



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), KOOME, & MUSINGA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. E512 OF 2020

BETWEEN

DUPOTO FARMS LIMITEDAPPLICANT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY

LIMITED & 121 OTHERS.....RESPONDENTS

(An application for injunction pending appeal against the Ruling of the Environment and Land Court at Kajiado (Christine Ochieng, J.) dated 21st September 2020 *in E.L.C. Case No. 30 of 2020.*)

RULING OF THE COURT

1. The applicant's application is brought under *Articles 25(c), 50(1) and 163(4) (b)* of the *Constitution* and *sections 3 and 3A* of the *Appellate Jurisdiction Act*. The applicant seeks an injunction to restrain the 1st respondent, its employees, servants and/or agents from interfering with the quiet possession and enjoyment of its property known as *Kajiado/Lorngosua/2338 (the suit property)* pending hearing and determination of its appeal against the judgment in *Kajiado Environment and Land Court No. 30 of 2020*. In that suit, the 1st respondent was allowed to carry out construction works that involves placing electric power lines across the suit property before the parties to the dispute fully agreed on the compensation payable for the grant of easements.

2. In refusing to grant an order of injunction that had been sought by the 1st respondent, the learned judge, *Ochieng, J.* held, *inter alia*, that:

“I find that indeed the 1st plaintiff (the 1st respondent herein) continues to suffer irreparable harm since the project is being delayed. Further, since the defendants will eventually be compensated for loss of use of their respective parcels of land which have already been gazetted, I see no reason why the project should be delayed because of disputes of compensation. I find that the damages they portend to suffer will actually be compensated for once they reach a consensus on the right amount.”

3. Being aggrieved by the aforesaid ruling, the applicant filed an appeal, on which it anchored this application. The applicant contends that the appeal is arguable and unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory.

4. The 1st respondent opposed the application. It stated that the appeal is not arguable, and that it has not been demonstrated that if successful, it would be rendered nugatory unless the orders sought are granted. The 1st respondent submitted that under *Article 24(1)* of the *Constitution*, enjoyment of rights and fundamental freedoms by an individual does not prejudice the rights and fundamental freedom of others; that public interests cannot be subjugated to private interests in so far as the project is concerned; that since the substantive issue is the quantum of compensation payable, the appeal, if successful will not be rendered nugatory.

5. This application was disposed of by way of submissions only, which we have carefully considered. The 1st respondent is constructing a 132 Kv Kajiado- Namanga Power Transmission Line as well as 400 Kv Kenya-Tanzania Transmission Line. On 21st April 2017 the 1st respondent published in the Kenya Gazette the areas that were to be affected by the power lines. The 1st respondent was to pay for the easements it was going to acquire from the various parcels of land, but some of the land owners did not agree with the amounts of compensation suggested by the valuer who was contracted by the 1st respondent. Consequently, the dispute was referred to court, as earlier stated.

6. In this application, the applicant has not invoked the provisions of **rule 5(2) (b)** of this **Court's Rules**. But since the applicant seeks an order of injunction, we must still consider whether an arguable appeal has been demonstrated and whether the appeal, if successful, will be rendered nugatory unless the orders sought are granted.

7. In its memorandum of appeal, the applicant faults the learned judge for, *inter alia*: failing to find that the 1st respondent's suit was bad in law in light of **sections 144, 146, 148 and 149** of the **Land Act, 2002**; granting the 1st respondent an order to undertake the project on the applicant's properties; failing to find that the applicant's complaint was not based on a simple question of the quantum of compensation payable but whether it ought to have allowed any easement at all; and for failing to find that the 1st respondent could only be allowed to move into the applicant's property upon all the issues raised by the applicant resolved and compensation paid.

8. This Court can only grant an order of injunction pending appeal where it is demonstrated that an applicant has an arguable appeal or intended appeal, and that unless the injunction is granted the appeal, if successful, would be rendered nugatory. An arguable appeal is not one that must succeed, it is one that is not frivolous and merits a full consideration by this Court. The applicant need not establish a multiplicity of arguable grounds, even a single one is sufficient. See **University of Nairobi v Ricatti Business of East Africa [2020] eKLR**.

Having perused the memorandum of appeal, as summarized above we think that the appeal is arguable.

9. Turning to the nugatory aspect, which must also be satisfied before the orders sought can be granted, we appreciate that **Article 40** of the **Constitution** guarantees protection of the right to property. However, under **Article 40(3) (b)** where the State requires land for a public purpose or in the public interest, it may lawfully deprive a person of his land, provided that there is payment in full, of just compensation to the person. The right to property is therefore not absolute.

10. From the affidavits that were filed before the trial court, it is evident that the 1st respondent genuinely required an easement over the suit property and was prepared to pay just compensation to the applicant and to many other persons whose properties were also affected by the public interest project it was undertaking. There are on-going negotiations regarding the quantum of compensation payable. If no agreement on the quantum is eventually arrived at, the law grants the National Land Commission power to determine the amounts payable.

11. Consequently, we are not satisfied that the appeal would be rendered nugatory unless the orders sought are granted. We think, without making a definitive statement that the learned judge exercised his discretion judiciously in granting the orders in favour of the 1st respondent. Besides, as per the Constitution, public interests take priority over private interests.

12. All in all, we find this application lacking in merit and dismiss it. Each party shall bear its own costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021

W. OUKO, (P)

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true *copy of the original*.

Signed

DEPUTY REGISTRAR