on the following grounds which in summary is that the Petitioner is the proprietor of land parcel number Kajiado/ Kitengela/ 6686 hereinafter referred to as the ‘ suit land’. The 1<sup>st</sup> Respondent has been responsible for the construction of a 60 meter wayleave trace for its 400 KVA transmission line project which runs from Mombasa to Nairobi and through the Petitioner’s land. The 2<sup>nd</sup> Respondent is usually contracted by the 1<sup>st</sup> Respondent to supervise and oversee the conducting of odd jobs on its behalf from time to time. The Petitioner undertakes agriculture on the suit land which is fenced and has a gate to control the entry of people therein. The Petitioner states that on 12<sup>th</sup> January, 2018, the 2<sup>nd</sup> Respondent in the company of seven (7) men who were carrying machetes and axes got into the suit land without its permission and this occasioned trauma to the Farm Manager Virginia Wanjiru Njoroge including some persons who hid in the farm house. The Petitioner contends that the men cut down trees and when confronted by the Farm Manager, they stated that they had instructions to cut down trees on the suit land. Further, that after the 2<sup>nd</sup> Respondent had cut down three trees, he informed the Farm Manager, that they would be back to cut others. They contend that it is unconstitutional and unlawful for the 1<sup>st</sup> Respondent to take administrative action that affects the Petitioner’s right without notifying it in writing and holding a meeting to arrive at a consensus. It is further unlawful for the Respondents’ to intrude into the Petitioner’s private property without notification. If orders sought are not granted, the Respondents will continue to intrude into the Petitioner’s parcel of land and cut down more trees without notification or seeking its opinion.

The application is supported by the affidavit of VIRGINIA WANJIRU NJOROGE, the Farm Manager of the Petitioner herein where she deposes that despite engaging with the 2<sup>nd</sup> Respondent herein, he was stubborn and intimated that he had firm instructions from the 1<sup>st</sup> Respondent to cut down trees. She contends that the Respondents’ without any justification, license or permit forced their entry into the Petitioner’s private parcel of land. She claims the Respondents intruded into their rights to privacy, quiet possession and usage of land. She insists the suit land is private land and not for public use. Further, that the Respondents have no right to unlawfully enter, use, alter or in any way take possession of anything on private land without permission or authority of the registered owner. She reiterates that the actions of the Respondents’ are unconstitutional and illegal as they contravene the Petitioner’s right to a fair administrative action. She avers that the Petitioner has demonstrated a prima facie case with a high probability of success and that an award of damages will not serve as an adequate remedy owing to the circumstances of the case.

The 1<sup>st</sup> Respondent opposed the application and filed a replying affidavit sworn by JOHNSON MUTHOKA who is its Senior Manager – Wayleaves Acquisition who denied the Petitioners’ allegations on forcefully entry, intruding as well as cutting down of trees. He avers that the 1<sup>st</sup> Respondent that is a State Corporation is mandated to build electricity transmission lines and operating the Kenya’s National Electricity Transmission Grid. Further, that the 1<sup>st</sup> Respondent to achieve its mandate, negotiates with landowners to grant it right of way over their land to enable construction of electricity transmission lines, in return for an amount of money that is calculated based on the value

of land, and the extent to which the land owner shall not be able to use their land as a result of the transmission line. He claims the Petitioner granted a right of way to the 1<sup>st</sup> Respondent over the suit land and executed an easement agreement in exchange for valuable consideration on 14<sup>th</sup> July, 2017. He explains that on 23<sup>rd</sup> August, 2017 an application to register the easement agreement was lodged and received by the lands department. He contends that the easement agreement was in relation to erecting electric line along the lands sixty (60) metre trace. He refers to paragraph 4 of the easement agreement and states that the grantor, being the Petitioner herein, was required not to plant any trees, shrubs or crops exceeding the height of twelve (12) feet from the ground below the electricity line in order to guarantee its safety. He denies that the 2<sup>nd</sup> Respondent was contracted by the 1<sup>st</sup> Respondent, neither is he its agent or employee as alleged. He reiterates that sometime in August, 2017, the 1<sup>st</sup> Respondent completed the construction and energization of the 400 KV Mombasa – Nairobi transmission line project that runs through the Petitioner's land. He insists the 1<sup>st</sup> Respondent acted legally in accordance with the Constitution and the Easement Agreement and has not derogated the rights of the Petitioner. He further denies that the 1<sup>st</sup> Respondent has authorized anyone to cut trees under the transmission lines and is categorical that the Petitioner in negotiations for compensation of the limited loss of land use maintained that they intended to use the section of the land for quarrying purposes.

Both parties filed their submissions that I have considered.

### **Analysis and Determination**

Upon perusal of the Notice of Motion dated the 22<sup>nd</sup> January, 2018 including the supporting as well as the replying affidavits; and on considering submissions filed herein, the only issue for determination is whether the Petitioner is entitled to orders of temporary injunction pending the outcome of the Petition.

The fulcrum of the suit revolves around the Respondents' alleged violation of the Petitioner's agents constitutional rights by forcefully entering the suit land and cutting down three trees thereon. It is not in dispute that the Petitioner is the proprietor of the suit land. The Petitioner has also not challenged the easement agreement it signed with the 1<sup>st</sup> Respondent on 14<sup>th</sup> July, 2017. It is the Petitioner's submission that as per the easement agreement, there was a requirement that a three (3) days' notice was to be issued before entry into the suit land. The Petitioner insists the Respondents trespassed on the Petitioner's land without giving notice as required by the easement agreement, and this culminated in the Petitioner's loss of privacy as well as destruction of crops thereon. The 1<sup>st</sup> Respondent submits that it is not in any way connected to the 2<sup>nd</sup> Respondent and that the Petitioner's claim is associated with the actions of the 2<sup>nd</sup> Respondent which the 1<sup>st</sup> Respondent cannot be held liable for. It insists there exists an easement agreement that allows it enter the Petitioner's land but since the Petitioner was concerned about the acts of the 2<sup>nd</sup> Respondent, it is their submission that the said 2<sup>nd</sup> Respondent should be punished in his individual capacity for the acts of trespass on the suit land. It argues that it is not liable for the tortious acts of the 2<sup>nd</sup> Respondent and relied on the case of **Jamlick Gichuhi Mwangi Vs Kenya Commercial Bank Ltd & Anor (2016) eKLR** to support its arguments.

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** as follows:

**"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

In line with this principle, the Court will proceed to interrogate whether the Petitioner has made out a prima facie case with a probability of success at the trial.

It is not in dispute that the Petitioner is the proprietor of the suit land and there exists an easement agreement between the Petitioner and the 1<sup>st</sup> Respondent. What is in dispute is the mode with which the 2<sup>nd</sup> Respondent entered the suit land and cut down three trees without notifying the Petitioner. From a reading of the easement agreement, I note at clause 4 of the agreement, the Petitioner accepted not to plant trees, shrubs or crop etc. within the area of the trace. Further, I note at clause 7 of the easement agreement, the Grantor which the 1<sup>st</sup> Respondent was allowed to fell or loop any tree which obstructed or interfered with the working of the electric line, after granting the Petitioner notice. I note clause 11 of the easement agreement stated that any dispute concerning the agreement was to be referred to arbitration. The 1<sup>st</sup> Respondent has denied knowledge of the 2<sup>nd</sup> Respondent and insists it is not liable for his actions. What is not clear is who sent the 2<sup>nd</sup> Respondent to the suit land to cut trees. The Court takes judicial notice of the fact that since there was an existing easement agreement, which provided for arbitration, the Petitioner should have resorted to the same first before lodging a complaint in Court. Insofar as the Petitioner had an issue of not being notified when the 2<sup>nd</sup> Respondent accessed the suit land, I opine that this cannot amount to acts of trespass on the part of the 1<sup>st</sup> Respondent in strict sense. Further, if they had an issue with the 2<sup>nd</sup> Respondent, they should have reported him to the authorities so as to be prosecuted for trespass. It is against the foregoing that I find the Petitioner has not demonstrated a prima facie case to warrant the order for injunction sought.

On the second principle as to whether the Petitioner will suffer irreparable loss which cannot be compensated by way of damages. I note the Petitioner had already entered into an easement agreement with the 1<sup>st</sup> Respondent who duly compensated it for Kshs. 24, 960, 000 for the use of the suit land. It is the Petitioner's claim that the Respondents should be restrained from entering into the suit land as it is private land. This request is however contrary to the easement agreement, which I have alluded to above. In the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, it was held that '...the applicant must establish that he 'might otherwise' suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot 'adequately' be compensated by an award of damages.'

I note that the Petitioner has already been compensated for the use of a portion of the suit land and the easement agreement is very clear that the 1<sup>st</sup> Respondent can enter thereon and cut down trees which are within the trace area. I find that the Petitioner's alleged injuries are hence speculative and not demonstrable as to warrant the grant of an injunction.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that at this juncture the balance does not tilt in favour of the Petitioner.

It is against the foregoing that I find the application dated the 22<sup>nd</sup> January, 2018 unmerited and dismiss it with costs.

**Dated signed and delivered in open court at Kajiado this 9<sup>th</sup> day of October, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**