



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

**AT MALINDI**

**ELC CIVIL CASE NO.30 OF 2015**

**NASIR MAALIM ARTE.....PLAINTIFF/APPLICANT**

**=VERSUS=**

**KENYA POWER & LIGHTING CO. LTD.....DEFENDANT/RESPONDENT**

**R U L I N G**

1. What is before me is the Application by the Plaintiff dated 24<sup>th</sup> February 2015. In the Application, the Plaintiff is seeking for the following orders:-

**(a) That there be a temporary injunction restraining the Defendant whether by itself, his servants, agents and/or otherwise howsoever from trespassing occupying or interfering with the Plaintiff's quiet and peaceful enjoyment and possession of Uns. Commercial Plot NO. K- Mokowe, pending the hearing and determination of this suit.**

**(b) That the costs of this application be provided for.**

**The Plaintiff's/Applicant's case:**

2. The Plaintiff has deponed that he is the lawful allottee of land known as Uns. Commercial Plot number K, Mokowe, situated within Lamu (the suit property) by virtue of a letter of allotment Reference Number 79586/IV.
3. According to the Plaintiff, the Defendant committed acts of trespass sometimes in the year 2014 by purporting to enter the suit property and has continued to trespass upon the suit property.

**The Defendant's/Respondent's case:**

4. In response to the Application, the Defendant's Manager, Legal Services, deponed that it is not true that the Plaintiff is the lawful allottee of the suit property; that the authenticity of the letter of allotment and the Part Development Plan attached thereto is highly questionable and that it is not true that the Defendant has committed acts of trespass.
5. It is the Defendant's case that it started the process of acquisition of the suit property sometimes in 1978; that in the early 1980s, the Defendant was allocated the suit property and fenced it off and that the Defendant has been in the process of obtaining title documents to the suit property just like its sister company Kengen which has obtained the title for the adjacent land.
6. According to the Defendant's Legal Manager, the Defendant owns the suit property together with two other parcels of land which are adjacent to it and that the said parcels of land are meant for

- public utility purposes being generation of electric energy and a substation for transmission and distribution of electric power.
7. The Defendant's Legal Manager deponed that the Government prepared a Part Development Plan number 231.IV.04 in respect to the suit property dated 4<sup>th</sup> November 2004; that the PDP was published in the Kenya Gazette of 3<sup>rd</sup> October 2004 and that previously, the PDP had earlier been placed in the local newspapers of 26<sup>th</sup> October 2009 and 28<sup>th</sup> September 2005.
  8. It is the Defendant's case that it is presently constructing a new Lamu 33,000/11,000 volts sub-station on the suit property; that the suit property was handed over to the contractor in September 2014 after a lengthy tendering process and that the sub station has been in the making since the Defendant applied to be allocated the land in 1978.
  9. According to the Defendant, construction works have already commenced for the benefit of the public; that the Plaintiff will not suffer any loss or damage since he has never been in possession of the suit property and that any loss that the Plaintiff may suffer can be compensated monetarily by way of purchase of the land from him.
  10. It is the Defendant's manager's deposition that an order of injunction will have a ripple effect on other projects which include the Lamu Port South Sudan Ethiopia Transport Corridor Project (LAPSSET) and improvement of quality and reliable power supply to over 220,000 people.

### **Further Affidavit**

11. In his Further Affidavit, the Plaintiff annexed a receipt for a sum of Kshs.38,479 evidencing payment of the stand premium.

### **Submissions:**

12. The Plaintiff's advocate submitted that unless it can be proved that the Plaintiff's letter of allotment has been revoked, the suit property cannot be allocated to another party; that it is the Plaintiff who should be presumed to be in possession of the suit property and that it is only in the year 2005 that the Defendant obtained a quotation from the District surveys office of the cost of demarcating the suit property.
13. I have considered the authorities that the Plaintiff's advocate annexed on her submissions.
14. The Defendant's counsel submitted that a letter of allotment does not confer title to a person; that the letter of allotment issued to the Plaintiff if at all is a nullity because the land was already committed to the Defendant who took possession by fencing it in the early 1980's and that by the time the Plaintiff paid the stand premium on 18<sup>th</sup> November 1998, the offer had already lapsed.
15. Counsel submitted that the suit land is public land in occupation of a state organ protected by Article 62 and that the Defendant is using the land for public purpose.
16. I have considered the numerous authorities that have been relied on by the Plaintiff's counsel.

### **Analysis and findings:**

17. The Plaintiff's Application for an order of injunction is premised on the ground that he was allocated the suit property by the Commissioner of Lands on 7<sup>th</sup> October 1998.
18. In support of that position, the Plaintiff annexed on the Supporting Affidavit a letter of allotment reference number 79586/IV dated 7<sup>th</sup> October 1998.
19. The Plaintiff also annexed on his Affidavit a PDP in respect to the "proposed commercial plot" dated 17<sup>th</sup> February 1998 reference number LMU 231.11.12.98.
20. In addition to the above two documents, the Plaintiff produced in evidence a receipt showing that he paid Kshs.38,479 to the Government in respect of the suit property on 18<sup>th</sup> November 1998.
21. The Defendant, on the other hand, has argued that the suit property was not available for allocation to the Plaintiff having applied to be allocated the same land in 1978.
22. According to the Defendant, it was eventually allocated the suit property in 1980 and took possession thereof by fencing it.
23. According to the letter dated 14<sup>th</sup> December 1978, the Defendant requested for land for a power station in Mokowe, Lamu.

24. Although the Defendant's case is that it took possession of the suit property in 1980's, the documents on record shows that the planning process did not commence until the year 2001.
25. According to the Minutes of the Lamu District Development Committee dated 20<sup>th</sup> August 2001, the 6.5 acres previously allocated for the power generation plant at Mokowe was not enough to accommodate a bigger power station. The DDC, under Minute 05/08/2011 approved the allocation of all the land alongside the vicinity of the planned area to be allocated to the Defendant.
26. The Committee further recommended "those who are within the said area should be reallocated elsewhere".
27. By way of a letter dated 14<sup>th</sup> September 2001, the then District Commissioner advised the Commissioner of Lands to start planning for the development of the land as per the recommendation of the DDC and the standard.
28. The notices for the completion of the Part Development Plan in favour of the Defendant were then published by the Director Physical Planner in the Daily Newspaper of 26<sup>th</sup> October 2009. No objection was filed by the Plaintiff in respect to the planning of the suit property as proposed by the Director of Physical Planning.
29. A further publication of the PDP in respect of the suit property was made in the Kenya Gazette.
30. It is therefore clear from the documents before the court that although the Plaintiff may have been allocated the suit property, and before the government could issue him with a title document, the government allocated the same land to the Defendant.
31. It is not for this court, at this stage, to state whether the letter of allotment annexed on the Plaintiff's Affidavit is a genuine document or not. However, if the said letter of allotment is a genuine document, then the Plaintiff, after proving that he abided by all the conditions in the said letter of allotment, has a legal right to question the allocation of the same piece of land to another entity without either being given an alternative piece of land or compensated.
32. The Plaintiff has however not shown, prima facie, that he abided by the terms of the letter of allotment. One of those terms was in respect of the payment of the stand premium within 30 days.
33. There are other "special conditions" which are referred to in the letter of allotment but which have not been annexed on the copy of the letter of allotment that was produced by the Plaintiff. The trial court will have to examine and determine if those "special conditions" were honoured by the Plaintiff or not.
34. The Plaintiff has not stated why he never objected to the planning or re-planning of the suit property when the Director of Physical Planning published in the local media the proposed part development plan in the year 2009.
35. Having failed to object to the planning of the suit property in favour of the Defendant in the year 2009, and considering that the Defendant has gone ahead and commenced construction of a sub-station worthy millions of shillings, it will not be in the public interest to stop the works at this stage.
36. Evidence has been produced to show the benefits that the public shall obtain after the completion of the installation of the said sub-station. The public interests in the circumstances of this case outweighs the Plaintiff's interest. (See Hassan Ngao & 53 others Vs Kenya Petroleum Refineries, Civil Appeal No. 38 of 2014 Nairobi.)
37. The Plaintiff has not denied that he is not in physical possession of the suit property.
38. Other than establishing that he has a prima facie case, the Applicant must show the injury he is likely to suffer. In the case of **Nguraman Limited Vs Ian Bonde Nelson & 2 others (2014) e KLR**, the court held as follows:

**"If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted however strong the applicants' claim may appear at that stage. If prima facie case is not established, the irreparable injury and balance of convenience need no consideration.**

39. The Plaintiff has not shown the irreparable injury that he is likely to suffer that cannot be compensated by way of damages if the injunctive orders are not granted. In the event the Plaintiff succeeds at trial, then he shall be compensated by the Defendant.

40. For those reasons, I dismiss the Plaintiff's Application dated 24<sup>th</sup> February 2015 with no orders as to costs.

Dated and delivered in Malindi this **18<sup>th</sup>** day of **September**, 2015.

**O. A. Angote**

**Judge**