



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 287 OF 2014

ALICE MWERU NGAIPLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTDDEFENDANT

RULING

The issue that calls for determination in this matter is whether or not this Court has jurisdiction to entertain this suit and thereby grant the orders of injunction sought by the plaintiff herein. The same has been raised as a Preliminary Objection by the defendant.

The genesis of the defendant's Preliminary Objection is as follows:-

By her plaint filed herein on 31st October 2014, the plaintiff who is the registered proprietor of the parcel of land No. KABARE/KIRITINE/1882 sought a permanent injunction to restrain the defendant, its agents, servants, employees or any other person acting through it from erecting, digging holes, constructing metal pylons, laying electric cables over the said parcel of land (herein the suit property) and or trespassing over the same. The plaintiff further sought damages for the illegal excavation of the suit property plus costs of the suit.

Simultaneously with the filing of the suit, the plaintiff filed a Notice of Motion under ***Order 40 Rules 1, 2, 4 and 10 of the Civil Procedure Rules*** seeking injunctive orders in the same terms which orders were granted ex-parte by the Deputy Registrar on 31st October 2014 and an inter-parte hearing fixed for 13th November 2014 before this Court.

In response to the application for injunction, the defendant through its Way Leave officer Mr. JOHN MURIUKI NTHIGA filed a replying affidavit and raised the following pertinent issues.

(a) That this suit is an abuse of the Court process having been the subject of litigation in GICHUGU P.M.C.C No. 18 of 2014 – ALICE MWERU NGAI VS KENYA POWER & LIGHTING COMPANY LIMITED

(b) That this Court has no jurisdiction to determine this dispute and that jurisdiction infact lies with the Energy Regulation Commission

When the matter came up before me on 13th November 2014, it was agreed by both Mr. Ndegwa for the plaintiff and Ms Ameyo for the defendant that the Preliminary Objection on jurisdiction would be canvassed by way of written submissions to be put in on or before 16th December 2014 when the matter would be mentioned to confirm compliance and fix a date for the ruling. However, by 16th December

2014, only the defendant's advocate had filed their submissions. I have therefore not had the advantage of the plaintiff's submissions as at the time of drafting this ruling.

I have considered the Preliminary Objection herein which, as I have stated above, hinges on this Court's jurisdiction to grant the orders sought both in the plaint and therefore, in the Notice of Motion, I have looked at the pleadings herein, the defendant's replying affidavit, the submissions by the defendant's advocate and the law.

As was held in the case of **OWNERS OF MOTOR VESSEL 'LILLIANS' VS CALTEX OIL KENYA LTD 1989 K.L.R 1**, jurisdiction is everything and once a Court has no jurisdiction, it has no power to make one more step. That is why issues of jurisdiction are usually raised at the earliest stage of the proceedings because without jurisdiction, the Court must down its tools.

From the replying affidavit of JOHN MURIUKI NTHIGA, it is clear that on or about the 12th August 2011, he met the plaintiff who is the registered proprietor of the suit property and explained to her that the defendant wished to install a 130 KV power line from Sagana to Embu which would traverse through the suit property and that she would be compensated for any loss and damage that would arise from the installation of the power line. The plaintiff gave her consent to the said works and signed both the requisite Notice (annexture JMT 3) and the Way Leave agreement on 12th August 2011. On the basis of the signed Notice and Way Leave agreement, the defendant proceeded with the construction of the proposed power lines and even compensated the plaintiff for the damage done to her crops – see annexures **JMT 5** and **6**. It would appear that the plaintiff was un-happy with the compensation offered to her and moved to GICHUGU COURT vide P.M.C.C No. 18 of 2014 but a Preliminary Objection similar to this one was raised by the defendant and was up-held by the Principal Magistrate Mr. T.M. Mwangi and no appeal was preferred against the ruling in that Court. The plaintiff then moved to this Court seeking the orders indicated above and has similarly been met by another objection to this Court's jurisdiction and also a claim that she is abusing the process of this Court.

It is the defendant's case that under the **Energy Act Chapter 314 Laws of Kenya**, once a Notice has been issued to a property owner that there is a proposal to construct a power line on one's land and there is no objection raised within 60 days, it is deemed that the Notice has been assented to and thereafter, any issues of loss or damage that the proposed electric supply line will cause becomes a matter to be determined by the **Energy Regulatory Commission** established under **Section 4 of the Energy Act**.

From the pleadings herein, the plaintiff's complaint is basically that the defendants, by laying electricity cables over the suit property, are trespassers on her land. It is however clear from the documents availed by the defendant that the plaintiff gave her consent to the construction of the cables on the suit property and she signed the requisite Notice issued under **Section 46 of the Energy Act** on 12th August 2011. That is not in dispute. She then proceeded to sign the Way Leave agreement as well as various other agreements detailing the nature of damage/loss and the amount due to her as compensation. Then on 27th May 2013, the defendant wrote to her informing her that the total amount due to her in compensation was Ksh. 245.850. Under **Section 48(1) of the Energy Act**, it is provided as follows:-

“An owner shall be deemed to have assented to a proposal to construct an electric supply line on his land if he fails to notify, in writing, the person desiring to construct an electric supply line, of his objection thereto within sixty days after the service on him of the notice required by Section 46 and in the event of an objection, the Commission, on application by the licensee, shall determine –

(a) What loss or damage, if any, the proposed electric supply line will cause to the owner or to the occupier or other person interested in the land

(b) Whether any loss or damage that may be caused is capable of being fully compensated for by money” emphasis added.

The plaintiff having been served with a Notice on 12th August 2011 as required by Section 46 of the Energy Act, she had sixty days within which to file any objection both to the Notice and the proposals that came with it. No such objection has been placed before the Court. If anything, the material placed before me in the form of crop damage and compensation agreements show that she received the following sums as compensation to her crops and trees:-

1. Ksh. 1,900 on 21/12/2012
2. Ksh. 60,160 on 19/1/2013
3. Ksh. 13,900 on 24/4/2014

Then on 27/5/2013 she was offered Ksh. 245,850 for the 0.4917 acres of her land that was to be used for laying the power lines. The jurisdiction to investigate whether or not the compensation made to her was adequate lies with the Energy Regulatory Commission. Under Section 48(2) of the Energy Act, the Energy Regulatory Commission has powers to:-

- (a) *Assess the amount of compensation payable in which case the construction may proceed and,*
- (b) *If the damage or loss is not one for which money may not be adequate compensation, the construction of the proposed electric supply line shall not proceed.*

Therefore, the Energy Regulatory Commission has the jurisdiction to decide that the person giving the Notice, in this case the defendant, “*shall not be entitled to construct or lay the proposed electric supply line*” if it, the Energy Regulatory Commission, is of the opinion that the nature of loss or damage to be suffered by the owner cannot be fully compensated for by money – see Section 48(2) (a) (ii) of the Energy Act.

It is clear from the above that the plaintiff’s first port of call should be the Energy Regulatory Commission and not this Court. Where the law has granted jurisdiction to other organs of Government to handle specific grievances, the Courts must respect and up-hold the law. The highest Court in the land in Supreme Court Constitutional Application No. 2 of 2011 recognized this when it stated as follows:-

“To allow the application now before us, would constitute an interference with due process and with the rights of parties to be heard before a Court duly vested with jurisdiction; allowing such an application would also constitute an impediment to the prospect of any appeal from the High Court upto the Supreme Court. This is a situation in which the Court must protect the jurisdiction entrusted to the High Court”

The same argument is applicable in this case. As is clear from what I have stated above, disputes of this nature are the preserve of the Energy Regulatory Commission and appeals therefrom lie with the Energy Tribunal as established under Section 108 of the Energy Act.

Similarly, in the case of JOSEPH NJUGUNA MWAURA & OTHERS VS REPUBLIC C.A CRIMINAL APPEAL NO. 5 of 2008 (NBI), the Court stated as follows:-

“It is incumbent upon any Court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction. The authority of Court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision making function”

The Court then went on to observe as follows:-

“In our understanding, Courts have no jurisdiction in matters over which other arms of Government have been vested with jurisdiction to act”

The Court was of course dealing with a Criminal Case but the arguments raised therein are very germane

to the matter now before me. In view of the clear legal provisions cited above and which stipulate the forum that ought to deal with a dispute of this nature and which forum the plaintiff has not approached as a first point of call, it would be an un-warranted intrusion into the jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of the proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their Statutory responsibilities. That is why those procedures were formulated and such organs established.

