



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 197 OF 2015

MACHAREUS OBAGA ANUNDA PLAINTIFF

VERSUS

KENYA ELECTRICITY TRANSMISSION CO. LTD ... DEFENDANT

RULING

1. The plaintiff is the registered owner of all those parcels of land known as LR Nos. Nyaribari Chache/Keumbu/1414 and Nyaribari Chache/ Keumbu/1446 (hereinafter referred to as "the suit properties where the context so admits). The defendant is a state owned corporation registered under the Companies Act, Cap 486 Laws of Kenya and regulated under the State Corporations Act, Cap 446, Laws of Kenya.
2. The mandate of the defendant is to plan, design, develop, maintain and operate the Republic of Kenya's national electricity transmission grid. In the discharge of its mandate aforesaid, the defendant decided in the year 2014 or thereabouts to construct a 132KV electricity transmission line from Kisii to Awendo in Migori County. This transmission line required a 30m wide strip of land running all the way from Kisii town to Awendo town. The suit properties are some of the parcels of land that were to be traversed by the said transmission line.
3. On 9th February 2015, the defendant wrote to the plaintiff notifying him that it was in the process of constructing the said electricity transmission line and that it would require portions of the suit properties for that purpose. In the same letter, the defendant offered to pay the plaintiff a sum of Kshs. 166,793.50 as compensation for the portion of LR No. Nyaribari Chache/Keumbu/1414 measuring approximately 0.22239 acres that was going to be affected by the said transmission line and a sum of Kshs. 833,962.50 for the portion of LR No. Nyaribari Chache/Keumbu/1446 measuring approximately 0.37065 acres that was also going to be affected by the said line. The total compensation offered by the defendant to the plaintiff for the affected portions of the suit properties amounted to Kshs. 1,000,756/=. The plaintiff wrote to the defendant on 11th March 2014 contesting the compensation aforesaid and questioning the manner in which it was put forward and the formula that was followed in arriving at the same. The defendant did not respond to the plaintiff's letter aforesaid. Notwithstanding the fact that the compensation for the portions of the suit properties in respect of which it wanted to acquire a way leave had not been agreed upon, the defendant proceeded to take possession of the said portions of the suit properties in the month of May, 2015 and commenced construction thereon of electricity transmission towers without the consent of the plaintiff.
4. The plaintiff brought this suit on 3rd June 2015 seeking a declaration that the arbitrary acquisition of the said portions of suit properties by the defendant is illegal and contrary to the provisions of Articles 40 and 67 of the Constitution of Kenya 2010 and, a permanent injunction to restrain the

defendant from trespassing onto the suit properties for the purposes of erecting electricity transmission towers or completing the ones already erected thereon. In the alternative and without prejudice to the above, the plaintiff sought an order compelling the defendant to pay to the plaintiff a just and adequate compensation to be determined by the court before the defendant can undertake and/or commence works or further works on the suit properties. The plaintiff also sought general damages for trespass.

5. Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 3rd June 2015 seeking a temporary injunction to restrain the defendant from trespassing onto the suit properties or any of them in any manner whatsoever for whatever purposes pending the hearing and determination of this suit. The plaintiff's application that was supported by the plaintiff's affidavit sworn on 2nd June, 2015 was brought on the grounds that the defendant entered the suit properties in the month of May, 2015 without the knowledge, consent and/or permission of the plaintiff and commenced the construction of an electricity transmission tower thereon without following the due process particularly, the provisions of Articles 40 and 67 of the Constitution of Kenya, 2010 dealing with the right to own property and the process of compulsory acquisition of property. In his affidavit, the plaintiff stated that he is the registered owner of the suit properties. He reiterated that the defendant entered onto the suit properties without his consent and commenced the construction of electricity transmission tower thereon. The plaintiff stated that he had earlier rejected the defendant's offer of compensation which he found inadequate and un-procedurally tendered. The plaintiff stated that the defendant did not respond to his letter in which he had raised objection to the compensation aforesaid and instead, it entered the suit properties and commenced construction works. The plaintiff stated that the injunction sought is necessary to stop the defendant's acts of trespass on the suit properties which if allowed to continue would deprive the plaintiff of his rights over the said properties. The plaintiff annexed to his affidavit copies of the title deeds for the suit properties and the correspondence he exchanged with the defendant.
6. The plaintiff's application was opposed by the defendant through grounds of opposition dated 10th June 2015 and a replying affidavit sworn by Matilda Moraa Mwamburi on 26th June 2015. In its grounds of opposition, the defendant contended that the plaintiff has not established valid grounds for granting the orders sought. The defendant argued that the electricity transmission towers that the defendant is constructing on the suit properties are intended for the common good of the public and that the dispute that the plaintiff has with the defendant is mainly over the compensation payable and as such the plaintiff can be adequately compensated in damages in case he suffers loss as a result of the defendant's activities aforesaid. In her replying affidavit, Matilda Moraa Mwamburi who is employed by the defendant as a land valuer stated as follows; in the course of the execution of its mandate, the defendant is in the process of putting up a 132KV electricity transmission line linking Kisii town and Awendo town with a view to improving the reliability of electricity supply in the two regions which line would traverse among others the suit properties. In order to execute the said project, the defendant approached the National land Commission to acquire for it a way leave (a right of way) over the parcels of land on which the said electricity transmission line was going to pass. For the parcels of land owned by the plaintiff, the defendant only required a way leave over portions of LR No. Nyaribari Chache/Keumbu/1414 and LR No. Nyaribari Chache/Keumbu/1446 measuring 0.2223 acres and 0.37065 acres respectively. The said portions of the suit properties were valued in accordance with the provisions of the Land Act, 2012 and a fair and just compensation therefor offered to the plaintiff. Ms. Mwamburi denied that the defendant intends to acquire the subject portions of the suit properties compulsorily. She reiterated that the construction of the power line in issue is of great national and public interest and that the defendant has followed the procedure laid down in the Land Act, 2012 for acquiring a way leave (right of way) over the portions of the suit properties that would be affected with the same. She stated further that the defendant is ready, willing and

able to pay to the plaintiff a just compensation for the portions of the suit properties that will be affected by the said way leave. She annexed to her affidavit, a copy of a letter dated 25th August 2014 that was addressed to the National Land Commission by the defendant.

7. When the plaintiff's application came up for hearing on 8th July 2015, the court directed that the same be heard by way of written submission. Both parties filed their respective submissions and the same are on record. I have considered the application before me and the replying affidavit and grounds of opposition filed by the defendant in opposition thereto. I have also considered the parties' respective submissions and the authorities cited in support thereof. The principles for granting a temporary injunction were laid down in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E. A 358** as follows:-

- i. The applicant must show a prima facie case with a probability of success.
- ii. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
- iii. When the court is in doubt, it will decide the application on a balance of convenience.

8. There is no dispute that the plaintiff is the owner of the suit properties. There is also no dispute that the defendant has entered the suit properties without the plaintiff's consent and commenced the construction of electricity transmission towers thereon. The plaintiff's contention is that the defendant's entry onto the suit properties is illegal and unconstitutional. The defendant on the other hand has contended that it followed the due process in acquiring the portions of the suit properties on which it is constructing the said electricity transmission towers. What this court would be called upon to determine at the hearing of this suit is whether the defendant's entry onto the suit properties and construction thereon of electricity transmission towers was illegal and unconstitutional and if so, the remedies available to the plaintiff.

9. Article 40 (3) of the Constitution provides as follows:-

“(3) The state shall not deprive a person of property of any description, or any interest in; or right over property of any description unless the deprivation –

- a. **results from an inquisition of land or a conversion of an interest in land or title to land in accordance with Chapter Five; or**
- b. **is for 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.”**

10. As stated above, the plaintiff has contended that the defendant which is a state corporation has acquired portions of the suit properties compulsorily without following the due process. The defendant has denied that claim. The defendant has contended that what it has acquired is a way leave (a right of way) through the suit properties and that it has complied with all relevant constitutional and statutory procedures. From the correspondence exchanged between the plaintiff, the defendant and the National Land Commission (“the commission”) which are annexed to the affidavit in support of the application herein and in the replying affidavit of Matilda Moraa Mwamburi, it is apparent that the portions of the suit properties which are in dispute have not been acquired compulsorily. The defendant had no intention of having the ownership of the said portions of the suit properties transferred to it. What it required was a way leave over the suit properties through which the electricity transmission line could pass. The Land Act,

2012(hereinafter referred to only as “the Act”) provides for the procedure through which a way leave is to be acquired. The issue that I need to determine is whether the defendant followed this procedure in relation to the portions of the suit properties over which it purports to have acquired a way leave.

11. Section 144 (1) of the Act, provides that:-

“Unless the commission is proposing on its own motion to create a way leave, an application, for the creation of a way leave shall be made by any state department, or the county government, or public authority or corporate body to the commission.”

Section 144 (4) of the Act provides that the applicant for a way leave shall serve a notice of its application for the creation of a way leave to all persons occupying the land over which the way leave is sought, the County Government within whose jurisdiction the land is situated and any other interested person. After service of the said notice, the commission is supposed to publish the application along the route of the proposed way leave. Section 146 of the Act requires the commission to consider all representations and objections received pursuant to the said notices and recommend to the cabinet secretary whether to carry out a public inquiry into the representations and objections or refer the application for the way leave to the county government or to initiate and facilitate negotiations with the persons who have made representations on the application with the applicant with a view of reaching a consensus on the application. The cabinet secretary is supposed to determine whether or not to create away leave after considering as the case may be the recommendation of the commission, or the advice of the county government or the outcome of any negotiations that may have been reached between the applicant for the right of way and those who had made representations or objections. If the cabinet secretary decides to create a right of way, it shall make an order to that effect which order shall among others be published in the Kenya Gazette. Once the order is made, any person who had made representation or objection to the application for the creation of a right of way may appeal against the decision of the cabinet secretary to the court on a point of law.

12. Section 148 (1) of the Act provides that compensation shall be payable to any person for the use of land of which the person is in lawful or actual occupation as a way leave which compensation shall be based on a value of the land as determined by a qualified valuer. Section 148 (4) of the Act places the duty to pay compensation upon the state department, county government, public authority or corporate body that has applied for the way leave. This section provides further that that duty shall be complied with promptly. Section 148 (5) of the Act gives the person who is dissatisfied with the compensation offered to apply to court to determine the amount payable and the method of making payment.

13. It is clear that the Act has an elaborate procedure to be followed when one wants to create a way leave over private land. A part from the letter dated 9th February 2015 through which the defendant notified the plaintiff of its intention to acquire a way leave over the suit properties through which letter it also made an offer for compensation, there is no evidence that the other procedures relating to the publication of the application for the said way leave, receipt of representations or objections, recommendation to the cabinet secretary, decision of the cabinet secretary on the recommendations and publication of the said decision were undertaken. From his letter dated 11th March 2014, the plaintiff had clearly made a representation objecting to the defendant’s intention to acquire a way leave over the suit properties. The law placed an obligation upon the commission and the cabinet secretary to consider the said representation and make a decision thereon which decision had to be communicated to the plaintiff. In this case, neither the defendant nor the commission which was supposed to acquire the way leave on its behalf considered the plaintiff’s representation. There is also no evidence before me that the cabinet secretary made an order creating a way leave(right of way) in favour of the defendant.

14. In the circumstances, it is not clear to me on what basis the defendant purported to enter onto the suit properties. From what I have set out above, no way leave had been created in favour of the defendant as provided by law and no compensation paid to the plaintiff. I am of the view that even if the way leave had been lawfully created which is not the case here, the defendant could not enter the suit properties without first making prompt payment of just compensation to the plaintiff which is a constitutional imperative before one can be deprived of property. I am satisfied on a prima facie basis that the defendant's entry and occupation of the suit properties is illegal and unconstitutional. The plaintiff has therefore established a prima facie case against the defendant with a probability of success. The next question to consider is whether the plaintiff stands to suffer irreparable harm unless the injunction sought is granted. The defendant has entered the suit properties and erected on the portions thereof electricity transmission towers. This means that the plaintiff has been dispossessed of the said portions of the suit properties. If the injunction sought is not granted, the plaintiff would be kept off the said portions of the suit properties. In my view, the plaintiff would in the circumstances suffer irreparable injury.
15. In view of the foregoing, I am satisfied that the plaintiff has met the conditions for granting a temporary injunction. The defendant has urged me not to grant the injunction sought on several grounds. The defendant has argued that the only dispute between the parties is the issue of the amount of compensation payable to the plaintiff and as such any loss which the plaintiff may suffer if the injunction sought is not granted can be compensated by an award of damages. I am not in agreement with this submission. The plaintiff's complaint as I have set out earlier in this ruling concerns the process that was adopted by the defendant in its purported acquisition of a way leave over the suit properties. This explains why I have analyzed the procedure for acquiring a way leave at great length. The issue of compensation comes at the tail end of the process. If the process of acquiring a way leave has not been carried out lawfully, the issue of compensation does not arise. I don't think that the plaintiff can be forced by this court to take compensation for its land which has been acquired unconstitutionally where such land is still within his reach.
16. The defendant has also argued that the public interest that would be served if the electricity transmission line is allowed to pass through the suit properties far much outweighs the plaintiff's private interest in the said properties. A right to acquire and own property is not absolute. Article 40 (3) (b) of the Constitution provides that one can be deprived of property or interest in or right over property for a public purpose or in the public interest. There is however a rider that such deprivation must be carried out in accordance with the constitution and any Act of Parliament that requires prompt payment of just compensation and allows a right of access to a court of law. The manner in which the defendant purported to acquire a way leave over the suit properties falls far way below the constitutional threshold. The defendant did not only fail to follow the procedure provided in the Act for acquiring a way leave but also failed to pay just compensation before taking possession of the suit properties. I am unable to limit the plaintiff's right to property save as provided in the constitution. The constitution limits the right to own property in the public interest or for public purpose provided that the law is followed in the process of such limitation and prompt payment is made of just compensation. With these conditions unmet, the plaintiff's private interest over the suit properties must prevail over the public interest of the residents of Kisii and Awendo to adequate power supply. Due to the foregoing, I see no merit in the arguments that have been put forward by the defendant in opposition to the injunction sought.
17. The upshot of the foregoing is that the plaintiff's application dated 3rd June 2015 has merit. The same is allowed in terms of prayer (b) thereof. I have noted from the reliefs sought in the plaint that the plaintiff would not mind being paid compensation for the portions of the suit properties which have been acquired albeit unlawfully by the defendant. In view of the practical difficulty that the defendant might find itself as a result of the order issued above having regard to the magnitude of the project that it is undertaking, I would suspend the order of injunction granted herein for a period of forty five (45) days within which the defendant shall pay to the plaintiff a

sum of Kshs. 1,000,756/= that was determined by its valuers as fair compensation for the portions of the suit properties over which a way leave has been created and a further sum of Kshs. 1,500,000/= into an interest earning bank account with a reputable bank in Kisii in the joint names of the advocates for the parties as security for any further compensation that the court may find due to the plaintiff at the trial of the suit. In the event that the said payments or any of them are not made on due dates, the injunction order granted herein shall take effect immediately and/or automatically without any further reference to the court. The plaintiff shall have the costs of the application.

Delivered, Dated and Signed at Kisii this 27th day of August, 2015.

S.OKONG'O

JUDGE

In the presence of:

Miss Okwoyo for the plaintiff

Mr. Abobo for Oyugi for the defendant

Mr. Omwoyo Court Assistant

S.OKONG'O

JUDGE



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