



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**LAND AND ENVIRONMENTAL LAW DIVISION**

**CIVIL CASE NUMBER 1290 OF 2015**

**KENYA POWER & LIGHTING CO.LTD. ....PLAINTIFF/APPLICANT**

**=VERSUS=**

**MOSIARA TRADING COMPANY LTD.....DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the Notice of Motion dated *15<sup>th</sup> December, 2015 brought* under *Order 40 Rules, 1,2,& 4 Order 51 Rule 1* of the *Civil Procedure Rules 2010*, and *Section 3A* of the *Civil Procedure Act*.

The application is brought by the Plaintiff herein *Kenya Power & Lightening Company* against the Defendant/Respondent *Mosiara Trading Company Ltd*. The applicant has sought for these Orders:-

- 1. An Order of injunction do issue against the Defendant restraining the Defendant whether by itself, its directors, officers, employees, agents or servants from encroaching on the Plaintiff's 12 meter wayleave trace of 66KV line from Nairobi West-sub-station to Karen sub-station which wayleave traverses LR.NO.209/12227 pending the hearing and determination of this suit.*
- 2. An order of injunction do issue restraining the defendant whether by itself, its directors, officers, employees, agents or servants from constructing, continuing to construct or otherwise interfering with the plaintiff's wayleave trace aforesaid pending the hearing and determination of this suit.*
- 3. An order of injunction do issue compelling the defendant whether by itself, its directors, officers, employees, agents or servants to demolish the illegal structures constructed on the Plaintiff's wayleave trace of 66KV line from Nairobi West0sub-station to Karen sub-station which traverse the defendant's land in default the Plaintiff be allowed by the Court to carry out the demolition aforesaid at the expense of the Defendant.*
- 4. Any other necessary order as required to safeguard the Plaintiff's wayleave and also safeguard the interest and safety of the public in relation to the said wayleave and illegal construction that is going on.*
- 5. The costs of this application be provided for.*

The application is predicated on the grounds stated on the face of the application and on the Supporting Affidavit of *John Muriuki Nthiga*.

These grounds are;-

- 1. The Plaintiff has a wayleave trace of 12 meters for the 66KV line from Nairobi West-sub-station to Karen sub-station.**
- 2. The Defendant is the registered owner of the property LR No.209/12227.**
- 3. The wayleave was granted in the year 1960 while the lines were constructed in the 1950s.**
- 4. The Defendant has now encroached on the Plaintiff's 12 meter wayleave while undertaking a construction on LR NO.209/ 12227.**
- 5. In spite of repeated requests to stop the encroachment and in spite of the outcry from the public, the defendant wantonly continues to encroach on that wayleave trace and to construct under the electric lines in total disregard of the Plaintiff's rights of the residents living near the wayleave trace and power lines.**
- 6. The defendant's actions are detrimental to the plaintiff and do expose the public to great risk and danger.**

In his supporting Affidavit, the Deponent **John Muriuki Nthiga** averred that he is a Wayleaves Officer employed by the Plaintiff and duly authorized to make this affidavit on behalf of the Plaintiff/Applicant. Further that the Plaintiff has a 12 meter wayleave trace in respect of the plaintiff's **66KV** line that runs from Nairobi West sub-station to Karen sub-station which wayleave cuts across **LR No. 209/12227** amongst other plots. He also stated that **LR NO. 209/12227** is owned by the defendant, as evident from annexure "**JMN1**". He also stated that in 1953, the plaintiff applied to the City Council of Nairobi seeking permission to erect overhead main lines along Bucklays Road substation (now Nairobi West substation) to Ngong Road (now Karen substation) and the City engineer gave the permissions vide his 2 letters of , and **13<sup>th</sup> March 1953**.

Again, in the year 1960, the plaintiff applied to the Ministry of Works for a wayleave trace in respect of that **66KV** line. The wayleave was approved by the Ministry of Works and also by the office of the Chief Secretary and the wayleave was granted. It was his contention that the **66KV** line then laid on that wayleave trace and the same is clearly shown by the survey maps and plans of the area.

The deponent alleged that the defendant has now started construction on plot **no.209/12227**, and that construction has cut across the plaintiff's wayleave and is being undertaken under the **66KV** lines in total disregard of the wayleave and the safety of the residents living next to the wayleave and power lines and the workers undertaking the construction. Further on **20<sup>th</sup> February 2008**, the defendant wrote a letter through one **Mr Stephen Manoti** requesting the plaintiff to relocate the power lines to enable the defendant develop the plot. Further the plaintiff considered the request internally and concluded that no alternative land could be found to reroute the lines and in view of the wayleave trace, it was not possible to relocate the lines and the officers of the plaintiff visited the defendant's site and advised the defendant that it had to plan the development outside the existing wayleaves trace or provide a new trace within its land.

He alleged that the defendant did not heed to the plaintiff's advice but has proceeded to construct on all the land including the wayleave in spite of the plaintiff's right to that wayleave and also the imminent danger this poses to the residents in the neighborhood and the construction workers. It was his contention that the plaintiff had also severally objected and warned the defendant regarding the dangers of encroaching onto the wayleave and power lines therein but the defendant continues to ignore the objections and warnings.

He also contended that unless restrained by an order of injunction and unless the illegal construction was demolished, the Defendant would continue to infringe on the plaintiff's wayleave and rights and also totally oblivious of the dangers it would be exposing the public to.

The application is contested and one **Dansteve K. Ragira**, the Managing Director of the Defendant swore a Replying Affidavit dated **8<sup>th</sup> February 2016**. He further averred that the defendant after obtaining title to the suit land applied for necessary approvals from the National Environmental and Management Authority as well as the Nairobi City Council now Nairobi City County which were legally obtained and/or granted to develop the land. Further that taking care not to encroach on the 12 meter wayleave trace in respect of the land the defendant again commenced construction of another building on the adjacent piece of land which was also underway.

He also contended that though the land bore one title deed it had been divided into two pieces because of the 12 meter way leave which the defendant has made space for in between the two pieces of land. It was his further contention that no construction touched on the 12 meter way leave and the defendant had no intention of encroaching on the way leave. He also alleged that a certified engineer drew the construction plans and the plans were approved by the necessary authorities with full knowledge that there was a 12 meter way leave trace which was provided for. It was his contention that the applicant was guilty of material non-disclosure of facts as well as misrepresented facts and does not deserve the injunctive Orders sought. Again the engineers report would have shown clearly that there was no encroachment by the defendant on the way leave and since the plaintiff has not attached and they herein attached one from a certified engineer.

He also averred that he was informed by his advocate on record which information he verily believed to be true that the plaintiff had not demonstrated clearly how the Defendant had encroached on the way leave hence no prima facie case made out of issuance of injunctive Order and further the encumbrances did not signify complete non-use of the affected land hence the defendant had a right to construct on the land so long as the 12 meter way leave was not interfered with.

The Court directed that the Notice of Motion be canvassed by way of written submissions and the Law Firm of **Hamilton Harrison & Mathews Advocates** for the plaintiff/applicant filed their written submissions on **11<sup>th</sup> March 2016**, whereas the Law Firm of **Momanyi & Associates Advocates** for the defendant /respondent filed their written submissions on **25<sup>th</sup> April 2016**. The Court had now considered the instant Notice of Motion and the pleadings generally. The court has also considered the annexures thereto, the relevant laws, the written submissions and the cited authorities and the court makes the following findings:-

There is no doubt that the defendants herein are the registered owner of **LR No. 209/12227** as is evident from the copy of the **Grant 85189** registered on **7<sup>th</sup> March 2008**. There is also no doubt that the plaintiff has a wayleave trace of 12 Meters for **66KV** line from Nairobi west-substation to Karen substation. It is also evident from the letter dated...that the wayleave was granted in the year 1960 and the same had passed over the Defendant's parcel of land **No.209/12227**. The Defendant has admitted the existence of the wayleave.

It is also evident that the defendant is constructing on his suit property. The plaintiff has alleged that the Defendant has encroached on the plaintiff's 12 meter wayleave while undertaking construction on his parcel of land. However, the Defendant has denied that allegation and stated that it has indeed constructed on its suit property but has taken care not to encroach on the 12 meters way leave trace and that no construction touches on the 12 meter way leave and that defendant has no intention of encroaching on the same. The above being the position taken by the rival parties the court has to consider whether the applicant is deserving of the orders sought.

The applicant has sought for injunctive orders which are equitable in nature and which are granted at the discretion of the court. However, the said discretion must be exercised judiciously. See the case of **CMC Motors Group Ltd and Another vs. Evans Kangeche Boro, Civil Appeal NO. 295 of 2007**, where the court held that:

***“In granting the injunctory reliefs, the superior court was exercising equitable jurisdiction which is discretionary and the court of Appeal can only interfere with the judicial discretion of the learned Judge, if it is satisfied that the learned Judge did not exercise is discretion***

*Judicially.....”*

And also in Hasmukh Khetshi Shah Vs Tinga Traders ltd, Civil Appeal No.326 of 2002 held that:-

*“ It must be stated at the outset that the granting of an interim injunction is an exercise of judicial discretion and an appellate*

*Court will not interfere unless it is shown that the discretion has not been exercised judicially“*

The orders sought herein being discretion, the Court will have to 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.*

Firstly, the applicant has to establish that it has a prima facie case with probability of success. In the case of Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125. the Court described prima facie case as:-

*“A Prima facie case in a civil application includes but 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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later.”*

Has the applicant herein established that it has a prima facie case with probability of success?. It is evident that the Defendant herein is the registered owner of LR No.209/12227 as evidenced by JMN1. That being the case, the 2<sup>nd</sup> Defendant is deemed prima facie to be the absolute and indefeasible property. This position is buttressed by Section 26(1) of the Land Registration Act which provides that:-

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, Unprocedurally or through a corrupt scheme.*

As a registered owner of the suit property the Defendant rights and interests are protected by Section 25(1) of the Land Registration Act which provides that:-

*25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject*

---

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

However such right can be defeated by operation of the law. It is evident that the plaintiff herein obtained the wayleave in 1960 and the said wayleave was to pass over the Defendants parcel of land. That was before the Defendant acquired the suit property. **Section 26(1)** of the Land Registration Act provides that a certificate of title issued to a proprietor vest the land to such proprietor as the absolute and indefeasible owner subject to **encumbrances, easements, restrictions** and other conditions. The Defendant's Grant herein issued it to is therefore subject to easement and conditions such as wayleave and public right of way. **Section 143(1)** of the Land Act provides for creation of public right of way and **Section 143(2)** provides as follows:-

***A public right of way may be—***

***(a) a right of way created for the benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organisations, authorities and bodies to carry out their functions, referred to in this Act as a wayleave; or***

***(b) a right of way created for the benefit of the public, referred to in section 145 of this Act as a communal right of way.***

It is evident that the Plaintiff applied for a public right of way or wayleave in 1953 and the same was granted. The Defendant's Grant is therefore subject to that public right of way (wayleave). The Defendant has a duty to safeguard that wayleave.

Though the defendant has right over the suit property, that right can be defeated by operation of laws. In the instant case by creation of public right of wayleave under **Section 143(1)** of the Land Act and the fact that the grant is subject to easement and conditions contained in the grant.

The plaintiff has alleged that the Defendant has encroached on the 12 meter wayleave by carrying on construction that touches on the wayleave. The defendant has alleged it has not encroached on the said wayleave and that an Engineer was called to carry out an assessment and he prepared a report which disapproved the encroachment. However the said Engineer's report was not attached to the Replying Affidavit. Even if the Defendant alleged that it obtained relevant approvals from the concerned authorities which approved the said constructions, the approvals were not attached to the Replying Affidavit. The said allegations were therefore not proved and the Plaintiff's allegations have not been disapproved. There is a construction being carried on by the Defendant below the 12 meter wayleave trace of the **66KV** line which cuts across the Defendants Land **LR No. 209/12227**. The Plaintiff enjoys the public right of way as guaranteed by **Section 143** of the Land Act and the Defendant's grant is subject to that easement and condition as provided by **Section 26(1)** of the **Land Registration Act**.

The plaintiff has therefore established that its right has been infringed by the Defendant through its act of construction of the upcoming building on its wayleave trace. The Plaintiff has therefore established that it has a prima facie case with probability of success.

On the second limb the court finds that the infringement of the plaintiff's right of enjoyment of the public way cannot be compensated by an award of damages as this infringement affect the public in general and the matter herein is of public interest. The court finds that an award of damages would not be an adequate remedy against the injury that the plaintiff herein and the general public would suffer.

On the balance of convenience, the court finds it is not in doubt. However, even if the Court was in doubt,

the balance of convenience would tilt in favour of the Plaintiff who has a right to enjoy its public right of way as the wayleave serves the public interest. The Defendant submitted that the court should endeavor to do justice and the court finds that justice herein will be seen to be done if the equitable reliefs sought are granted and the Defendant asked to explain in the main trial.

Therefore the court finds that the Plaintiff/Applicant is entitled to the equitable orders that have been sought herein consequently, the court allows the Plaintiffs application dated **15<sup>th</sup> December, 2016** in terms of prayers No.4 and 5.

However, on prayer **no.6** the same is a Mandatory order which is only issued in very special circumstances as was held in the case of **Kenya Breweries Ltd and another Vs Washington O Okeyo , Civil appeal No. 332 of 2000 (2000) LR 4984, ( IEA 109)** where the Court held that;

*“A Mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application (see Halsbury’s Law of England Volume 24, 4<sup>th</sup> Edition paragraph 948).*

The Court finds there are no special circumstances to warrant the court to issue the said mandatory order of compelling demolition of the structures allegedly constructed by the Defendant. The said **prayer No.6** will have to await the calling of evidence and interrogating of the same through cross- examination. For the above reasons, the Court declines to allow prayer **no.6**.

Given the circumstances and the nature of this matter, the parties are directed to ensure that the main suit is set down for hearing expeditiously so that the underlying issues can be resolved at once. In a nutshell, the Court allows the Plaintiff’s Notice of Motion dated **15<sup>th</sup> December 2015**, in terms of prayers **No.4** and **5** with costs being in the cause.

It is so ordered.

Dated, Signed, and Delivered this **26<sup>th</sup>** day of **September, 2016**.

**L.GACHERU**

**JUDGE**

In the presence of

Mr Makori for the Plaintiff/Applicant

None attendance for the Defendant/Respondent

Court Clerk : Hilda

**L.GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the presence of the above advocates and absence of the Advocate for the Respondent.

**L.GACHERU**

**JUDGE**