



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.504 OF 2017

KENYATTA UNIVERSITY STAFF

RETIREMENT BENEFITS SCHEME.....PLAINTIFF/APPLICANT

-VERSUS-

ATHI WATER SERVICES BOARD.....1ST DEFENDANT/RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF ENVIRONMENT,

WATER & NATURAL RESOURCES.....2ND DEFENDANT/RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD DEFENDANT/RESPONDENT

THE ATTORNEY GENERAL.....4TH DEFENDANT/RESPONDENT

RULING

The matter coming for determination is the Plaintiff's/Applicant's ***Notice of Motion*** application dated ***2nd May 2017***, which seeks for an order of temporary injunction to restrain the 1st Defendant whether by itself, or through its employees, agents, workers or servants from entering upon, occupying, fencing, excavating, constructing upon, developing, alienating or in any way using any portion of ***LR.No.3544 Kiambu***.

The application is premised upon the grounds stated on the face of the application and on the ***Supporting Affidavit*** of ***John M. Sawaya***. These grounds are:

a) The Applicant herein is the registered proprietor of all that piece of land known as LR.No.3544 situated in Kiambu within the Republic of Kenya and containing 191 acres by measurement.

b) Without any colour of right, the 1st Defendant has egregiously trespassed upon 17,492 acres of the Plaintiff's property by entering thereon and materially using the same, to the detriment of the Plaintiff.

c) *The 1st Defendant has now threatened to put up concrete posts around the said 17,492 acres which would effectively lock out the Plaintiff from its own property.*

d) *Unless the Honourable court intervenes and grants the orders sought, there is an imminent danger that the Plaintiff's property will be wasted and alienated and the same cannot be compensated by an award of damages.*

e) *It is in the interest of justice that the application be allowed.*

In his Supporting Affidavit the deponent, **John M. Sawaya**, the **Principal Pension Officer**, averred that the Applicant is the registered proprietor of **LR.No.3544** situated in Kiambu County which comprises of **191 acres** by measurements. Further that on **21st November 2012**, the 1st Defendant notified the Applicant of its intention to acquire **17,492 acres** of the Applicant's aforesaid property at a price of **Kshs.64,295,800/=** for the purpose of constructing a dam.

Further, that on **10th September 2015**, the Plaintiff/Applicant presented its Counter Offer to the 1st Respondent of **Kshs.165,848,414/=** as evidenced from **JMS3**. He further averred that since there was no agreement on the price, the Plaintiff and 1st Defendant resolved to undertake joint valuation of the property and this was done by **M/S Losai Management Ltd** and **General Africa Asset Manager Ltd**. He further averred that in a joint meeting held on **8th March 2016**, they agreed at a price of **Kshs.135,781,650/=** as is evident from annexure **JMS4**. It was his contention that the 1st Defendant has failed to remit the sum of **Kshs.135,781,650/=** and has also failed to commence the process of compulsory acquisition through the 2nd and 3rd Defendants as envisaged by the law. He also contended that the 1st Defendant has backtracked and has insisted on payment of the initial price of **Kshs.64,298,800/=** and has also started the process of construction on the suit property. The deponent further averred that the 1st Defendant action is unlawful and it contravenes Articles 40(1) and 40(3) of the Constitution. Further that the 1st Defendant occupation of the suit property is illegal and unlawful which infringes on the Plaintiff's right to property. He urged the Court to allow the instant application.

The application is contested and the 1st Defendant through the **Law Firm of Kipkenda & Co. Advocates**, filed Grounds of Opposition and urged the Court to dismiss the Plaintiff's/Applicant's application.

Further the 2nd & 4th Defendants also opposed the application and **Engineer Joseph Kamau**, filed a **Replying Affidavit**. He averred that he was the Project Manager for the construction of the **Kiambu Water Supply** and that the implementation of **Kiambu Water Supply Project** was financed by **World Bank** and was affecting various properties within Kiambu County. It was his contention that the Plaintiff's suit property **LR No.3544**, was one of the properties affected by the project as evidenced by annexure **JK1**. The acreage affected was **17,492** as per the **report of Trans County Valuation Report** prepared on **19th August 2013**. Further that the compensation value was assessed at **Kshs.64,298,800/=**. It was his averment that **Athi Water Services Board** notified the Plaintiff herein of its intention to acquire **17,492 acres** of the suit land at **Kshs.64,298,800/=**. In response, the Applicant gave a Counter Offer of **Kshs.165,848,414/=** which necessitated a consultative meeting between the parties.

