



Kenya Electricity and Transmission Company Limited v Kassam & 4 others (Environment & Land Case 208 of 2021) [2024] KEELC 6915 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 208 OF 2021
SM KIBUNJA, J
OCTOBER 23, 2024**

BETWEEN

**KENYA ELECTRICITY AND TRANSMISSION COMPANY
LIMITED PLAINTIFF**

AND

MAHMOOD KASSAM & 4 OTHERS & 4 OTHERS & 4 OTHERS DEFENDANT

RULING

1. The plaintiff moved the court through the application dated the 2nd May 2024 seeking for its officers and those of the National Land Commission to be allowed to enter onto the defendant's land to undertake valuation of the wayleave trace thereof, before the suit is heard and determined, and that the report thereof be used as evidence in this matter. The application is based on the five (5) grounds on its face, and supported by the affidavit of Walter Akwabi Chiboli, legal officer litigation, sworn on the 2nd May 2024. It is the plaintiff's case that the parties herein had initially entered into a consent dated 18th October 2021 to have a joint valuation of the wayleave trace, but their respective valuers failed to agree, and ended up doing separate valuations. That as the plaintiff is a parastatal, it is desirous to have the valuation conducted by the National Land Commission that ordinarily undertakes such exercises for the Government, and hence this application.
2. The defendants opposed the application through the replying affidavit of Mahmood Kassam, 1st defendant, sworn on the 7th May 2024, inter alia deposing that the plaintiff filed the application outside the time given and has been disregarding judicial timelines; that the parties consent of 18th October 2021 was adopted as a court order and has since been complied with wholly, and this application is frivolous and an abuse of court process; that each party has already done their valuation of the wayleave trace and filed the reports, which were used to determine the amount deposited in the interest earning account; that the application is meant to frustrate the expeditious prosecution of the suit contrary to



the last term of the consent of 21st October 2021, to the effect that parties endeavour to ensure an expeditious hearing and determination.

3. The learned counsel for the plaintiff and defendants filed their submissions dated 27th May 2024 and 29th May 2024 respectively, which the court has considered.
4. The following are the issues for the court's determinations:
 - a. Whether the plaintiff has established a reasonable case for the order they seek to be issued.
 - b. Who pays the costs?
5. The court has considered the grounds on the notice of motion, affidavit evidence, submissions by the parties' learned counsel, superior courts decisions cited thereon, the record and come to the following findings:
 - a. That the plaintiff among others submitted that as it is a parastatal, and the valuations done by the parties pursuant to the consent of 12th June 2023 that compromised their application dated 18th October 2021, were by private valuers, it is only fair that it be allowed to have a wayleave trace valuation on the defendants' land done by the National Land Commission. The learned counsel further submitted that the plaintiff is engaged in projects for the benefit of all people and therefore public good should override individual interests. The counsel relied on the Court of Appeal decision in the case of Hassan Ngoa & 53 Others versus Kenya Petroleum Refineries Ltd CA No.38 of 2014 [unreported] and Nassir Maalim Arte versus Kenya Power & Lighting Co. Ltd, Malindi ELC No.30 of 2015 [unreported]. The application is opposed by the defendants, who submitted it was a further delaying tactic and an attempt to vary the valuation reports done by the parties pursuant to their consent of 1st December 2021 that was adopted by the court. That there was nothing preventing the plaintiff from engaging the National Land Commission to do their valuation the last time, but it chose Dansal & Associates Ltd, whose report they now seek to vary. The learned counsel submitted that the plaintiff has not met the threshold to set aside consent order, and relied on the Court of Appeal decision in the case of Flora N. Wasike versus Destimo Wamboko [1988] KLR 429; [1982-88] 1 KAR 625.
 - b. That I have perused the record and confirmed that the parties compromised the plaintiff's application dated the 18th October 2021 through their consent of 1st December 2021, in which they inter alia agreed to have a joint wayleave valuation done, with each party appointing their own valuer, and in case of disagreement, each to file separate reports. It is apparent the valuers failed to agree and each filed their respective reports. As submitted by counsel for the defendants, which I agree with, there was nothing stopping the plaintiff from engaging the National Land Commission then to do the valuation but the instead opted for another valuer. Indeed, the plaintiff must have been aware from the time it commenced this suit that it was a parastatal and that the National Land Commission is the agency that does valuations for Government agencies, but there is no explanation tendered why it never engaged the commission for a report then or soon hereafter. It is always a party's responsibility to gather, file and serve the other party with the documents, witness statements and other evidential materials the party will be relying on to prove their case or defence at the stage of filing their pleadings or soon thereafter, before pleadings are closed. The plaintiff has failed to lay the basis of another valuation of the wayleave trace, when their expert has already done one and the report thereof filed.



- c. For posterity's sake, I find it important to point out that though the plaintiff had indicated in the application that it was "grounded on the annexed affidavit of Lydia Wanja..." and the defendants at paragraph 2 of the replying affidavit made reference to the "affidavit in support of the application sworn by Lydia Wanja ..." no such affidavit was annexed. The supporting affidavit that is annexed to the application is the one sworn by Walter Akwabi Chiboli, plaintiff's legal officer litigation.
 - d. Pursuant to the provisions of section 27 of Civil Procedure Act chapter 21 of Laws of Kenya that costs follow the events except where ordered otherwise for good cause, I find no reason to depart from that edict and award the defendants the costs.
6. Flowing from the above conclusions, the court finds and orders as follows:
- a. That the plaintiff's notice of motion dated 2nd May 2024 is without merit.
 - b. The said application is dismissed.
 - c. Costs awarded to the defendants.
- 7 Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23RD DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : Mrs Kabone For Kariuki

Defendants : Mr Kiluko

Leakey – Court Assistant.

