



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL CASE NO. 28 OF 2015**

**KIMOLO BONIFACE MUTUKU**

**STANLEY JULIUS KILONZO.....PLAINTIFFS/APPLICANTS**

**-VERSUS-**

**JAMES NJENDU KAMAU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KENYA POWER & LIGHTING CO. LTD...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

[1] The plaintiffs commenced their suit against the defendants vide a plaint dated 20<sup>th</sup> February 2015. Alongside the plaint, they filed a notice of motion of even date in which they sought for the following orders ;

**(3) That the honourable Court be pleased to make an order of injunction restraining the Defendants/Respondents, their agents, employees any/or servants from re-routing and /or in any way dealing with the three phase high voltage electricity running along the public road between the plaintiff's properties and the alleged 1<sup>st</sup> Defendant's property in any such way as may make it run above the plaintiff's properties pending the hearing and final determination of this suit.**

**(4) That the honourable Court do make further orders as it may deem fit and just in the circumstances.**

[2] The application is grounded on facts listed on the face of it *inter alia* that they are the lawful owners of three plots known as plot No 69, 70 and 72 which fall within plot No 624 section 1 Mainland North. That the 1<sup>st</sup> defendant has dishonestly applied to the 2<sup>nd</sup> defendant to re-route a 3 phase high voltage power line over the plaintiffs' properties. Lastly, that should the power line be re-routed to run above or near the plaintiffs' houses the said houses shall become inhabitable. Therefore they asked the Court to issue preservative orders to stop any such exercise.

[3] The application is also premised on the affidavits deposed by the plaintiffs. Mr Kimolo Mutuku the 1<sup>st</sup> applicant deposed that he has been in occupation of the two properties since 2004. That the 1<sup>st</sup> defendant claims to be the owner of plot Nos 8005 - 8010 section 1 MN neighbouring their plots and separated by a public road. He deposed that for many years the 1<sup>st</sup> defendant has been pursuing the 2<sup>nd</sup> defendant to re-route the high voltage power line and for the same to **run above his houses.**

[4] The 1<sup>st</sup> plaintiff deposed further that the wall erected by the 1<sup>st</sup> defendant encroached on the public road and enclosed the power line. That they presented complaints to the Municipal Council of Mombasa who subsequently stopped the construction of the said wall. Later in November 2012 they noticed frequent visits of the 2<sup>nd</sup> defendant's employees on the site surveying with a purpose to re-route the line. The 1<sup>st</sup> plaintiff went further to annex a letter written to Hon Awiti Bolo by the 1<sup>st</sup> defendant complaining that the power line runs over his property.

[5] The 1<sup>st</sup> plaintiff deposed that the 1<sup>st</sup> defendant is colluding with some employees of the 2<sup>nd</sup> defendant and has been given estimate costs of re-routing the power line to run over the applicants' properties. They believe there is a real threat that the power line may be relocated anytime. The 2<sup>nd</sup> plaintiff in his supporting affidavit deposed that the facts brought out in the 1<sup>st</sup> plaintiff's affidavit apply to him as well.

[6] On 23.4.2015, the plaintiffs sought leave to file a supplementary affidavit in response to the Replying affidavit. This Court granted them leave to do so within 14 days of that date. At the time of writing this determination, there was nothing on record. The application is opposed by replying affidavits sworn by each of the defendants.

[7] The 1<sup>st</sup> defendant Mr James Njendu Kamau admitted being the owner of plot Nos 8005 – 8010 section 1 Mainland North. He also admitted the existence of a public road but denied there has been any encroachment on it by his wall. The 1<sup>st</sup> defendant deposed that on September 2011 on realising that the power line was erected over his parcels, he sought audience with the 2<sup>nd</sup> defendant seeking the same to be re-routed along the road reserve or their boundary. No action was taken by the 2<sup>nd</sup> defendant and he deposed to writing a second letter on 25<sup>th</sup> February 2011. He deposed further that when he sought re-routing, he never requested nor advised the 2<sup>nd</sup> Respondent to do so through the applicants or any other person's parcel.

[8] The 1<sup>st</sup> defendant deposed that he has instituted a suit against the 2<sup>nd</sup> defendant and annexed copies of pleadings in MSA CMCC No 1211/2014. It is his case that the 2<sup>nd</sup> defendant is yet to communicate on re-routing of the power line but indicated that the same would be done through underground cables along the public road. He contends that the instant application is brought in bad faith and should be dismissed.

[9] The 2<sup>nd</sup> defendant via an affidavit deposed by Mr Richard Ottaro, the Wayleaves Officer deposed that he is aware of the public road separating the plaintiffs' and 1<sup>st</sup> defendant's parcels of land. He deposed that before laying the high voltage line, the 2<sup>nd</sup> defendant considered and followed all the relevant statutory and administrative provisions before and during the laying of the line.

[10] It is deposed that the 2<sup>nd</sup> defendant obtained the requisite wayleave agreement from the then registered owner of plot No 624/1/MN as per a copy that was annexed as "RO-1". The 2<sup>nd</sup> defendant deposed that they have not served the applicants with any quotation of re-routing plans. Secondly that the 2<sup>nd</sup> defendant cannot go to a site before any payment is made by its clients. Thirdly that a quotation has a shelf life of 90 days thus as of now there is no quotation letter issued to the 1<sup>st</sup> defendant.

[11] Mr Ottaro continued to depose that the 2<sup>nd</sup> defendant has not approved any application to re-route the power line. He also referred to the suit whose pleadings are annexed by the 1<sup>st</sup> defendant. He deposed that he is advised that the applicants have failed to show a prima facie case and therefore the application should be dismissed.

[12] The defendants filed very detailed submissions which I have read and considered while writing this decision. I need not repeat their contents herein. The applicants did not file any written submissions. The 1<sup>st</sup> defendant pointed out in his submissions that a party cannot be **barred to refrain from doing what he/she has not done**. The 2<sup>nd</sup> defendant took the view that the orders being sought are of a permanent nature at an interlocutory stage and therefore rendered submissions both on the principles of

granting mandatory and interlocutory injunctions.

[13] It is settled law that for a party to be granted relief of a temporary injunction, he/she must demonstrate to Court that he/she has a prima facie case with a probability of succeeding or that he/she will suffer such great loss/injury that cannot be compensated by an award of damages or that the balance of convenience requires the orders to be granted. This obligation rested on the applicants. See the case **Nguruman Ltd vs Jan Bonde & 2 others (2014) eKLR page 10.**

[14] In the pleadings as filed, none of the defendants has questioned the ownership of the plaintiffs' parcels of land. It is also not in dispute that a public road separates the plaintiffs land and the 1<sup>st</sup> defendant's parcels. The applicants admit being served with infrastructures provided by the 2<sup>nd</sup> defendant. In paragraph 7, the 1<sup>st</sup> applicant deposed to the 1<sup>st</sup> defendant putting up a wall which enclosed the power line. He annexed a photograph taken on 3<sup>rd</sup> February 2015. He went further to aver that this wall encroached a little to the public road thus narrowing the road and they had to move the relevant authorities to stop the construction of the said wall. The pictures however show a complete wall.

[15] In my understanding the gist of the applicants' case was based on a quotation dated 9<sup>th</sup> February 2015 addressed to the 1<sup>st</sup> defendant and annexed as 'KBM 8'. This letter is referenced as **"Electricity Supply to your premises on plot No 8005 – 8010 Bombolulu"**. One of the steps the letter sets out to be taken is that a design would be done before a quotation is issued. Paragraph 3 also stated that Way leaves approval will be sought by the 2<sup>nd</sup> defendant.

[16] There was no other document annexed that such wayleave had been sought from the applicants. If as pleaded by the applicants that there is a road between their land and the 1<sup>st</sup> defendant's parcel and that the first defendant's wall already encloses a power line onto his plot then it is illogical that the supply of the power would be done through the applicants plot. Further there is nothing shown as pointed by the 2<sup>nd</sup> defendant of any plan to re-route the existing power line on the applicant's plots.

[17] The Court was also shown an existing suit between the defendants where the 1<sup>st</sup> defendant is seeking to have the 2<sup>nd</sup> defendant ordered to remove the high power voltage power line from his land. This suit was filed in 2014 and is yet to be concluded. By virtue of the existence of this suit, the 2<sup>nd</sup> defendant cannot remove the existing power line until the suit is concluded.

[18] Going through the pleadings, I am unable to see any real threat likely to be undertaken by any of the defendants either severally or jointly that would interfere with the applicants user and occupation of their land more particularly causing the three phase high voltage electricity to run through their parcels of land. I do find that the applicants have not discharged their obligation of proving any of the principles for granting the injunction and prematurely came to Court.

[19] In conclusion, it is my finding that this application lacks merit and is based on unfounded threats. The same is dismissed with costs to the defendants.

**Ruling dated and delivered at Mombasa this 6<sup>th</sup> day of October 2016.**

**A. OMOLLO**

**JUDGE**