It is clear from the above that the Preliminary Objection on this Court's lack of jurisdiction to hear this dispute is well taken.

The other issue taken up by the defendant is that this suit is an abuse of the Court process. It is clear from the annexures herein that when the plaintiff moved the Court in GICHUGU P.M.C. No. 18 of 2014, her complaint was that the compensation offered to her for the use of the suit land was not adequate. She described it as "**minimal and paltry**". She therefore sought adequate compensation. She admitted having been served with a Notice by the defendant notifying her of the intention to use part of her land to lay the transmission cables. That suit was struck out and no appeal was filed against that decision. In the case now before me, she accuses the defendant of trespassing on the suit property yet she not only signed the Notice issued to her under **Section 46 of the Energy Act** but also proceeded to execute a Way Leave agreement authorizing the defendant to erect power lines on the suit property and further proceeded to receive compensation for damage to her crops and trees. All this is not in dispute. That notwithstanding, she has now pleaded in paragraph 11 of her plaint as follows:-

"The plaintiff further claim from the defendant for the damages suffered on her land for illegally excavating on the land without her consent"

And in paragraph 4 of her affidavit in support of the Notice of Motion seeking injunctive remedies, she has deponed as follows:-

"That the Respondent has no legal (sic) of entry on the applicant's land L.R No. KABARE/KIRITINE/1882 and therefore it's a mere trespasser"

As stated above, having been served with a Notice under **Section 46 of the Energy Act** and not having raised any objection thereto within sixty days after service of the Notice to her as provided for under **Section 47 of the Energy Act**, the plaintiff was "**deemed to have assented to a proposal to construct an electric supply line on his land**". She cannot now turn around and allege that the defendant is trespassing on the suit property. A trespasser is one who intrudes into another person's land without justification – see **CLERK & LINDSELL ON TORTS**. The defendant's conduct in this matter with regard to the suit land can hardly be regarded as an un-justified intrusion into the plaintiff's land.

Courts have power to strike out suits that are an abuse of their process. What constitutes an abuse of the process of the Court is a matter to be determined by the circumstances of each case. In the case of **MUCHANGA INVESTMENTS LTD VS SAFARIS UN-LIMITED (AFRICA) LTD & TWO OTHERS 2009 K.L.R 229**, the Court of Appeal described the term abuse of process as follows:-

"The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it"

Looking at the circumstances of this claim, the only reasonable conclusion that can be made is that the same is clearly an abuse of the process of the Court. On one hand, she moves a Court seeking adequate compensation for her land. She does not complain that the entry into the land is illegal. On the other hand, she now pleads trespass onto her land. All this notwithstanding that she has consented to the use of

part of her land for the erection of power supply lines and received compensation for the damage to her crops and trees. And all this time, she has not approached the forum set up to adjudicate over disputes such as the one that she has. It is of course true that a party should be allowed to have his day in Court. It is also true that Courts exist to resolve real problems and not to engage in academic exercises. In the MUCHANGA case (supra), the Court addressed itself as follows:-

“In our view, the often quoted principle that a party should have his day in Court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time”

Those words may sound harsh. However, they aptly capture the circumstances of this case. Not only has the plaintiff chosen the wrong forum to agitate her claims but she also seeks to eat her cake and have it all at the same time. That is clearly an abuse of the Court’s process.

Ultimately therefore, upon considering all the matters herein, I up-hold the defendant’s Preliminary Objection and strike off both the suit and the Notice of Motion with costs.

B.N. OLAO

JUDGE

8TH APRIL, 2015

8/4/2015

Before

B.N.Olao – Judge

Gichia – CC

Mr. Kariithi for Ndegwa for Plaintiff – present

Ms Kairu for Defendant – present

COURT: Ruling delivered this 8th day of April 2015 in open Court.

Mr. Kariithi for Mr. Ndegwa for Plaintiff present

Ms Kairu for Defendant present.

B.N. OLAO

JUDGE

8TH APRIL, 2015