



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 665 OF 2017**

**SIMON KIPOYPOY OLE NKAI.....PLAINTIFF**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION COMPANY LTD.....DEFENDANT**

**RULING**

What is before Court is the Plaintiff's Notice of Motion dated the 23rd November, 2015 brought pursuant to Order 40 Rule 1 of the Civil Procedure Rules , Section 3 and 3A of the Civil Procedure Act and all the other enabling provisions of the law.

The application is based on the following grounds which in summary is that the Defendant has illegally and unprocedurally constructed transmission towers and suspended transmission lines on the Plaintiff's land. The Defendant has been cutting down trees on the Plaintiff's land now totaling 857 and the Plaintiff has not been compensated for use of his land. The Plaintiff has tried to have the matter dealt with outside court but this has been in vain.

The application is supported by the affidavit of SIMON KIPOYPOY OLE NKAI the Plaintiff herein where he deposes that he is the owner of land title number KAJIADO/ EWASO KEDONG/1409 whose approximate area is 39. 7 hectares. He states that after cutting 857 trees on his property, the Defendant put up transmission towers and suspended transmission lines on 15 acres of his land without his express consent. Further that he wrote to the Defendant seeking removal of the transmission lines or compensation but never received any response. He avers that the Defendant's claim to have compensated people who own Land Reference Number KAJIADO/EWASO KEDONG/ 1702 which he claims is part of his property. Further that KAJIADO/EWASO KEDONG/1702 does not exist on the ground or in the registry and the alleged owners are interlopers imposed by the local chief and land officers with fraudulent intentions and the Defendants are part of this scheme. He further avers that the alleged owners of KAJIADO/EWASO KEDONG/1702 had through fraud by the Secretary of the Group Ranch, Land Officers and Government Surveyors falsified the map to take his land. He reiterates that the Defendant is part of the scheme that seeks to take his land without compensation, with the map creating LR Number KAJIADO /EWASO KEDONG/ 1702 being made in August 2015 without his permission.

The Defendant opposed the application and filed a replying affidavit sworn by JILLO ALI MADRAS a Surveyor working therein who deposes that the defendant constructed a 100 kilometre long electricity transmission line, to transmit electricity from Suswa Station to Isinya Station in Kajiado County known as the Suswa - Isinya transmission line. He avers that the Plaintiff's land title number KAJIADO/EWASO KEDONG /1409 measuring 39.97 hectares is among the private parcels of land affected by the Suswa - Isinya Transmission line out of which only 2.92 hectares is affected and for which he was offered just compensation in exchange for a Grant of Easement. He states that the Plaintiff instead claims that his land title number KAJIADO/ EWASO KEDONG/1409 measuring 118.69 hectares was affected. Further that

in support of his claim, the Plaintiff asserts ownership of land parcel number KAJIADO/EWASO KEDONG/1702 registered in favour of one KUYIA OLE KITUKUI. He states that upon doing diligence and confirming land parcel number KAJIADO/EWASO KEDONG/1702 belong to KUYIA OLE KITUKUI, the Defendant duly compensated the said KUYIA OLE KITUKUI with an easement duly granted and registered in his favour. He insists all other parcels of land neighbouring the Plaintiff's land were duly captured and compensated after due diligence had been undertaken. He further avers that it duly compensated the Plaintiff for all the crops that fell within the wayleaves trace with respect to land parcel number KAJIADO/EWASO KEDONG/1409 and the dispute herein arose when the Plaintiff sought compensation for land parcel number KAJIADO/EWASO KEDONG/ 1702 registered in the name of KUYIA OLE KITUKUI.

The Plaintiff filed a further affidavit and insisted that the Defendant has never compensated him for his 857 trees that they felled nor for use of land or damages on his crops or for trespass to his land. He reiterates that the Defendant has put up transmission towers and suspended transmission lines on 14.422 acres instead of 2.92 hectares. He reaffirms that despite demanding compensation from the Defendant to remove the transmission towers and lines, they have not responded to his request. He avers that the Defendant claims to have paid compensation to people who own land reference number 1702 which they claim is part of his property, yet the said land reference number 1702 does not exist on the ground or in the Land Registry Map.

The Defendant filed a further affidavit sworn by JILLO ALI MADRAS who is their Land Surveyor where he deposed that the initial letter of offer dated 1st July, 2013 was issued to the Plaintiff before a claim was made by KUYIA OLE KITUKUI on an adjacent parcel of land title number KAJIADO/EWASO KEDONG/1702. The said Letter of Offer indicated that the affected area on KAJIADO/EWASO KEDONG/1409 belonging to the Plaintiff was 14.422 acres. He affirms that he conducted a search at the Land Registry in Kajiado which revealed that title number KAJIADO/EWASO KEDONG/1702 belonged to one KUYIA OLE KITUKUI and subsequently the Plaintiff's Letter of Offer was replaced by the letter dated 2nd September, 2013 which indicated that the affected area of KAJIADO/EWASO KEDONG/1409 belonging to the Plaintiff was 7.211 acres as it was based on a 30% compensation for the value of the wayleave trace.

He avers that pursuant to a dispute between the Defendant and the land owners whose land lie along the SUSWA - ISINYA Transmission line on the amount payable as compensation for the loss of land use, the President of Kenya intervened and negotiated a solution to the dispute with the Defendant and the said land owners agreeing that a further 20% compensation shall be payable to the land owners including the Plaintiff herein. Subsequently, the Defendant prepared a supplementary letter of offer dated 7th June, 2016 for the payment of the 20% negotiated additional compensation and owing to an error on the Defendant's clerk, they erroneously used the affected area in the initial Offer Letter dated 7th June, 2016 which indicated the affected area is 14.422 acres. He claims that the correct position is that the area affected by the wayleave trace is 7.211 acres and not 14.222 acres and the Defendant prepared an amended Offer Letter to this effect. He reiterates that the Plaintiff has refused to accept the 30% and the additional 20% compensation offered to him on the basis that the adjacent property title number KAJIADO/EWASO KEDONG/1702 does not exist and the property is his property. He asserts that the Plaintiff in alleging ownership to the adjacent land title number KAJIADO/EWASO KEDONG/1702 belonging to KUYIA OLE KITUKUI ought to enjoin him in this application and suit and without his participation is a breach of the rules of natural justice. He claims the applicant in paragraph 2 of the supporting affidavit states that his title number KAJIADO/EWASO KEDONG/1409 measures 39.7 hectares which is indicated in the search result and his further claim that his property is 118.69 hectares is therefore fallacious.

Both parties filed their respective written submissions which I have considered.

### **Analysis and Determination**

Upon the perusal of the Notice of Motion dated 23rd November, 2015 including the respective affidavits filed herein plus the attached annexures, I find that the issues for determination at this juncture are:

- Whether the Plaintiff is entitled to the injunctive orders sought.
- Whether the Defendant should remove its electricity transmission towers and transmission lines from the Plaintiff's land.
- Who should bear the costs of this application.

The principles for granting of temporary injunctions were 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."**

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

I note from annexure 'SKO 2 a' which is a letter dated 2nd September, 2013, that the Defendant offered to use the Plaintiff's land parcel Number KAJIADO/EWASO KEDONG/ 1409 as a way leave corridor for the Suswa Isinya Transmission Line and to compensate him. I note that the Plaintiff vide his letter dated 13th October, 2014 annexure 'SKO - 2b' at paragraph one, he acknowledged receipt of the Defendant's request and responded as follows: *' Sir, in relation to the above subject, I am hereby acknowledging your letter dated 2nd September, 2013. Sir sticking to my decision that there shall be two transmission lines traversing my land title number EWASO/KEDONG/1409, my compensation shall be Kshs. 2.5 million per transmission line per acre transverse which means Kshs. 5 million for both lines per acre transverse. This is my final decision and not Kshs. 210,000 per acre transverse. My land is privately owned and I do not go by the decision of others.'*

At paragraph 4 of the said letter he adds that: *' As the transmission line shall be permanent I would like to be compensated each year to enable my family members enjoy the fruits of their land. No transmission line shall traverse my land without payment at the rates printed above.'*

From the above, it is evident that there was indeed a discussion between the Plaintiff and the Defendant on the creation of a wayleave over the suit land. The Plaintiff did not refuse to have the wayleave created. However, what is in dispute is the issue of compensation and the Plaintiff's claim that the suit land KAJIADO/EWASO KEDONG /1702 also belongs to him.

**Section 148 of the Land Act 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.**

**(6) The Commission shall make Regulations prescribing the criteria to be applied in the payment of compensation under this section and to give effect to this section.'**

The Plaintiff in his supporting affidavit is claiming for compensation for the destruction of trees and to be paid annually for the wayleave.

The Defendant contends that the Applicant has refused to accept both the 30% and the additional 20% compensation offered to him on the basis that the adjacent land parcel number KAJIADO/EWASO KEDONG/ 1702 does not exist and that the property is his.

The Plaintiff has not furnished Court with documents from the Lands office nor any evidence to the contrary to prove that the land 1702 does not exist. What he has stated are mere allegations.

The Plaintiff contends the Defendant is a trespasser on his land and seeks mandatory orders compelling the Defendant to remove the transmission lines. The Court takes judicial notice of the fact that this is an electricity transmission route from Suswa to Isinya Stations and the Plaintiff's parcel of land is one of the pieces of land affected by this project. The Court further notes that this is a wayleave and there are clear provisions on the mechanisms to be undertaken by the government in the construction of such an electricity transmission line. In the instant suit, I am disinclined to interfere with the government's construction of transmission lines but if the Plaintiff feels aggrieved by the mode of compensation, the procedure to claim the same is clearly indicated within the Land Act.

The Plaintiff has not informed the Court as to whether he sought interventions from the Cabinet Secretary as regards his disagreement as to the amount of the compensation to be paid or as to the person entitled to receive compensation.

I note that the proprietor of land parcel number KAJIADO/EWASO KEDONG/1702 already entered into an agreement for Grant of Easement dated 23rd October, 2013 which was duly signed by Julius Ole Resiroke, Tumpet Ole Resiroke and Mututua Ole Kuya Kitukui. The issues raised by the Plaintiff that the purported owners of the said land are interlopers imposed on his land by the Group Ranch Officials, Land Officers and Government Surveyors who falsified the map to defraud him of his land, with the Defendant being part of the scheme are serious allegations which have to be proved through substantial evidence at the trial of this case. I further note the Plaintiff has annexed copies for title deed for land parcel number KAJIADO/EWASO KEDONG/1409 measuring 39.37 hectares as annexure SKO 1 a' and not the 118.69 hectares that he claims. The Plaintiff has further not furnished court with documents to prove his land is measuring 118.69 hectares.

The issues raised by the Plaintiff on the acreage of the suit land, its ownership and compensation are matters which can only be determined at the full trial and not at this interlocutory stage.

In the circumstances I will disallow the Plaintiff's motion dated 31st January, 2017. Costs will be in the cause.

**Parties are urged to comply with Order 11 and set the suit down for hearing and final determination.**

The costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 3<sup>rd</sup> day of October, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**