



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 192 OF 2014

GRACE NYABOKE MOGUNDE.....PLAINTIFF

VERSUS

MOSES NYANDIEKA MOGUNDE.....1ST DEFENDANT

KENYA ELECTRICITY TRANSMISSION CO. LIMITED.....2ND DEFENDANT

RULING

1. The plaintiff and the 1st defendant are sister and brother respectively. Their deceased father Mogunde Ochako who died in 1983 was the registered owner of land parcel **Machoge/Boochi/1071**. The plaintiff by her plaint filed herein on 19th May 2014 claims that she constructed a permanent house on the said land between 2006 and 2008 which house stands along the power line that the 2nd defendant wishes to construct passing through the said parcel of land. The plaintiff avers that the 2nd defendant and the 1st defendant have secretly held consultations respecting compensation for the said house and the 2nd defendant has paid 50% of the compensation to the 1st defendant without the involvement of the plaintiff. The plaintiff avers that the deal between the 2nd defendant and the 1st defendant is fraudulent and should be stopped and it be declared that she is the sole person entitled to the compensation for the said house.

2. The 2nd defendant, Kenya Electricity Transmission Co. Ltd (KETRACO) following agreement on compensation for passing its power lines over the suit property with one Omwando Mugunde who was then the person in occupation of the suit property paid to the account of the 1st defendant herein with the authority and consent of the said Omwando Mugunde a sum of kshs. 1,368,500.00 representing 70% of the agreed compensation leaving a balance of kshs. 586,500.00 being 30% of the compensation which was to be paid after the structures on the path of the power lines had been demolished and vacant possession of the portion affected yielded to KETRACO for the necessary works to be done.

3. On 3rd June, 2014 the parties through their advocates recorded a consent order, which consent the 2nd defendant states it had not authorized to be recorded to the effect that the plaintiff was to withdraw her application dated 19th May 2014 on the terms that the 2nd defendant would pay the sum kshs. 912,387/= due to the 1st defendant and another in respect of the suit property into a joint interest earning account in the name of the advocate for the plaintiff and 1st defendant in full discharge of its obligations in respect of the suit property within 15 days of the date of the order. The plaintiff was on the date represented by her advocate as was the 1st defendant. Mr. Oguttu advocate as per the record held brief for Mr. Okonjo advocate for the 2nd defendant.

4. Following the making of this consent it appears the family members who are parties to the dispute submitted the compensation dispute to the project committee Boochi Chache/Kebere locations before the chief and an agreement was reached that the sum of kshs. 586,500/= being the 30% balance of the compensation payable be paid to the plaintiff herein as there was proof that it is her who constructed the house to be demolished and not her brothers. This agreement was signed by Omwando Mugunde who had earlier on authorized the payment of 70% of the compensation to be paid to the 1st defendant. The payment of kshs. 586,500/= was duly paid by the 2nd defendant to the plaintiff's bank account on 20th July 2015. I have set out the background of this matter to contextualize the 2nd defendant's Notice of Motion application dated 17th May 2016 which is the subject of this ruling. The application by the 2nd defendant is expressed to be brought under section 1A, 1B and 3A of the **Civil Procedure Act**, Order 25 Rule 5 (1) and (2), Order 45 Rules (1) and (2) and Article 159 (2) of the Constitution. The application seeks the following:-

- 1. THAT the honourable court be pleased to order that this entire suit be deemed as fully compromised as between all the parties and thus marked as settled with no order as to costs.**
- 2. THAT the honourable court be pleased to order that as an alternative prayer to one (1) above, the suit as between the plaintiff/respondent and the 2nd defendant/applicant be deemed as fully compromised and thus marked as settled with no orders as to costs.**
- 3. THAT the honourable court be pleased to order that in the alternative and without prejudice to the foregoing, the consent order made and or issued on 3rd June 2014 be and is hereby reviewed and or set aside.**
- 4. THAT the honourable court be pleased to order that in the alternative and without prejudice to the foregoing, the sum of Kenya Shillings Five Hundred and Eighty Six thousand, five hundred only (586,500.00) already paid to the plaintiff/respondent by the 2nd defendant/applicant be transferred to court pending hearing and determination of any pending issues herein.**
- 5. THAT the honourable court be pleased to order that the 2nd defendant/applicant herein be allowed to continue with the construction, erection or otherwise of the wayleave as well as its acquisition process passing through title number Machoge/Boochi/1071.**
- 6. THAT this honourable court be pleased to issue an order that the rightful owner of the suit premises i.e title number Machoge/Boochi/1071 as shall be determined by the process of succession or through any other lawful court order shall sign an easement in favour of the 2nd defendant/applicant within twenty one (21) days when called upon to.**
- 7. THAT the costs of this application be provided for.**

5. The application is supported on the grounds set out on the face of the application and on the supporting affidavit by Matilda Moraa Mwamburi sworn on 11th May 2016. The gist of the application is that the instant suit has been compromised through the acts and the conduct of the parties. The 2nd defendant asserts that the compensation sum agreed with the plaintiff's and 1st defendant's family has been fully paid. Annexure "MMM1" shows that a sum of kshs. 1,368,500/= being 70% of the assessed consideration was paid to the 1st defendant after his brother Omwando Mogunde gave authority for him to paid. Annexure "MMM3" shows the balance of kshs. 586,500/= representing 30% of the compensation was paid to Nyaboke Mogunde the plaintiff herein following negotiations involving the family and representatives of the 2nd defendant and the local administration. Again Omwando Mugunde who was involved in the payment of the initial 70% compensation to the 1st defendant was heavily involved in the deliberations and signed off the agreement reached on behalf of the family. This family meeting took place on 13th July 2015 as per annexure "MMM3" and was therefore long after the

consent order made on 3rd June 2014. Having regard to these occurrences the 2nd defendant avers that it has discharged its obligations in respect of the compensation it was to pay the family of the plaintiff and the 1st defendant and all that remains is the formalization of the wayleave/easement over the land which would be done with the administrator and/or beneficiary of the suit land once the family has finalized with the administration of their late father's estate through the appropriate succession proceedings. On that account the 2nd defendant asserts the instant suit has been compromised and seeks orders as prayed in the application.

