



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 370 OF 2016**

**THATHINI DEVELOPMENT COMPANY LIMITED.....PLAINTIFF**

**VS**

**KENYA POWER AND LIGHTING COMPANY LIMITED.....DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 30<sup>th</sup> November 2016. It is brought under Order 5 Rule 17, Order 40 rules 1, 2 and 3 of the Civil Procedure rules section 1A,1B,3A and 63 of the Civil Procedure Act cap 21 and all other enabling provisions of the law.

2. It seeks;

1. Spent

2. Spent

3. That a temporary order do issue restraining the defendant, his agent, assigns or representatives from continued trespassing and or laying electricity cables and erecting electricity poles in the applicant's parcel of land otherwise known as Mombasa/Mainland.North/Block4/221 pending the hearing and determination of the suit.

4. That an order do issue directing the defendant to remove/relocate the offending electricity poles and lines currently criss crossing the applicants land.

5. That costs of this application be provided for.

3. The grounds are on the face of the application;

a) That the Applicant is the registered owner of plot known as Mombasa/Main-Land North/Block4/221.

b) That the defendant have invaded the said portion of land and are busy laying electricity cables and erecting electricity poles in the applicant's parcel of land without the consent and/or authority of the applicant.

c) The continued laying of high voltage electricity cables and erecting electricity poles is destroying the economic value of the land and exposing the plaintiff to immediate danger.

d) That it is prudent that the said trespass is stopped forthwith.

4. The application is supported by the affidavit sworn by Githende Gachanja, a Director of the Plaintiff/Applicant sworn on the 30<sup>th</sup> of November 2016.

5. The application is opposed. There is a replying affidavit sworn by Richard Ottaro, an Assistant Wayleaves Officer of the defendant sworn on the 5.6.2017.

6. I have considered the pleadings, the application, submissions of counsel and the authorities cited. In the oral submissions counsel substantiated their clients respective positions stated in their respective affidavits.

The issue for determination is whether the Plaintiff/Applicant has made out a good case to warrant the orders sought.

7. It is none appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Griella –versus- Cassman Brown and Co.Ltd [1973] EA 358**. First the applicant must show a prima facie case with a probability of success. Secondly, that an interlocutory injunction will not normally be granted unless the application might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it should act on a balance of convenience.

8. It is the Plaintiff's/Applicants case that it is the registered owner of the suit land. They have annexed a certified copy of green card and a certificate of official search.

The copy of the green card does not show any casements and/or encumbrances. They have also exhibited photographs showing electric poles already erected. Their contention is that they were erected without the permission of the plaintiff.

9. The Respondent on their part told the court that the Suit property is a sub-division that in the head title, Mombasa/MN/Block4 the defendant obtained a right of casement.

That on 14.7.1995 the defendant signed a wayleaves agreement over the property with the plaintiff. Therefore the poles have been erected with authority.

The Assistant Wayleaves Officer of the defendant in his affidavit gave a history of what is now the suit property. Further that the suit property is subject to the wayleaves agreement.

10. I find that the Applicant has failed to demonstrate that they have a prima facie case with a probability of success as set out in the case of **Mrao Limited –versus- First American Band And 2 Others [2003] KLR 125**.

The plaintiff has also failed to demonstrate what loss or injury it will suffer if the orders are not granted. The balance of convenience tilts on favour of the defendant who has the duty to transmit and distribute electricity to residents of that area.

They ought to be given a chance to show that the poles were erected with the permission of the plaintiff and what better way than to adduce evidence.

11. I also note that prayer (3) of the application is in the nature of a mandatory injunction. It is now well settled principles that mandatory injunctions can only be granted in the clearest of cases. It can only be granted in special circumstances.

The Plaintiff/Applicant has failed to show that special circumstances exist to warrant this court to grant the orders as sought in prayer (3) as well.

12. All in all I find no merit in this application and I decline to grant the orders sought.

I hereby dismiss the application. The costs of the application do abide the outcome of the main suit.

It is so ordered.

**Signed, Dated and Delivered at Mombasa this 21<sup>st</sup> September 2017.**

**L. KOMINGOI**

**JUDGE**