



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 352 OF 2015

SYLVIA WAMBUI KURIA.....PLAINTIFF

VERSUS

KENYA ELECTRICITY TRANSMISSION COMPANY

LIMITED (KETRACO).....DEFENDANT

RULING

Sylvia Wambui Kuria (hereinafter referred to as the plaintiff) has come to court by way of plaint wherein she claims that she is the registered owner of all that parcel of land known as Kakamega/Soy/79, **(hereinafter referred to as the suit property)** situate in Soy along Eldoret-Kitale Raod approximately 30 kilometres from Eldoret and right at the boarder of Uasin Gishu and Kakamega counties, measuring approximately 28.5 ha herein after known as the suit land. She claims that in or about the year 2014, the plaintiff saw some people digging holes in the suit property and upon inquiry, the said people informed the plaintiff that they had been instructed by **Kenya Electricity Transmission Company Limited (KETRACO).. (hereinafter referred to as the defendant)** to dig holes for purposes of erecting poles for electricity transmission lines.

That since no one had sought the plaintiff's authority or consent to dig up the holes or put up any electricity transmission lines in the suit land, the plaintiff took up the matter with the defendant, warned the defendant verbally and by a letter dated 13.9.2014 done by the plaintiff's Advocates, Ms Nyairo and Company Advocates, to stop further activities on the suit land. On receipt of the Plaintiff's Advocates letter aforesaid, the defendant stopped the activities and/or acts of trespass and left the suit land. However, on or about 3rd September, 2015, the plaintiff was shocked to see a group of people on her land digging holes and on inquiring, the people told the plaintiff that they were the defendant's agents, servants and/or persons acting on the defendant's instructions.

The plaintiff further contends that the defendant by itself or through its servants, agents and/or people acting on the defendant's authority have gone a step further to pour concrete materials on the said holes without the plaintiff's consent or approval which action amounts to trespass to property.

The plaintiff also filed a Notice of Motion under Articles 40, 64 and 159 (d) of the Constitution of Kenya 2010 and Section 24 of the Land Registration Act, Section 1A, 1B3, 3A and 63(e) of the Civil Procedure Act and Orders 40 Rule 1 and 2, 51 Rule 1 of the Civil Procedure Rules, Rule 3 of the High Court (Practice and Procedure Rules) praying for a temporary injunction to restrain the defendant, its agents and servants, employees or any person acting on their behalf from entering, digging holes, erecting, constructing, laying electric cables over the suit property or trespassing over the said land.

The application is based on grounds that the plaintiff is the registered owner of the suit property

and yet the defendant has unlawfully and without the Plaintiff consent or authority entered into the Plaintiff/Applicant's land and dug holes with the intention of erecting poles for electricity transmission lines which action amounts to trespass. The defendant's action threatens to deprive the plaintiff of occupation and quiet possession of the land which is illegally being utilised by the defendant and that the Plaintiff is suffering and will continue to suffer loss unless the orders herein are granted. The plaintiff believes that she has a *prima facie* case with high chances of success and that the balance of convenience tilts in favour of the Plaintiff who is the registered owner of the parcel of land.

The application is supported by the affidavit of the plaintiff' who states that she is the registered owner of the suit property. That recently, she saw people digging holes in her parcel of land and upon inquiry they told her that they had been instructed by the Defendant/Respondent to dig holes for purposes of putting up electricity transmission lines.

That since no one had sought her authority or consent to dig up the holes or put up any electricity transmission lines in her parcel of land, she took the matter up with the defendant/respondent and warned the defendant/respondent verbally and through a letter from her Advocate to stop further activities on her land.

That on receipt of her Advocate's letter, the defendant/respondent stopped its acts of trespass and left her land. However, to her utter shock and dismay, the defendant/respondent, in total defiance to her warnings and her Advocate's letters, recently through its agents and/or servants or persons acting under its instructions started digging holes and pouring concrete on the holes.

