



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 432 OF 2017

LAWANGIRO CAMEL FARMS LIMITED.....PLAINTIFF

VERSUS

KENYA ELECTRICITY TRANSMISSION.....DEFENDANT

RULING

1. By a Notice of Motion dated 26th May 2017 made under Order 51 Rule 1, Order 40 Rule 1(a) and Rule 4 of the Civil Procedure Rules and Section 1A,1B and 3A of the Civil Procedure Act and inherent jurisdiction of this Court and all other enabling provisions of the Law, the plaintiff/Applicant seeks orders that:-

i. **Spent**

ii. **Spent**

iii. **Spent.**

iv. **Spent**

v. The Defendant/respondent be restrained whether by themselves, their servants and/or employees, agents and tenants from trespassing, occupying, carrying out any and all activities that would cause damage to the pasture, trees or any other structures that would cause damage to the pasture, trees or any other structures thereon, or in any manner whatsoever interfering with or dealing, with all that parcel that parcel of land (amounting to 11,000 acres) in the expansive Mutura Ranch in S.E Rumuruti Township, Laikipia (L.R No 10069 comprising approximately 63,220 acres) which is the subject of the Lease Agreement dated 1st August, 2010 and the Addendum to the Lease dated 3rd December, 2015 between the Plaintiff and ADC, pending the hearing and determination of this suit.

vi. There be an order of injunction restraining the Defendant by themselves, their servants and/or employees, agents and tenants from harassing, threatening and intimidating the plaintiff through notices, correspondence, phone call or otherwise relating to the leased property in the Mutara Ranch pending the hearing and determination of this suit

vii. The costs of this application be provided for

2. The said application was supported by the grounds on the face of the application and Affidavit, sworn by Musa Said Hassan the Director of the Plaintiff/Applicant herein.

3. Briefly, the Plaintiff/Applicant's case is that they run their business in livestock industry wherein they rear about 3000 herds of cattle, 1000 goats and 500 camels on a 15 year lessee of 11,000 acres in the expansive Mutura Ranch situated within the expansive Mutara Ranch in S.E Rumuruti Township, Laikipia. (L.R No 10069 which comprises approximately 63,220 acres).

4. That on or about January 2017, the Defendant/Respondent's workers without color or right entered into the Plaintiff/Applicant's parcel of land and begun building electricity towers thereto which in turn has caused wanton destruction on the property and in particular on the pasture which is a source of food for their animals.

5. That despite several notices to desist from this kind of conduct, the Defendant/Respondent had failed to desist with their activity which has subsequently resulted into causing damage to the property. Further, the Defendant/Respondent shows no intention to compensate the plaintiff pursuant to provisions of Sections 107-119 of the Land Act.

6. The Plaintiff/Applicant's contention is that since they have interest on the land, the Defendant/Respondent ought to be enjoined from continuing with the said trespass and also to be compelled to pay damages.

7. In response, the Defendant/Respondent through their grounds of opposition and a replying affidavit sworn by one John Macharia Gathari, a valuer working with the Defendant/Respondent, filed on the 28th June 2017, admitted that indeed they were in the process of constructing an electricity transmission line from Loiyangalani in Marsabit County to Suswa in Narok to transport affordable energy generated at lake Turkana Wind farm so as to spread the electricity grid to the Northern part of Kenya.

8. That they had applied for and had been granted permission by Agricultural Development Cooperation (ADC) to construct the said line across the suit land on which the Mutara Ranch is situated.

9. That the Defendant/Respondent entered the suit land through permission of the proprietor who is a public body and therefore by virtue of Section 148(2) of the Land Act which reads as follows:

'Compensation relating to a way leave 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 the public body.'

10. That the Applicant could not be compensated as the public body in the present case was not in use of the suit land leased out to the Plaintiff/Applicant to graze their animals

11. The project being undertaken by the Defendant/Respondent herein was of great National importance in that it would uplift the economy of the country.

12. When the matter came before me for hearing on an ex-parte application, the court directed for service to be effected for inter-parties hearing on the 16th June 2017. The Defendant/Respondent were not ready to proceed and sought for more time to file their papers.

13. The court thus granted the Plaintiff/Applicant prayers 3 and 4 of their application and adjourned the hearing to the 19th September 2017 on which date the parties agreed by consent to canvass the application by way of written submissions and to have the court deliver its ruling thereafter.

14. I have read the written submissions by both parties as well as looked at the cited authorities and the relevant law therein.

15. In their submissions, the plaintiff applicant framed their issues for determination to wit;

16. Whether they were entitled to the prayers sought in the application and secondly who was to pay for the costs of the application.

17. They responded to the said issues for determination by stating that they were entitled to the prayers for permanent injunction pending the hearing and determination of the suit because they had met all the conditions spelt out in the celebrated land mark case of *Giella vs Cassman Brown*.

18. The Applicant's submission was that they had made out a prima facie case and relied on the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, where a prima facie case was described as follows:

"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

19. The Applicant's submitted that they had demonstrated that they had an arguable case by relying on the provisions of the Land Act and Article 40(3) of the Constitution to buttress the fact that their legal right to property as a lessee had been contravened through the Defendant/Respondent's action.

20. The Applicant further reiterated that they were the lawful and registered lessee of the suit land and that although the Respondent/Defendant knew of this right, yet they had entered upon the suit premises with the view to building electricity towers for the public's benefit, which entry was actually a compulsory acquisition of the suit land to which they were entitled to compensation.

21. That their prayer for compensation was not on the interest of the land, but rather for the loss of use of the portions compulsory acquired and for the damages resulting from the Respondent's entry and activities carried out on the pasture and the destruction of tress thereon which are critical in their business.

22. The Applicant's submission was that they had made out a prima facie case and that they would suffer irreparable harm if the injunction was not granted because they had invested heavily in the leased property rearing about 3000 herds of cattle, 1000 goats and 500 camels which animals depended on the pasture and trees.

23. Their contention was that the Respondent's interference on the suit land had destroyed the animal's habitant to the extent that they are likely to starve to death unless the Applicant expended a significant amount of resources to obtain animal feed the livestock.

24. The Applicants, through their written submissions, expressed their concerns that the Respondent's activity would only take a few months

to finalize by which time, if the injunctive orders were not issued, and the power transmission is finalized, the suit would have been overtaken by events and any orders issued thereafter will be merely academic.

25. They relied on the case of **E. Kamau & Another vs. National Bank of Kenya Ltd (2009)** to submit on their point on the balance of probability. In this case, the court of Appeal held that:

‘The courts including this Court in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or exercising any power must take into consideration the overriding objective as defined in the two Acts. Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.’

26. The application was opposed by the Defendant on grounds that the Applicant had not established a prima facie case or even satisfied that grounds set out in the *Giella vs Cassman brown* case.

27. They conceded that indeed they were constructing an electricity transmission line from Loiyangalani in Marsabit County to Suswa in Narok to transport affordable energy generated at lake Turkana Wind farm so as to spread the electricity grid to the Northern part of Kenya and that their activities on the suit land was sanctioned by the proprietor of the land, the Agricultural Development Co-operation (ADC) when they granted them permission to do so.

28. The respondent submitted that since the land belonged to the Agricultural Development Co-operation who had granted them permission, they were not trespassers to the said suit land and their actions were not illegal. If the Applicant felt aggrieved, then it ought to have directed their grievances to the Agricultural Development Co-operation.

29. The Respondents further submitted that the Applicants had not demonstrated what damage the digging of the holes had occasioned to them nor annexed any valuation report to quantify and/or support their claim.

30. They further submitted that under the Land Act, the Government could only enter into an agreement for compensation with a registered proprietor of the land, after gaining a right of way on land of an entity but not with third parties as in this case. The Applicant and the Respondent had no privity of contract herein and so the issue of compensation could not arise.

31. They further submitted that the damage caused to the land by the digging of the holes to build the towers could be easily assessed by a forester and further that it was trite law that where damages were an adequate remedy, then an injunction could not issue.

32. The Respondent relied on Section 148(2) of the Land Act to submit that the effect of Compensation relating to a way leave 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. The Public body in the present case, the Agricultural Development Co-operation, was not in use of the land leased out to the Applicant and therefore the Applicant was not entitled to compensation.

33. The Respondent’s submission was further to the effect that since the project was for the benefit of the people in the Northern part of Kenya, the balance of convenience had tilted in their favor.

34. In conclusion, the Defendants submitted that that the Applicants had failed to establish the principles set out for the issuance of an injunction and relied on the case of **Patrick Simiyu Khaemba v Kenya Electricity Transmission Co. Ltd (Ketraco) & another [2014] eKLR** to buttress their submission.

Analysis and Determination

35. Having heard submissions by both sides as well as having regard to the annexures filed herein, consequently the pending issue for determination is:

- i. Whether the Applicant is entitled to compensation from the Respondent.
- ii. Whether this court should grant the Applicant an interim injunction pending the hearing of the suit.

36. I shall therefore proceed to determine the current application on that basis.

37. On the First issue as to whether the Applicant is entitled to compensation from the Respondent, I am guided by section Section 148(2) of the Land Act which stipulates that compensation relating to a way leave 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 the public body.

38. I am therefore in agreement with the Respondents that the Government can only enter into an agreement for compensation with the registered proprietor of the land to wit the Agricultural Development Co-operation (ADC) which granted it the right of way on the suit land, but not with third parties as in this case the Applicant herewith

39. On the second issue, the celebrated case of **Giella vs Cassman Brown (1973) EA 358** set out conditions for the grant of an interlocutory injunction which principles were authoritatively captured in the famous Canadian **case of R. J. R. Macdonald vs. Canada (Attorney General) [1994] 1 S.C.R. 311** where the three part test of granting an injunction were established as follows:-

i. Is there a serious issue to be tried(prima facie case)

ii. Will the applicant suffer irreparable harm if the injunction is not granted;

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called "balance of convenience").

40. On the first issue as to whether the Plaintiff/Applicant in this matter had made out a prima facie case with a probability of success, the court notes that it was not in dispute that vide a lease agreement dated 1st August 2010 and an Addendum to the lease dated the 3rd December 2015, Plaintiff/Applicant had leased the suit land from the Agricultural Development Co-operation (ADC) for 15 years.

41. It is also not in dispute that the Respondent herein, pursuant to the provisions of Section 46 of the Energy Act, had sought permission of the land owner, being the Agricultural Development Co-operation (ADC) before entering the suit land to start laying electric supply line from Loiyangalani in Marsabit County to Suswa in Narok. They were therefore not trespassers.

42. In my view thereof both the Applicant and the Respondent had been placed on the same footing by the Agricultural Development Co-operation (ADC). That of being licensees to the suit land.

43. **Order 40, rule 1** of the Civil Procedure Rules is very clear on the cases in which temporary injunction may be granted hence:

Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

44. In the present case, there has been no evidence adduced by the Applicant to the effect that property in dispute in a suit is in danger of being wasted, damaged, alienated or that the defendant threatens or intends to remove or dispose of this property. In short, the Applicant has not established a *prima facie* case with probability of success.

45. I find that the Respondent, being a public body, was obliged to act in public interest and that due process was followed when they obtained permission from the proprietor of the land No. L.R 10069 while laying the project.

46. On the issue of *irreparable injury*, I find that the project is of great value to the national economy and moreover if an injunction was granted against the Respondents, the consequences will be heavy and dire for them as the tax payer is likely, *on balance of convenience* to lose millions of shillings.

47. While the Applicants must demonstrate that there has been breach or threatened breach of their Constitutional rights and thereby show that they have a prima facie case with a likelihood of success, the court has a duty to consider whether grant or denial of the conservatory relief will enhance the Constitutional values and objects of the specific right. I must consider public interest *visa vis* private interests.

48. Based on the above findings, I am not convinced that the Plaintiff/Applicant has shown that they have any beneficial interest in the suit land which is capable of being preserved or protected by means of an interlocutory injunction as we await the conclusion of this case. Accordingly, I find that the Plaintiff/Applicant has not established a prima facie case with a probability of success in the main trial.

49. I decline to grant the order of injunction sought, with the result that the Applicant's Notice of Motion dated 26th May 2017 is accordingly dismissed with costs to the Defendant/Respondent.

It is so ordered.

Dated and delivered at Nyahururu this 20th day of November 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE