



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL SUIT NO 95 OF 2014

**KENYA ELECTRICITY TRANSMISSION CO.
LTD.....PLAINTIFF**

VERSUS

KENDONG RANCH LTD1ST DEFENDANT

NTIKA OLE ROKA.....2ND DEFENDANT

TERERE OLE MALOI.....3RD DEFENDANT

KOOLU MUTUTWA.....4TH DEFENDANT

RULING

(Application for injunction; plaintiff seeking order to be allowed to proceed with the construction of electric supply lines pending hearing of suit; plaintiff claiming to have an easement over suit land on the basis of three agreements; only one agreement executed; other two agreements not executed; no easement registered; easement transaction having been negotiated when there was a stop order issued in another suit; whether prima facie case established; whether in the circumstances it is proper to allow the plaintiff continue with construction of the electric supply lines; risk to public funds being lost; balance of convenience tilts in not proceeding with construction pending hearing of the suit)

1. The application before me is an application filed by the plaintiff and brought inter alia under the provisions of Order 40 Rule 1 of the Civil Procedure Rules. The plaintiff wants the defendants restrained from interfering with the plaintiff's construction of an electricity transmission line on the land parcel L.R No. 8396 pending hearing and determination of the suit.

2. Before I go to the gist of the application, I think it is best that I give a little background to this suit.

3. This suit was commenced by way of plaint filed on 15 December 2014. The plaintiff is a state corporation whose mandate is to operate Kenya's national electricity transmission grid for the public. It is pleaded in the plaint that the plaintiff obtained an easement from the 1st defendant over the 1st defendant's land parcel L.R No. 8396 (the suit land). It is pleaded that about May 2013, the plaintiff learnt that at the time of obtaining the easements, there were several cases pending in the High Court where the title of the 1st defendant was being challenged, and that there were court orders prohibiting the 1st defendant from dealing with the suit land. It is pleaded that the 1st defendant failed to disclose these cases to the plaintiff, and failed to disclose the prohibitions, and that the 1st defendant is therefore guilty of

material non-disclosure. It is pleaded that in October 2014, the plaintiff's contractor while building an electric transmission line on the suit property, was prevented by the 2nd, 3rd and 4th defendants from continuing with construction, an act which has caused the plaintiff loss of Kshs. 10,560,000/= as stoppage charges.

4. In its suit, the plaintiff has sought the following orders :-

- (a) *An order compelling the 1st defendant to give easements to the plaintiff.*
- (b) *In the alternative to (a) above, an order that the 1st defendant do pay the plaintiff Kshs. 108,342,822/= being the consideration paid for the easements together with incidental charges.*
- (c) *An order that the 1st defendant do pay the plaintiff Kshs. 10,560,000/= being construction stoppage charges.*
- (d) *An order of permanent injunction prohibiting the 2nd, 3rd and 4th defendants from interfering with the plaintiff's construction of electricity transmission lines on LR No. 8396.*
- (e) *A declaration that the construction of electricity transmission line by the plaintiff on LR No. 8396 is of great public interest and ought to continue uninterrupted.*
- (f) *Costs and interest of this suit.*

5. The application is supported by the affidavit of Antony Mbunya Kiarahu, who is a Legal Officer with the plaintiff company. He has *inter alia* deponed that on 5 March 2013, the plaintiff wrote to the 1st defendant requesting the 1st defendant for an easement over part of the suit land. It is averred that in the course of negotiations, the 1st defendant represented that it is the lawful owner of the suit property and failed to disclose that there were third parties who were laying claims of ownership over the suit land. It is stated that the 1st defendant also failed to disclose the existence of pending court cases where the title of the 1st defendant was under challenge. He has deposed that a first easement dated 16 November 2012 was prepared for an easement of 176.53 acres for a total consideration of Kshs. 29,127,450/= which money was paid on 24 October 2012. Later, the plaintiff required two more easements; one for the Eastern Electricity Highway (Ethiopia-Kenya line) where 180.9 acres was required and consideration agreed at Kshs. 29,848,500/=, and the second for the Loyangalani-Suswa line at an agreed consideration of Kshs. 34,617,000/=. Payment of a total sum of Kshs. 65,239,771.95/= was made for these latter two easements. The easement agreements were drawn for these two latter easements and sent to the 1st defendant for execution and registration, but it deposed that the 1st defendant has not returned an executed copy to the plaintiff, nor shown any evidence of registration. It is deposed that further sums of Kshs. 900,000/= for a temporary access road and Kshs. 13,075,600/= for additional acreage on the first easement were paid.

6. In May 2013, Mr. Kiarahu was informed that there were persons in actual occupation of the suit land and who were claiming ownership. They also alleged that there was a court order stopping the 1st defendant from dealing with the land. The plaintiff wrote to the 1st defendant, who wrote back through its advocates, but the issues were not addressed. In 2014, an Indian company, KEC International Ltd, began construction on the suit land on the basis that there was a right of way. They were stopped and later the plaintiff instructed them to demobilize and leave the suit land. This is what has caused the stoppage charges. It is deposed that the plaintiff should be allowed to carry on with the transmission line since the delay is causing harm to the public as it is denying them the benefits of more affordable power.

7. The 1st defendant entered appearance and filed Grounds of Opposition to the application. *Inter alia*, it is stated that the 1st defendant is the legal owner of the suit land; that the issue of ownership was determined on 30 January 2015 in Nakuru ELC 21 of 2010 (OS); that the 2nd, 3rd and 4th defendants are not licencees of the 1st defendant; that their cause is different from that of the 1st defendant; that the rights of the plaintiff are recognized as its predecessor, Kenya Power & Lighting Company Limited's rights were noted in the title; that the orders sought have been overtaken by events.

8. The 2nd, 3rd and 4th defendants entered appearance through the law firm of M/s Otieno Ogola & Company Advocates. A replying affidavit was sworn by the 2nd defendant on behalf of himself and the 3rd and 4th defendants. It is deposed that the suit land is the subject matter in Nakuru ELC No. 21 of 2010 (OS) in which the ownership of the property is being litigated. It is deposed that several interim orders stopping dealings in the suit land were issued. It is averred that the plaintiff cannot be granted any orders as any agreement was entered into contrary to an existing court order and therefore illegal. It is further stated that it is the Court which gave orders stopping the plaintiff from erecting its transmission lines.

9. The 3rd defendant later changed counsel to M/s Odhiambo & Odhiambo Advocates. On the day of the hearing of the application, Mr. Yoni of the said firm, applied for adjournment to enable them file a reply to the application. I was of the view that the application for adjournment was not merited and ordered the application to proceed.

10. Mr. Kibanga for the plaintiff urged me to allow the application. Inter alia, he stated that the transmission of power is of national importance. Mr. Kadima for the 1st defendant submitted that the dispute over ownership of the land was resolved in the suit Nakuru ELC No. 21 of 2010 (OS). He further submitted that the interests of the plaintiff are noted in the title, as there was a grant registered in favour of the plaintiff's predecessor, Kenya Power and Lighting Company Limited. Mr. Otieno for the 2nd and 4th defendants argued that any dealings over the suit land were in disobedience of the court order of injunction issued in Nakuru ELC No. 21 OF 2010 (OS). Mr. Yoni, associated himself with the submissions of Mr. Otieno.

11. I have considered the application. Essentially, what the plaintiff wants is for the defendants to be stopped from interrupting the erection of an electricity supply line over the suit land. The basis of this, is that the plaintiff has an easement over the suit land, allowing for the construction of several electric supply lines. Mr. Kibanga, in his submissions admitted that the stoppage of construction of the electric lines did not come from the 1st defendant but from the 2nd, 3rd and 4th defendants. The 2nd, 3rd and 4th defendants were plaintiffs in the case Nakuru ELC No. 21 of 2010 (OS) where they claimed that they were entitled to the suit land by way of adverse possession. Judgment in the matter was delivered on 30 January 2015; the claim by the 2nd, 3rd and 4th defendants was dismissed. However, there were interlocutory orders issued in the said suit which barred any disposition over the suit land pending hearing and determination of that suit. The order was affirmed on 29 July 2011 by Ouko J (as he then was).