That as a result of the activities on her parcel of land and carried out under the defendant's instructions, she has been deprived of utilising approximately 2.34 acres of fertile land which she would have put to good use to assist her financially. That in addition, she has lost several trees which were cut down under the defendant's instructions to propagate the defendant's illegal activities on her parcel of land and that her right to quiet possession and enjoyment of her parcel of land as enshrined in the Constitution now hangs in the balance and continues being violated courtesy of the defendant's illegal activities on her land. She is apprehensive that the defendant may further interfere with her proprietary right over the suit property unless a temporary injunction is issued to restrain the defendant, its agents, servants and/or assigns from interfering with occupation and use of her property pending this suit. She believes that no prejudice will be suffered if the orders sought issue since the balance of convenience tilts in her favour as the registered owner of the suit property. That she is informed by her advocate, Mr. A. K. Nyairo which information she verily believe to be true that she has a *prima facie* case with high chances of success and she is therefore deserving of the orders sought.

The gist of the defendant's defence and the replying affidavit of **Joel Ombati Nyamweya**, a registered Land Valuer working for the defendant in the capacity of a land economist is that the orders sought in the application are very drastic in nature and with very far reaching ramification and hence must only be issued in the clearest of all circumstances and that the Plaintiff's suit does not meet even the bare minimum of the thresholds required by law in order for the Honourable Court to issue the injunctive reliefs sought and that the defendant herein is a government of Kenya body charged with the responsibility of among other things planning, designing, constructing and operating electrical transmission lines, and such equipment and facilities necessary for the transmission of electrical energy which mandate is of a public nature and thus acts in the best interests of all Kenyans, the Plaintiff herein, as well as the good Counties of Kakamega, Bungoma, Uasin Gishu, as well as Trans Nzoia where the transmission line, which forms part of the subject matter therein, is traversing.

In the exercise of its public mandate, KETRACO, as the relevant agency of the Government of Kenya, and through external funding, embarked on a project of plant design, supply and erection of 132Kv transmission lines complete with all structure and accessories as per prior approved designs at an aggregate cost of United States Dollars Two Million, Seven Hundred and Fifteen Thousand, Three Hundred and Forty Eight and Eighty One Cents Only (USD 2,715, 348.81)and Kenya Shillings One Hundred and Fifty Six Million, Eight Hundred and Ninety Nine Thousand, Nine Hundred and One only (Kshs.156,899,901.00).

That at an exchange rate of Kenya Shillings One Hundred and five Only (Kshs.105.00) to one United States of America dollar, the contract price translates to about Kenya Shillings Four Hundred and Forty Two million, Eleven Thousand, Five Hundred and Twenty Six Hundred and five Cents Only (Kshs.442,526.05), a colossal sum of money by any standards.

The project referred to herein above is part of the Government of Kenya plans to increase access to electricity in Kenya tenfold from the current 4% in the rural areas to about 20% by the year 2020. This was to be done through identification of various 132 KV and 220KV developments in order to improve the performance of the national grid network to cater for the ever increasing electricity load and thereby meet objectives of the vision 2030.

In order to realize the foregoing objective, on 16.03.2013, the defendant, through its predecessor, Kenya Power & Lighting Company Limited, entered into a contract for the plant design, supply and erection of 132KV transmission line (Eldoret – Kitale) with an Indian company by the name Tata Projects Limited.

The contractor mentioned herein above has since mobilized the manpower to continue with work on this highly significant project aimed at solving power shortage problems in the counties of Bungoma, Trans Nzoia, Uasin Gishu, Kakamega and other adjoining areas, thereby not only spurring economic growth specifically, but even more significant, development in general.

One of the parcels of land identified for traversing by the 132KV transmission line (Eldoret – Kitale) was Title Number Kakamega/Soy/79, which parcel of land forms the basis of this suit.

After the process of identification of the various parcels of land where the aforesaid line would pass, including the one in contention herein, had been concluded, KETRACO proceeded to the ground with a view to engaging the owners of the affected properties, the local as well as political administration of the areas in question.

That several meetings and public *barazas* were convened over a considerable period of time with a view to explaining the mandate of KETRACO, significance as well as benefit of the project, compensation issues for any quantifiable resultant losses as well as minimizing any likely negative impact arising out of the passage of the high voltage electricity transmission lines.