6. The plaintiff's advocates were served with the instant application on 20th May 2016 and did not file any response and/or appear during the hearing of the application and hence the plaintiff is deemed not to oppose the application. The 1st defendant belatedly filed grounds of opposition dated 19th July 2016 on the same day when the application was coming for hearing but there was no representation on his part prompting the court to hear the application ex parte. The 1st defendant inter alia argues in his grounds of opposition that the 2nd defendant has not honoured the consent order made on 3rd June 2014 that required the 2nd defendant to deposit a sum of Kshs. 912,87/= in the joint names of the plaintiff's and 1st defendant's advocates. It is the 1st defendant's position that as the 2nd defendant has not complied with the order there is no basis for saying the suit has been compromised. The 1st defendant states the 2nd defendant should comply with the order or leave the 1st defendant's land **Machoge/Boochi/1071**.

7. The issue to decide in this application is whether the plaintiff's suit has been compromised as against the 2nd defendant. The plaintiff's suit as per the plaint was in regard to compensation for the house that required to be removed to enable the 2nd defendant's power lines over the suit property to be constructed. The suit did not relate to payment for the wayleave and/or easement that is created by registration of an instrument in favour of the 2nd defendant. I have perused the record and the 1st defendant in his statement signed by him and filed in court on 29th May 2014 inter alia states:-

“When my father subdivided his land to all his sons, he did not reserve or allocate any portion to our sisters who are now married and have their own properties as we do with our wives.

Before the death of our parents we had jointly decided to construct a permanent house for them which was initiated by the plaintiff. But I disagree that she paid all the money for the construction. I am the one who paid for the labour and did the ground work up to the roof where she purchased the iron sheets.”

8. The 1st defendant goes on to state that it is his brother Omwando who occupied the house after the death of his parents as it stands on the portion that was allocated to him. The 1st defendant further states he acknowledged his benefit from KETRACO and he received on behalf of his brother Omwando his benefit since he did not have his identity card. In closing the 1st defendant stated he had been wrongly sued and he called for the dismissal of the suit. From the 1st defendant's written statement it is clear he admits the plaintiff made financial contribution towards the construction of the structures that the 2nd defendant was making compensation for to facilitate their removal and/or relocation. The 1st defendant also admits the structures were on his brother, Omwando Mogunde's portion of the land. As is evidenced by annexure **“MMM1”** it is clear the compensation was for the structures that required to be demolished and the plaintiff having financially contributed towards putting up the structures she was perhaps entitled to have a say as to the distribution and/or apportionment of the compensation. Her suit indeed is to the effect that she is the one who funded the putting up of the structures and on that account compensation for them should be made to her.

9. The 1st defendant premises his opposition to the application by the 2nd defendant on the non compliance with the order of 3rd June 2014. The consent order required the deposit to be placed within 15 days from the date of the order. This was not done and in the absence of any party applying for the

enforcement of the order, the order became spent when no deposit was placed within the said period and no party applied for enforcement of the same. The subsequent negotiations by the family as evidenced by annexure “MMM3” in my view is a clear manifestation that the parties treated the order of 3rd June 2014 as spent. Omwando Mogunde on whose land the structures were standing participated in these negotiations. The plaintiff following the negotiations was paid the 30% balance of the compensation. The effect of this agreement by the family members to have the plaintiff paid the balance of 30% of the compensation in my view operated to vary the consent order earlier recorded and in consequence virtually compromised the suit. The plaintiff was the complainant in the suit and the 1st defendant had not made a counter claim. The plaintiff is not opposing the application and in my view the 1st defendant has not shown he has a claim against the 2nd defendant.

10. In the circumstances it is my determination that following the payment by the 2nd defendant of the balance of 30% of the assessed compensation of the structures on the suit land, the 2nd defendant’s obligations in regard to the compensation for the structures was discharged and consequently the present suit was fully compromised as it relates to and affects the 2nd defendant. The court order dated 3rd June 2014 having not been complied with and there having been no enforcement proceedings in regard to the same was varied by the acts and conduct of the parties by entering into negotiations and agreeing payment otherwise than in conformity with the court order. The plaintiff through the negotiated settlement obtained what she sought as against the defendants and she would stand bound by the settlement.

11. In conclusion it is my finding and holding that the 2nd defendant’s application dated 17th May 2016 is meritorious and I grant the same in terms of prayer (2) thereof. I set aside the order made on 3rd June 2014 the same having been superceded by the settlement between the parties. I allow prayer (3) of the Notice of Motion but decline to grant the order prayed for under prayer 6 of the Notice of Motion and direct that the 2nd defendant shall negotiate and agree the terms of the easement/wayleave with the person who becomes the registered owner of land title number **Machoge/Boochi/1071** or any resultant subdivision from the said parcel of land where the power lines will be passing over. Each party to bear their own costs of the application and the compromised suit.

12. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 29th day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Mr. Momanyi for Sagwe for the 1st defendant

Mr. Momanyi for Ms. Kariuki for the 2nd defendant/applicant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE