



**REPUBLIC OF KENYA**

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

**CASE NO. 177 OF 2017**

**KENYA ELECTRICITY TRANSMISSION**

**COMPANY LIMITED..... PLAINTIFF**

**VERSUS**

**SIMEON ONGERI NYAUNDI, ANDREW OBUBA NYAUNDI**

**AND PAULINA KEMUNTO (Sued as joint owners)....1<sup>ST</sup> DEFENDANT**

**PERIS KWAMBOKA NYANCHWAYA.....2<sup>ND</sup> DEFENDANT**

**DOMINIC ONTARIGE MIKAYE.....3<sup>RD</sup> DEFENDANT**

**WILFRED MONYENYE YOGI AND BEATRICE NYANGARA**

**MARANGA(sued and JOINT OWNERS.....4<sup>TH</sup> DEFENDANT**

**AND**

**PHILIP GICHABA GICHANA.....1<sup>ST</sup> INTERESTED PARTY**

**RUTH K. OTWEKA .....2<sup>ND</sup> INTERESTED PARTY**

**AMOS OBWOGI .....3<sup>RD</sup> INTERESTED PARTY**

**KEFA OMBUI MOGIRE.....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

1. The plaintiff is a state corporation charged with the mandate to plan, design, construct, operate and maintain high voltage electricity transmission lines. In executing their mandate the plaintiff has the duty and obligation to implement and drive the government policy of making electricity available and accessible to all Kenyans. To effectuate its mandate the plaintiff in consultation and in liaison with the National Land Commission (NLC) identifies and Gazettes parcels of land to be affected by any project of constructing transmission lines they are undertaking and appropriate compensation is made to the owners of all affected land owners as provided under the law.

2. The present Originating Summons was precipitated by the plaintiff’s inability to identify the persons

entitled to compensation in regard to land parcel **Bassi/Bogetaorio II/813** which apparently has been subdivided severally with the result that there is dispute as to who among the several persons who have come up claiming to be the persons entitled to be compensated is in fact entitled to such compensation. The plaintiff brought the instant originating summons dated 15<sup>th</sup> September 2017 seeking the determination of the following questions:-

- 1. Who amongst the defendants should the plaintiff herein compensate for the limited use of LR No. Bassi/Bogetaorio II/813 Kisii-Awendo for purposes of passing over the said property.**
- 2. Who should bear the costs of the originating summons and accompanying application.**
- 3. Whether the defendants should be permanently enjoined from interfering with the plaintiff's construction of the High Voltage power line along the said parcel of land.**

3. Simultaneously with the originating summons (OS) the plaintiff filed a Notice of Motion dated 15<sup>th</sup> September 2017 which is the subject of this ruling seeking inter alia the following orders:

**3. That pending the hearing and determination of this application, the defendant/respondents by themselves, their agents, or any other person claiming through them be restrained from interfering with the plaintiff's/applicant's construction of a High Voltage Power line over 1.66 Acres of LR No. Bassi/Bogetaorio II/813 Kisii-Awendo pending the hearing and determination of the originating summons.**

**4. That the plaintiff/applicant be allowed to deposit in court Kenya Shillings one Million one Hundred and Forty Five Thousand (Kshs. 1,145,000/=) being the compensation for the limited use of the 1.66 acres over LR No. Bassi/Bogetaorio II/813 Kisii-Awendo pending the hearing and determination of the originating summons.**

**5. That the costs of the application be provided for.**

4. The application was supported on the grounds set out on the face of the application and on the grounds set out in the supporting affidavit sworn by Lydia Wanja, Manager, Legal Services of the plaintiff/applicant. The grounds set out in support of the application are as hereunder:-

**(a) The plaintiff/applicant's nationally designed power line known as Kisii-Awendo Transmission Line passes over 1.66 Acres of the subject property herein.**

**(b) The plaintiff/applicant is by law commanded to compensate the rightful registered owner of the subject property by paying Kenya Shillings One Million, One Hundred and forty Five Thousand (Kshs.1,145,000/=) as is calculated by the National Land Commission as being 30% of the value of the affected area.**

**(c) The plaintiff/applicant is not able to pay the amount as there is a dispute as to who is payable between the registered owners of the subject parcels.**

**(d) The dispute is causing the applicant delays as the plaintiff/applicant cannot construct the power line over the subject property unless the dispute is resolved.**

**(e) To avoid wastage of public funds, the plaintiff/applicant seeks the prayers herein to enable the construction works to proceed.**

**(f) It will be in the interest of justice and the general public good to grant the orders as prayed.**

5. Upon service of the application on the defendants there were varied responses. The 4<sup>th</sup> defendant,

Wilfred Monyenye Yoge filed two replying affidavits, the first one sworn on 19<sup>th</sup> October 2017 and the other sworn on 27<sup>th</sup> October 2017. The gist of the 4<sup>th</sup> Respondent's response was to the effect that land parcel **Bassi/Bogetaorio II/813** did not exist as it had been subdivided into several parcels. The copy of the mutation form annexed showed that the parcel of land had been subdivided into four parcels **5009** to **5012**. The 4<sup>th</sup> defendant stated he was the registered owner of land parcel **Bassi/Bogetaorio II/5010** which was a resultant subdivision of land parcel 813. The 4<sup>th</sup> defendant further averred that he had extensively developed his land asserting that the value of his developments were in excess of kshs. 3 Million which was way above the valuation the plaintiff had placed on the portion of 1.66Acres that they stated they required.

6. The 1<sup>st</sup> defendants filed a response vide Simeon Ongera Nyaundi who swore a replying affidavit filed in court on 30<sup>th</sup> October 2017. The 1<sup>st</sup> defendants averred that the subdivisions alluded to by the 4<sup>th</sup> defendant were fraudulently procured by the 2<sup>nd</sup> defendant and were illegal. The 1<sup>st</sup> defendants annexed a copy of an official search carried out on 23<sup>rd</sup> October 2017 which indicated that land parcel **Bassi/Bogetaorio II/813** was still intact and was registered in the joint names of **Simeon Ongera Nyaundi, Paulina Kemunto** and **Andrew Obura Nyaundi** the 1<sup>st</sup> defendants/ respondents.

7. Further twists and turns unfolded in regard to the tussle respecting the metamorphosis of land parcel **Bassi/Bogetaorio II/813** when on 19<sup>th</sup> October 2017 Philip Gichaba Gichana averred that he was the registered owner of land parcel **Bassi/Bogetaorio II/5019** and he annexed a copy of a title issued in his name on 2<sup>nd</sup> February 2015 and which showed the parcel of land to have been a subdivision of land parcel **5009**.

8. The 3<sup>rd</sup> respondent, Peris Kwamboka Nyachwaya swore a replying affidavit dated 31<sup>st</sup> October 2017 where she affirmed having caused the subdivision of land parcel 813 and sold parcels of land to the 3<sup>rd</sup> and 4<sup>th</sup> defendants as well as some of the interested parties. The 2<sup>nd</sup> respondent avers that the 1<sup>st</sup> defendants had no interest in land parcel **Bassi/Bogetaorio II/813** as they were not entitled to inherit the same.

9. The plaintiff filed a further affidavit sworn by Lydia Wanja, Manager legal services on 19<sup>th</sup> October 2017 where the plaintiff annexed a copy of a valuation for land parcel **Bassi/Bogetaorio II/813** which was carried out on 19<sup>th</sup> March 2014. As at the date of inspection the property is said to have been registered in the names of Simeon Ongera Nyaundi, Andrew Obura Nyaundi & Paulina Kemunto as owners in common. The property measured 5.4Ha. A copy of a search certificate dated 18<sup>th</sup> March 2014 attached to the valuation report affirms these details of the property. The value returned for the affected part of the property was kshs.1,500,000/=.

10. The plaintiff acknowledges that the property was subdivided after they carried out the valuation but the 1<sup>st</sup> respondents who were the registered owners have challenged the subdivision arguing that the same was fraudulently carried out by the 2<sup>nd</sup> defendant/respondent behind their back. It is not clear how the 2<sup>nd</sup> defendant/respondent could effect the subdivision if she was not the registered owner given that the 1<sup>st</sup> respondents are shown to have been registered as joint/common owners on 26<sup>th</sup> February 1983 and were issued with title to the land parcel 813. **At what point did the title change to the 2<sup>nd</sup> defendant/respondent so that she could do the subdivision?** That is not evident from the record and I cannot on the basis of the material placed before the court say that the 1<sup>st</sup> respondents contestation that the land parcel 813 was subdivided fraudulently is without merit. The records do not assist the situation since we have a current copy of certificate of official search dated 23<sup>rd</sup> October 2017 which still indicates the 1<sup>st</sup> respondents are the current registered owners of land parcel **Bassi/Bogetaorio II/813** measuring 5.4Ha. How would that be possible if the property was subdivided as alleged by the 2<sup>nd</sup> defendant? At the same time there are titles held by the 4<sup>th</sup> respondent and some of the interested parties which are said to have originated from a subdivision of land parcel **813**. Quite clearly somebody needs to explain this state of affairs where the official records show and reflect divergent positions in regard to the ownership

of the same parcel of land.

11. I am in agreement with the plaintiff that given the attendant scenario there is no way that they, could have determined who among the disputants is the lawful owner of the affected property the subject of compensation by the applicant/plaintiff. The plaintiff/applicant is duty bound to compensate the lawful owner of the property affected and on which the transmission power line is to pass. In the circumstances of the present case I do not think it was possible for the plaintiff to ascertain who the lawful registered owner of the affected property was for the purposes of compensation. As matters stand there are up to 8 interested persons who are all staking claim to the compensation. Who among them should the plaintiff compensate? That indeed is the question.

12. I am satisfied that in the instant case it would be in public interest for the court to allow the plaintiff/applicant's Notice of Motion dated 15<sup>th</sup> September 2017. The project the plaintiff is undertaking is for the wider public interest and benefit and public interest should override private interest. Once the disputing parties are able to resolve their dispute and the person or persons entitled to be compensated are identified the compensation will dutifully be made to them. The parties have in some of their responses raised issue as to the adequacy of the compensation and in regard to that I would only state that the National Land Commission is the agency that deals with compensation and that there is an elaborate mechanism through which an award of compensation may be challenged and/or reviewed under the enabling provisions of the Land Act, 2012.

13. Accordingly and for reasons given above, I allow the plaintiff/applicant's application in terms of prayers (3) and (4) and further direct that the plaintiff/applicant deposits the sum of kshs.1,145,000/= in court within the next twenty-one (21) days from the date hereof. The costs of the application will be in the cause.

**Ruling dated, signed and delivered at Kisii this 10<sup>th</sup> day of November, 2017.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Ms. Kebungo for Otieno for the Plaintiff

Mr. Onguti for Ombasa for the 1<sup>st</sup> Defendants

N/A for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Mr. Nyambati for the 4<sup>th</sup> Defendants

Mr. Nyambati for Ondari for the interested parties

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**