The deponent also averred that although there was a joint valuation on the suit property carried out by **M/S Losai Management Ltd** and **General Africa Asset Management Ltd**, which valued the property at **Kshs.135,781,650/=**, the alleged report did not have the necessary back-up and was only to be adopted as the fair value of the suit property upon some condition being fulfilled by the valuers. It was his contention that the value of **Kshs.64,298,800/=** was based on the valuation report carried out for all the **Project Affected Persons (PAPs)** and therefore by a letter dated **12th April 2017**, **Athi Water Services Board** communicated to the Applicant their wish to compensate them using the original offer.

It was his further contention that **Athi Water Services Board** has always been willing to initiate the National Land Commission's process of compulsory acquisition of the **17,492 acres** of the Applicant's land at a compensation of **Kshs.64,356,700/=** as the original assessment for all PAPs. The deponent

further deponed that the project commenced on **15th October 2014**, and at the onset of the implementation, the Applicant allowed **Athi Water Services Board** to commence works on the land pending compensation. He deposed that it was untrue and misleading for the Applicant to assert that the 1st Respondent has just entered into the suit property as the project commenced in the year **2014**. Further that the said water project is complete as per the completion certificate marked **JK7**. Therefore the interim orders sought are not tenable. He further contended that with the project is already completed, and the only element for determination is compensation due which issue can be disposed off on the basis of *viva-voce* evidence. It was his further contention that the 1st Respondent is ready and willing to compensate the Plaintiff/Applicant with **Kshs.64,356,700/=** based on the original valuation as the rate adopted were uniform across all the PAPs. The deponent therefore urged the Court to dismiss the instant application.

John M. Sawaya filed a further affidavit and denied the averments made by **Engineer Joseph Kamau** in his **Replying Affidavit** of **12th June 2017**, and averred that **Trans County Valuation Report** dated **27th May 2013**, does not bear the accurate reflection of current land values which was superseded by the Applicant's Counter Offer dated **10th September 2015**.

The application was canvassed by way of written submissions which the respective advocates for the parties duly filed.

The Court has now carefully considered the instant **Notice of Motion**, the annexures thereto, the written submissions, cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that the Plaintiff/Applicant herein is the registered proprietor of **LR.No.3544**, which is situated in Kiambu County. There is also no doubt that the 1st Defendant did express its intention to acquire **17,492 acres** of land from the aforesaid property at a proposed price of **Kshs.64,298,800/=**.

There is also no doubt that the Applicant did not accept that offer and did give a Counter Offer of **Kshs.165,848,414/=** which offer was not acceptable to the 1st Defendant. Further it is evident that the Applicant and 1st Defendant engaged services of professional valuers **M/S Losai Management Ltd** and **Gen Africa Asset Management Ltd** and the price quoted for **17,492 acres** was **Kshs.135,781,650/=**. It is evident that the 1st Respondent has been ready to compensate the Plaintiff/Applicant. What is in dispute is the amount or value of compensation.

The 1st Defendant has alleged that it is ready and willing to start the process of Compulsory Acquisition. The Plaintiff/Applicant has come to court seeking for orders that the 1st Defendant be restrained from encroaching on the stated parcel of land. However the 1st Defendant has averred that it commenced the **Kiambu Water Project** in the year **2014** and the Applicant allowed it access to the suit property pending the issue of compensation. The 1st Defendant submitted that application for injunction is not tenable.

The issue of compulsory acquisition of interest in land is governed by Sections 107-111 of the Land Act 2012. Section 111 of the Land Act provides as follows:-

- (1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.**
- (2) The Commission shall make rules to regulate the assessment of just compensation..**

Therefore, from the above provision of law, wherein land is acquired compulsorily under this Act, a just compensation should be paid promptly.

The above position is buttressed by Article 40 (3) which provides:-

- (3) The State shall not deprive a person of property of any description, or of any interest in, or**

right over, property of any description, unless the deprivation—

(a results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

Therefore, if the Plaintiff's parcel of land has been taken over by the State for

public purpose, the Plaintiff is entitled to compensation. The 1st Respondent has alleged that it is ready and willing to compensate all the other property owners whose properties were affected by the implementation of the Water Project. The Court finds that if the only issue in dispute is on how much the Plaintiff/Applicant is deserving as compensation, then that is an issue that can be resolved by calling of evidence in Court and testing the same through cross-examination.

The Applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. However, the said discretion must be exercised judicially. Further the Court has noted that the application herein is anchored under Section 3A of the Civil Procedure Act, which donates inherent powers to the Court to make such orders that are necessary for the end of justice to be met and to prevent abuse of the Court process.

Since the orders sought are injunctive orders, the Court will be guided by the principles laid down in the case of ***Giella... Vs...Cassman Brown & Co. Ltd 1973, EA 358***. These principles are:-

a) The Applicant must establish that he has a prima facie case with probability of success.

b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.

c) When the Court is in doubt, to decide the case on a balance of convenience.

Has the Applicant herein established that it has *prima-facie* case with probability of success?

The Applicant has alleged that the 1st Defendant/Respondent has trespassed into its parcel of land and commenced the process of constructing a dam for the ***Kiambu Water Project***, before compensating it in full. The Applicant has asked the Court to injunct the 1st Respondent. However the 1st Respondent has alleged that it entered into the parcel of land earmarked for compulsory acquisition in the ***year 2014***, with the permission, authority and knowledge of the Plaintiff/Applicant. Further that the alleged project is now completed and a ***completion certificate*** issued marked ***JK7***. Therefore injunctive orders would not suffice because the action to be injuncted is already completed and thus overtaken by events. If indeed the said implementation of the water project is complete, then the orders sought herein have been overtaken by events and cannot be issued. See the case of ***Jane Kemunto Mayaka..Vs...Municipal Council of Nakuru & Others, HCCC No.124 of 2005***, where the Court held that:-

"injunctions are issued to prevent the occurrence of an event that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place....."

Equally in this matter if the 1st Respondent entered into the suit property in the ***year 2014***, and has already implemented the water project, then the threatened action has occurred and an injunction cannot issue.

The Applicant is aggrieved because it has not been compensated. That is an issue that can be adequately dealt with in the main trial. This Court finds that having allowed the 1st Defendant to enter the suit property, the Applicant cannot now turn around and seek for injunctive order against the said 1st Defendant. Therefore the Court finds that **the Plaintiff/Applicant** has not established that it has a *prima-facie* case with probability of success at the trial.

On the second limb of irreparable loss which cannot be compensated by an award of damages, it is evident that the Applicants are seeking for compensation over their land which was compulsory acquired by the State. The said land can be valued and quantified and therefore the Plaintiff/

Applicant would be adequately compensated in damages in case it turns out that the Plaintiffs are winners after the full hearing. See the case of Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322, the Court held that:-

“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.

On the third limb of if the Court is in doubt to decide on the balance of convenience, the Court finds that the 1st Defendant is implementing a water project which is for the public benefit and therefore public purpose.

The Court, after considering the facts of this case, finds that the

balance of convenience tilts in favour of the 1st Defendant and therefore disallowing the orders sought. The Court will concur with the findings in the case of Edith Wangari Gitati...Vs...Athi Water Services Board Nairobi, ELC No.192 of 2012, where the Court held that:-

“Lastly when I consider the facts of this case, they tilt in favour of the Respondent as the works they want to carry out shall benefit the public at large. Public interest prudence over the private or individual interest. I therefore find that granting the injunctive orders sought would restrict and/or stop the Defendant, works that are necessary and are of national importance”.

Equally, the water project being implemented by the 1st Respondent is for the public benefit and granting of injunctive order would interfere with a public interest project. Therefore the Court finds that the Applicant is not deserving of the injunctive order sought.

Having now carefully considered the instant **Notice of Motion** application dated **2nd May 2017**, the **Court finds it not merited**. Consequently, the said Notice of Motion application **is dismissed entirely with cost being in the cause**.

It is so ordered.

Dated, signed and delivered at Thika this **19th** day of **October** 2017

L. GACHERU

JUDGE

In the presence of

Mr. Muchiri holding brief for Mr. Mbaluto for Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

M/S Ndundu for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

M/S Ndundu for 4th Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE

Court –Ruling read in open Court in presence of the above stated

advocates.

L. GACHERU

JUDGE

Mr. Muchiri holding brief for Mr. Mbaluto for the Plaintiff/Applicant - We seek for leave to appeal if need be.

M/s Ndundu - No objection.

Court - The applicants are granted leave to appeal. Parties to file their pleadings and set the matter down for Pre-trial directions before the Deputy Registrar within the next 45 days from today's date.

L. GACHERU

JUDGE

19/10/2017