Furthermore, KETRACO, through its predecessor, Kenya Power & Lighting Company Limited commissioned an environmental and social impact study report for the 132Kv transmission line (Eldoret-Kitale).

With respect to title Number Kakamega/Soy/79, the defendant's Project Implementation Team (PIT) in respect of 132Kv transmission line (Eldoret-Kitale) went to the ground and met a Mr. Tom Kuria, who introduced himself as one of the plaintiff's sons.

At that particular time, the defendant's Project Implementation Team (PIT) had not been able to confirm the search details and or ownership of the subject property herein and thus relied mainly on Mr. Kuria's averments.

An analysis of the impact of the 132Kv transmission line (Eldoret-Kitale) was conducted on the subject property herein and Mr. Kuria was given a letter of offer which he promised to share with his mother, the Plaintiff herein as well as well as family lawyers, M/s Nyairo and Company Advocates.

Meanwhile, the defendant, through the National Land Commission, and as by law required, notified all affected land owners, including the plaintiff about the intended 132Kv power line wayleave acquisition through an advertisement appearing in the local Kenyan daily newspapers.

As at the time of filing this defence, the defendant has not received any notification from the National Land Commission objections regarding the wayleave construction as per the requirements of

section 146 of the Land Act, 2012.

It is the defendant's further averment that Mr. Kuria informed its Project Implementation Team (PIT) that the matter would henceforth be handled by the family lawyers, M/s Nyairo and Company Advocates but an understanding was reached to the effect that since this was a Government of Kenya project with a huge public interest element, work would continue on the subject parcel of land as discussions on the quantum of compensation progressed.

The decision to continue with the work was reached owing to the fact that out of the 201 towers, it is only the one on the plaintiff's parcel of land that had not been worked on due to this dispute.

The defendant's Project Implementation Team (PIT) successfully contacted M/s Nyairo & Company Advocates and continued with discussions pertaining to the compensation for the wayleave, which culminated in the enhancement of the quantum of money from Kshs.510,607.44 to Shs.875,327.04. Instead of receiving a confirmation of the tentative enhanced figure on wayleave compensation, the defendant was totally surprised to receive court papers. It is evident from the foregoing averments that the defendant entered the suit property lawfully and has been negotiating compensation with the plaintiff, through the law firm of Nyairo and Company Advocates.

The defendant states that he is able, ready and willing to pay the due compensation as soon as the same is agreed upon but in the alternative and without prejudice to the foregoing, the defendant is willing to deposit the tentative compensation amount of Kshs.875,327.04 in court and or in a joint interest earning account between the parties' advocates pending resolution as to the quantum of compensation payable and opines that if the plaintiff succeeds in having the injunctive reliefs sought confirmed, the project for the plant design, supply and erection of 132Kv transmission line (Eldoret-Kitale) will stall and thus complicate issues to do with financing thereof, availability of steady power supply and thereby affect millions of Kenyans beyond the borders of the counties of Trans Nzoia, Uasin Gishu, Kakamege and Bungoma. If this Honourable Court is inclined to confirm the orders of injunction as sought, then the defendant is likely to be put in a situation where it may end up breaching multi million contracts and thus exposing itself to paying out huge claims in damages, a state of affairs that would be most untenable as the money is most likely come from the government and or taxpayers of Kenya.

The defendant further states that the plaintiff is guilty of material non-disclosure for not telling this Honourable Court the whole truth and or bringing to its attention all the facts about the background of the case in order to put the Honourable Court in a position that would make it arrive at a just and well considered decision and or conclusion and states that if an injunction is granted it should be on condition that adequate security be furnished within seven (7) days from the date of ruling.

Given the nature of the project at hand, the minimum security proposed is a bank guarantee from a reputable and sound financial institution in favour of the defendant in the sum of the entire project amount Kenya Shillings Four Hundred and Forty Two Million, Eleven Thousand, Five Hundred and Twenty Six Hundred and five Cents Only (Kshs.442,011,526.05), and which guarantee shall be varied to the extent of any liability that the defendant may be exposed to as a result of any breach and or delay in implementation of the subject contracts alluded to herein above.

The plaintiff is non-suited as against the defendant and it reserves the right to raise and argue a preliminary objection at the first hearing hereof for this suit to be struck out and or dismissed with costs accordingly.

The plaintiff filed *a supplementary affidavit* whose gist is that the consultations referred to by the defendant were done without her input, instructions, knowledge and/or involvement and that the said project will not only have a negative impact on her parcel of land but also her land will lose its value which information was not brought to her attention at all.

That she has never seen any advertisement with respect to the defendants project. In any event, the said advertisement was done on 27.5.2015 well after the defendant/respondent had illegally entered

into her parcel of land and it does not mention her name or land parcel Kakamega/Soy/79. That it would be incorrect for the defendant/respondent to state that it never received any objection regarding the project given that she instructed her advocates who issued a demand letter to the defendant/respondent registering her displeasure on the defendant/respondent's acts of trespass. That she has never consented to the defendant/respondent entering into her parcel of land or undertaking or continuing with any project on her land.

That defendant proposal of compensation is aimed at arm twisting her into accepting a figure that she has neither suggested nor agreed to considering that the defendant intended project aims at depriving her of almost 3 acres of rich and fertile land which have a river frontage which she fully depend on for her livelihood not to mention the health risks that the transmission lines will expose her to. The said offer is too low to be considered.

Mrs Khayo learned counsel for the plaintiff, submits that the plaintiff has established a **prima facie** case against the defendant because the defendant entered the land without her consent and proceeded to cut down trees to make paths for machines to be used for putting up transmission lines. She is the registered proprietor of the parcel of land whose rights are protected by **Article 40 of the Constitution** and is entitled to enjoying all rights and privileges on account of the registration. She argues that it was mandatory that notice be issued for the intended erection of the power lines. **Secondly**, the plaintiff argues that she stands to suffer irreparable harm or injury if injunction is not granted as her right to property hangs in the balance. She claims that the damage to the property may be irreversible as the land is her only source of livelihood. She is also likely to suffer mental anguish and that the land will depreciate in value and that the nature maintenance will deprive her of quiet enjoyment of her property. **Thirdly**, that the balance of convenience tilts towards her as she is duly registered and protected by the constitution.

Simiyu, leaned counsel for the respondent on his part argues that the applicant has not established a **prima facie** case with probability of success. He argues that the respondent being a public body is obliged to act in public interest and that due process was followed in identifying the parcel of land and laying the project. The defendant further submits that the plaintiff **has not established a legal right infringement** by the defendant. On the issue of **irreparable injury** that cannot be compensated by way of an award of damages, the defendant argues that the project is of great value not only to the national economy but also to counties such as West Pokot, Trans Nzoia, Bungoma, Kakamega and Uasin Gishu. Moreover, he argues that the plaintiff will be compensated by damages as the land can always be valued. The defendant further argues that the plaintiff is guilty of material non-disclosure as his son was deeply involved in consultation in respect of the project.

On balance of convenience, the defendant submits that if injunction was granted, the consequences will be heavy and dire for the defendant as the tax payer is likely to lose millions of shillings. He finally argues this court to consider public interest *visavis* private interests.

I have carefully considered the pleadings, the affidavits, submissions on record and the oral submissions and do find that the land in dispute is registered in the plaintiff's name as the absolute proprietor subject only to the entries in the register relating to the land and to such overriding interests set out in section 30 of the Registered Land Act Cap 300, Laws of Kenya (repealed). The certificate of registration was given on the 10.6.2010. It is not disputed that the defendant has identified the plaintiff's land to be traversed by the 132 Kv Transmission line (Eldoret-Kitale). The issue that is at the core of this matter is whether the plaintiff's consent was sought at all, and obtained. The defendant contends that their implementation team went on the ground and met one Tom Kuria who introduced himself as the one of the sons of the plaintiff. The defendant admits that they did not do a search of details of ownership and merely relied on Tom Kuria's assertions. Surprisingly, Mr. Tom Kuria has not been made to swear any affidavit to confirm the above. The plaintiff avers that she was never consulted and that she has never seen any advertisement in the newspapers and that in any event, the advertisements were done after the defendant had entered her land. The defendant is willing and able to compensate the plaintiff and has even offered to deposit the money in an interest earning account in the joint names of the advocates of parties.

The principles of granting interlocutory injunctions are set out in the locus classicus case of ***Giella V Cassman Brown & Company Ltd(1975) EA at page 358***, thus an applicant must demonstrate a ***prima facie case with a probability of success***. Secondly, an injunction may not be granted unless the applicant will ***suffer irreparable harm***. Lastly, when the court is in doubt it will determine the application on the ***balance of convenience***.

Article 40 of the Constitution of Kenya provides that every person has the right, either individually or in association with others to acquire and own property of any description and in any part of Kenya-

“40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Article 40(3) (b) is precise that the land acquired from an individual under the Article must be for a public purpose or in the public interest and the acquisition should be in accordance with the constitution and any Act of Parliament that requires prompt payment in full, of just compensation to the person. This court is of the view that public interest ***per se*** does not limit the rights and fundamental freedoms of an individual except by law in this case the Land Act which provides for the procedure of acquisition of land in public interest.

Section 110 the Land Act 2012 provides for Notice of acquisition of land. **Section 111(1)**

provides that land is acquired compulsorily under the Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. **Section 111(2)** provides that the Commission shall make rules to regulate the assessment of just compensation which to the best of my knowledge it has not been done. The defendant has not demonstrated to this court that the procedure above said was followed or that notice was given as envisaged by law.

From the foregoing, the applicant has satisfied me that she has a *prima facie* case with a probability of success as she has a right to ownership of the disputed land that should be protected by law against arbitrary acquisition.

On the issue of irreparable loss that cannot be compensated with damages, I have weighed the plaintiff's private interest against the defendant's public interest and do find that had the defendant consulted the plaintiff, and had he done due diligence to ascertain the registered owner of the parcel of land, then I would have been inclined to hold that the public interest outweighs the private interest in this matter and that the plaintiff can be awarded damages.

Moreover, the fact that the defendant is dealing with the son of the plaintiff who is not the registered owner makes it possible that the compensation will be paid to the son and therefore the plaintiff is likely to suffer irreparable loss that cannot be compensated by damages as the money will be paid to a stranger who is not the registered owner.

I have considered the Authorities cited by the defendant. I do find that in Kakamega High Court, Civil Appeal No. 114 of 2015, the **County Government of Kakamega vs Everlyne K. Nanyama & Others** is not persuasive as the parties therein were not opposed to the construction of the power lines and that the owner of the parcel of land is the County Government of Kakamega who did not oppose the construction of the power lines but only wanted to be involved in the transaction.

In the **Patrick Simiyu Khaemba vs Kenya Electricity Transmission Company Limited & Kenya Power & Lighting Company Limited – Kitale ELC No. 166 of 2013**, the facts are different as the applicant was not the owner of the parcel of land where the power lines were to be constructed but his was adjacent to the said land. Moreover, the issue was compliance with the Environment Management and Coordination Act no 8 of 1999 as regards environmental impact assessment.

In **Kitale ELC NO. 14 of 2013, Hon. Bernard Shinali vs Kenya Electricity Transmission Company Limited**, the facts again are different as negotiations took place between the applicant and KETRACO as opposed in the case before me whose negotiation took place between the defendant (KETRACO) and the applicant's son who is a stranger to the title to land as the land is registered in the plaintiff's name.

I do not find any evidence of guilt of material non-disclosure on the part of the plaintiff as she claimed that she was not aware of any dealings by her son with the defendants. The contrary was not proved.

The upshot of the above is that the application is allowed in terms that a temporary injunction is hereby issued to restrain the defendant, its agents and servants, employees or any person acting on their behalf from entering, digging holes, erecting, constructing, laying electric cables over land parcel KAKAMEGA/SOY/79 or trespassing over the said land until the hearing and determination of suit. Costs to the plaintiff Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF OCTOBER, 2015.

ANTONY OMBWAYO

JUDGE