12. It is curious that despite the said order, the 1st defendant still went ahead to deal with the suit land by negotiating an easement with the plaintiffs, when the injunctive orders were still operative. It is interesting that the plaintiff complains in this suit, that the 1st defendant did not advise them of the previous suit or of the adverse orders made in that suit. I say so, because I can see for myself that the order of injunction was registered against the title on 30 August 2011, and simple due diligence by the plaintiff, least by way of conducting a search of the title, would have revealed the restriction. I in fact fail to understand how the plaintiffs would have proceeded to deal with the suit land before doing a search of the title. That is very basic due diligence. Title has to be investigated before any conveyance, let alone a conveyance involving huge sums of money. I do not know why the plaintiff is now complaining that it was never informed of the pending cases, nor of the adverse orders made, while they had a duty to investigate the title, which if done, would have revealed to the plaintiff the presence of the restriction. It seems to me, at least from the evidence before me at this stage of the proceedings, that this was never done.

13. Worse, the plaintiff seems to have paid tens of millions of shillings, before it even received an executed copy of the latter two easements. Mr. Kiarahu has himself admitted that they do not have copies of the latter two easement instruments, and it is not even known whether the two instruments have been executed by the 1st defendant, or even where the documents may be. The last mention of them is that they were forwarded to the advocate who was representing the 1st defendant in the transactions. Why then did the plaintiff pay all this money to the 1st defendant before even seeing the executed agreement/s? That is not clear to me.

14. Moreover, it is also admitted by Mr. Kiarahu that the 1st defendant has not provided any evidence of registration of any of the easements. I have looked at the copy of grant of the suit land annexed to the affidavit of Mr. Kiarahu, and it does not show any evidence of registration of any easement in favour of the plaintiff. Again, I wonder why the plaintiff paid all the money under the transaction before being assured that the easement that they wanted has been registered against the title. Ordinarily in conveyances such as these, which involve huge sums of money, only part of it is paid out, usually a deposit, and the rest is either held by a stakeholder until completion and registration, or is paid after proof of execution and registration. The plaintiff should be worried that it may have received hot air for its money, for there is no proof of any easement registered against the title, and no proof of execution of the latter two easements.

15. Mr. Kadima for the 1st defendant argued that the interests of the plaintiff are taken care of by registration of an easement in favour of the Kenya Power & Lighting Company (KPLC). I have looked again at the register. What I can see at entry 3 thereof is a caveat in favour of KPLC. Why KPLC placed the caveat is not clear to me and I cannot tell what sort of interest they wanted to protect. Without clear evidence of what this caveat entailed, it cannot be assumed that the said caveat was the equivalent of the easement being claimed by the plaintiff; and if it were, then it probably needs to be explained why the plaintiff was paying huge amounts of money for an easement that was already created and was existing in the register.

16. The main prayer in the plaint is an order to compel the 1st defendant to give easements to the plaintiff. In asking for this order, it appears to me as if the plaintiff is acknowledging that it holds no easements over the suit property. The plaintiff has in fact, in its second prayer, asked for a refund of the Kshs. 108,342,822/= in the alternative. Now, if the plaintiff acknowledges that it has no easement over the suit land, and is indeed asking in this very suit, for the same to be delivered, how then can they be entitled to an order to be allowed to continue with construction of the power lines over the suit land pending hearing of the case? Can it really be said that they have established a prima facie case? What if no easements are delivered and the alternative prayer has to be allowed? Does it mean that the plaintiff will yet again appoint contractors and pay for the relocation of the electric supply lines? This will no doubt cause the plaintiff, nay the public, for the plaintiff has been said to be a public entity, to lose huge sums of money. Given these circumstances, I cannot say that the plaintiff has established a prima facie case to warrant the injunction.

17. I could of course be wrong, but if I am, the balance of convenience tilts in favour of not erecting electric supply lines until the easements are delivered, for if none are delivered, there will be huge loss of public funds if the electric lines are put up and need to be relocated for want of easements.

18. For the above reasons, I dismiss the plaintiff's application dated 10 December 2014 with costs.

It is so ordered.

Dated signed and delivered in open court at Nakuru this 19th day of February 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of: -

Mr Kibanga for the plaintiff/applicant

Mr Kadima for the 1st defendant/respondent

Mr Willis Otieno for the 2nd & 4th defendants/respondents.

Mr Biko present for 3rd defendant/respondent

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU