THE REPUBLIC OF UGANDA

IN THE MATTER OF THE ELECTRICITY ACT 1999, CAP 145 LAWS OF UGANDA

IN THE MATTER OF THE ELECTRICITY TRIBUNAL

COMPLANT EDT NO. 005 OF 2019

BETWEEN

KYAKIMWA SAUDA & ANOTHER ========== COMPLAINANT

AND

ECO POWER HOLDINGS LIMITED ========== RESPONDENT

Before:

Mr. Charles Okoth - Owor
Mr. Anaclet Turyakira
Eng. Paul Mubiru

JUDGEMENT

Brief Background

1. Eco Power Holdings Limited (Respondent) constructed a hydropower plant in Kasese District and in the process of doing so acquired by way of purchases from various persons including parcels of land belonging to Kyakimwa Saudah (CW1) and Musubaho Zubairi (CW3) a couple and residents of Kikongo Upper Rugendendabara 1 Cell, Kikongo Ward, Rugendabara Kikongo Town Council, Kasese District, for the Project. This was in the years 2012 and 2015. In their complaint filed at the Tribunal on 30th January 2019, the duo complained of the under valuation of their respective pieces of land which they owned as a couple.

2. They contended that they negotiated and entered into agreements for the surrender of their respective pieces of land to the Respondent as a result of undue influence

having been told that Government would take the land for free if they did not accept the money offered to them by the Respondent. They further contended that the transactions were done in the English language, in which language they did not have a lot of competence. Furthermore, they contended that their land was seriously undervalued alleging that the amounts that were paid for similar pieces of land in the same district for the "same project" by Nyamwamba EMS were higher yet the people who were paid by Nyamwamba EMS were alleged to be squatters on Kilembe Mines land. They contended that their complaints to the Kasese District Local Government Chairperson were ignored by the Respondent, the Respondent said that it was not willing to re-open the matter

3. The Complainants therefore run to the Tribunal seeking the following orders: -

    a. A declaration that their pieces of land were not properly valued "keeping in mind that squatters on Kilembe Mines land were paid more money".

    b. An independent re-evaluation to be done.

4. In its defense, the Respondent contended that it entered into mutual agreement with the Complainants to purchase their land. The Respondent further contended that the Complainants' land was properly valued and the Valuation Report was approved by the Chief Government Valuer. Though the agreements were written in English, the Respondent contended that prior to their execution, the contents of the agreements were read, translated and explained to the Complainants. The Respondent also contended that there was no undue influence subjected upon the Complainants and the agreements were signed in the presence of other people who were witnesses and with clear consciences of both parties to the agreements. The Complainants were paid all their dues and no balance remained and the entire process from valuation, negotiation and payment involved the area Local Council who represented the Complainants' interests, the Respondent contended.

5. The Complainants were represented by Counsel Adolf Masereka of Ngamije Law Consultants and Advocates located at Plot 42 Rwenzori Road, P.O. Box 279 Kasese while the Respondent was represented by Counsel Herbert Kigundu Mugerwa of

Kabayiza, Kavuma, Mugerwa and Ali Advocates located at Bandali Close, P. O. Box 36362 Kampala.

6. The Complainant's witnesses included Ms. Kyakimwa Saudah (CW1), Mr. Masereka Mustafa (CW2) and Mr. Musubaho Zubairi (CW3). The Respondent's witnesses included Mr. Tugume Emmanuel (RW1), Mr. Kambale Daniel (RW2) and Mr. Kanyonyi Yowasi (RW3).

Issues to be determined

7. The following issues were agreed upon:

    a. Whether there was proper valuation and adequate compensation for the Complainants' properties; and

    b. What remedies were available to the parties.

Submissions

8. In his submission, **Counsel for the Complainants** contended that the basis of the Complaint was undervaluation and that there was undue influence and that most transactions were entered into in the English language, which language the Complainants did not have competences, a situation that resulted into undervaluation. He contended that CW1 had told Court in her Witness Statement (paragraph 11) that one Kanyonyi Yowasi and Kambale told CW1 when she wanted to refuse to sign the Sales Agreement that Government has the power to take the land for free and that this was collaborated by CW3. He further contended that during cross-examination, CW1 told Court that she was not invited when they were measuring her land and that one Katikiro Alex and Daniel Kambale had threatened her. Counsel for the Complainants further contended that CW1 had stated that in 2015 she was tricked with prices and that she did not complain early because she was told that they (Respondent) would give her more money and that this was confirmed by CW2 and CW3.

9. Counsel for the Complainants also contended that during cross-examination, RW2 stated that he handled 125 complaints an indication that it is not only the Complainants

in this matter who did not agree with the valuation but that the Complainants did not go to the Grievances Committee because its head, RW2 had threatened them and therefore opted to go to the Environment Officer of the Respondent and the LCV Chairperson.

10. The Complainants' submission also dealt at great length on the issue of illiteracy. Counsel referred to **Section 1 (b) of the Illiterates Protection Act, Cap 78** which defines an illiterate in relation to a document as, a person who is unable to read and understand the script or language in which the document is written or printed and **Section 2** which is to the effect that signatures of illiterate persons should be verified. He cited Justice Madarama, in **Miao Huaxian Vs Crane Bank and Another Miscellaneous Application No. 76 of 2016 at page 10** in which the Honorable Justice Madarama interpreted Sections 2, 3, 4 and 5 of the Illiterates Protection Act stating that "*the word document as used under sec, 2,3,4, 5 of the Illiterates Protection Act has the object of enactment, in other words, it is a document capable of being used as evidence of fact or a thing against the person of an illiterate*"

11. Counsel contended that all the proceedings of the Tribunal were translated in the Lukonzo language, all documents were in the English language and CW2 (Musubaho Sanairi[1]) only thumb marked an indication that they do not read and write. He also contended that the purported translator Kanyonyi Yowasi (RW3) himself did not understand the English language. He further contended that Exhibits CE4 and CE3(i) were made by lawyers who have a higher bargaining power than the Complainants and the purported attestation on Exhibit CE3(i) is by a lawyer who does not know the local dialect of the Complainants.

12. Counsel for the Complainants also contended that the Respondent's lawyers used different names on the purported valuations forms stating that on Exhibits CE2(i), CE2(ii), CE2(iii) and CE2(iv) the name Rwimi Mini Hydro Power Project – Kitswamba was used while the memorandum of Sales Agreement had the name Eco Power Holdings Ltd and under Exhibit CE4, the name Rwimi EP Co, Ltd was used all of which are different and were used to hide the truth from the Complainants who were only asked to append their signatures/thumb prints and which the Complainants did without

[1] Counsel for the Complainant seems to have confused the Complainants' witness as CW2 was Masereka Mustafa and CW3 was Musubaho Zubairi

understanding, something that caused under valuation. He contended that if there was proper translation, the Complainants would have seen all the anomalies and therefore there was no fair dealing and the Complainants did not understand what they were doing.

13. Counsel for the Complainants also cited the case of **Nakiwala and 2 others vs Rwekibira and Another CS No. 280/2006 decided in 2014 at page 9** that "*Going by the settled position of the law on the matter as above stated, the mandatory provisions of the Illiterates Protection Act Cap 78 would apply with full force to the two documents. They cannot be relied upon in any litigation by any party trying to enforce a right. It is also the established law that the provisions are requirements of substantive law and cannot be regarded as technicalities that could be cured under article 126(2) e of the Constitution. This finding was buttressed by the case of* ***Tikens Francis and another vs the Electoral Commission & 2 others (Supra)*** *where the Court held that, inter alia that; the legal requirements of the Illiterates Protection Act are legal requirements and not procedural requirements. The law cannot be bent under Article 126 (2) e of the Constitution".* He contended that all the documents the Respondent is trying to rely on to enforce its right are in total disregard of the law and thus have no force under the law.

14. He contended that it is trite law that a Court of law cannot sanction an illegality once brought to its attention as was held in **Makula International versus His Eminence Cardinal Nsubuga 1985 HCB at page 11.**

15. Counsel for the Complainant also contended that Stanfield Property Partners – Certified Valuers never endorsed/stamped any of the documents tendered in the Tribunal and instead Exhibits CE7(ii) and CE7(iii) were stamped by Meridian Surveyors, thus creating doubt to the whole process of valuation.

16. He concluded his submission by contending that the Complainants had proved their case and prayed the Tribunal to hold that:

    a. The land was undervalued;
    b. Order for independent valuation;
    c. Subsequent compensation;

d. Mense profits;
e. Costs of the suit; and
f. Any other order the Court may deem fit.

17. **Counsel for the Respondent** focused his submission on the two areas namely;

a. Whether there was proper valuation of the Complainants pieces of land bearing in mind that squatters on Kilembe Mines land were allegedly paid more money than the Complainants; and

b. Whether in the circumstances an independent re-evaluation should be done.

18. In the submission, Counsel for the Respondent highlighted paragraph 4 of the Complaint which stated that:

"We are however of the considered opinion that our land was seriously undervalued considering the amounts that were paid for similar pieces of land in the same district for the same Project by Nyamwamba EMS. This is even irrespective of the fact that the Nyamwamba Project, the people paid were squatters on Kilembe Mines Project. We will avail samples of agreements in case need arises".

19. He cited the case of **Interfreight Forwarders Ltd Vs East African Development Bank Civil Appeal No.33 of 1992,** which he said set the Law of Pleadings by stating categorically that parties have to stick to and cannot depart from their Pleadings. He contended that the Complainants failed to prove their case with any cogent evidence, stating that:

a. Whereas the Complainants case was that comparatively the Kilembe Mines squatters' land was valued higher than their land the Complainants did not adduce evidence to support this allegation. No witness from among the effected Kilembe Mines squatters was brought to the Tribunal and no compensation agreement from the affected squatters was tendered as evidence.

b. The complaints seemed to arise from the fact that the value of the Project compared to what was paid to them was peanuts. This is apparent from Exhibit CE8 which is a letter from the second Complainant (CW3) to the Respondent, dated 7th April 2018 in which the second Complainant stated that:

"The Project in my land is a multibillion one yet I was under paid. I wish you compared the value of my land in regard to the Project that has been planted thereon and the profits that you have always realized. If I may ask, do you really think the five million you paid to me was in any way of comparison with the Project thereon?"

c. Counsel for the Respondent contended that it was apparent that the Complainants were under the mistaken impression that the valuation should have been commensurate to the future value of the developments on the land or the Projects to be enjoyed by the Developer from the land, whereas not.

d. He further contended that according to Exhibits CE2(ii- iv) and CE7 (i – iv) the valuations were carried out in 2012 yet the Complainants officially communicated complaints to the Respondent in 2018 (after six years) and failed to explain why they delayed to complain, during cross-examination. Furthermore, Kambale Daniel (RW2) testified that as Chairperson of the Grievances Committee of the Project affected persons, he has never received any complaint from the two Complainants since 2012.

20. Counsel for the Respondents contended that the Complainants' land was properly valued and that the Complainants were happy with the valuation and subsequent compensation and their Complaint was an afterthought which arose six (6) years later after the land was valued and they had received their respective compensations. He also contended that of all the Project affected persons, it was only the wife and husband couple (the Complainants) who have complained and indeed RW2 (Kambale Daniel) who was also a Project affected person has never complained.

21. Counsel for the Respondent also contended that in 2012, the locality was a rural setting (a Sub-County) as evidenced by Exhibits CE2(i – iv), CE7 (ii- iv) and paragraph 8 of CW3's Witness Statement. Nine (9) years later, the terrain had changed and

according to Exhibit CE8, a Power House had been built on the land by the Respondent and Exhibit CE1 shows photographs of developed land with a Power House thereon. The sparse vegetation had been replaced with a Power House and the property values had automatically appreciated as a direct consequence of the developments by the Respondent.

22. Counsel for the Respondent contended that it was untenable to have the properties re-valued for purposes of getting the alleged values of 2012. He further contended that the Complainants were guilty of laches and acquiescence explaining that Laches as a doctrine in Equity states that:

"those who delay in assertion of an equitable right will not be entitled to bring an action"

23. He contended that because of the delay in asserting their legal right, the landscape had changed, the place which was a Sub-County in 2012 is now a Town Council and the property rates had now appreciated and due to the delay it was now impossible to get a Valuation reflecting the 2012 values.

24. Counsel for the Respondent concluded his submission by contending that the Valuation was above board as it involved the Local Authorities as testified by RW2 and RW3. The Local authorities translated the proceedings to the Complainants and the Property assessments CE2 (i – iv) and CE7(ii – iv) were signed by the Complainants and the Local authorities. He contended that RW1 categorically stated that the process from inception to compensation was supervised by the local authorities especially the process of identifying the Complainants' property, valuing the property and subsequently payments/compensation for the properties. The local authorities participated in the process to ensure that the local residents got a fair deal and that the process was transparent and all the documents involved were translated to the Complainants before execution.

25. He contended that the Complaint was frivolous, vexatious and untenable in law and prayed that it be dismissed.

Assessment

26. We have perused all the evidence adduced by the parties in this matter and wish to make the following observations:

27. In his submission, Counsel for the Complainants pleaded the issue of illiteracy of the Complainants as a fundamental pillar against which the evidence adduced by the Respondent should be expunged. Counsel for the Complainant brought out Exhibit CE7(i), a Memorandum of Sales Agreement executed between CW3 and the Respondent on 18th October 2012 by which the Respondent paid Shs. 5,954,00/= to CW3 for 0.57 acres of land and the crops thereon. CW3 thumb printed both the first, second and the Certificate of Attesting Witness pages of the said Memorandum of Sales Agreement. Counsel also contended that Davis Wesley Tusingwire of Muwema & Mugerwa Advocates & Solicitors was not fluent in the local language Lukonzo and therefore would not have satisfactorily translated the contents of the Sales Agreement to the Complainant, CW3.

28. However, scrutinizing Exhibit CE8, which is a hand written letter written by CW3 to the Respondent on 7th April 2018, the following observations can be made:

    a. The handwritten letter (CE8) is in the English language, exhibiting an author who is sufficiently fluent in the English language, and signed, not thumb printed, by CW3.

    b. If the pleadings by Counsel for the Complainants, on this issue of illiteracy, were to be sustainable, the original letter would be expected to be in Lukonzo (and written by a third party), and possibly only thumb printed by CW3, said to be an illiterate. This, however, was not the case.

    c. When asked during cross-examination whether he is the one who wrote this letter (CE8), CW3 answered in the affirmative.

    d. Similarly, although CW1 thumb printed the Memorandum of Sales Agreement submitted as Exhibit CE3(i), and her letter to the Respondent dated 5th April

2018 (Exhibit CE5), she appended her signature on documents Exhibited as CE2(i), CE2(ii), CE2(iii) and CE2(iv) implying that she may be able to write and read.

e. The contention by Counsel for the Complainant that Davis Wesley Tusingirwe was not fluent in the Lukonzo language was not supported by any evidence and is speculative at most.

29. Furthermore, the evidence adduced shows that among the people who participated in the entire process right from Project land identification through compensation were those who were fluent in both the English and Lukonzo languages. For example, Mr. Kambale Daniel (RW2), who testified that he was one of the project affected persons. It is clear, therefore, that throughout the land acquisition process there was sufficient ability and opportunity to provide translation services to those who needed the same or to avail oneself of the same. RW2 also stated that he was the head of a Grievances Committee which handled 125 complaints raised by project affected persons. 125 is a sizeable number and it is highly unlikely that out of all the project affected persons only two people, the Complainants, are the ones who suffered or became victims of language barriers.

30. The pleading of illiteracy as a factor to rely upon to expunge the evidence adduced by the Respondent is in our opinion not sustainable.

31. Furthermore, the picture painted in the Complainants' submission that the Respondent was dealing with only a group of illiterate unsuspecting project affected persons is negated by examining Exhibit CE7(ii) which shows that among the project affected persons was Mukwano Industries Ltd, who according to this Exhibit parted with 0.235 acres towards the Respondent's Project. Such a project affected person, Mukwano Industries Ltd, is a company of stature and exposure and therefore not likely to be taken advantage of and neither is there a convincing reason that of the so many PAPs, the Respondent chose to victimize or take advantage of the two Complainants only in the evaluation and compensation process.

32. Turning to the issue of valuation, Counsel for the Complainant contended that no Valuation Report was attached to the Respondent's defense nor was it exhibited

signaling that no report was made. He further contended that although RW1 stated that the valuation was conducted by Stanfield Property Partners Certified Valuers, these never signed anywhere on the submitted documents and that instead it is Meridian Surveyors who stamped Exhibit CE7(ii) and CE7(iii). However, Exhibit CE2(iii) and CE2(iv) appear to be on Stanfield letterheads. Furthermore, CE2 (i – iv) and CE7 (ii) and CE7(iii) speak to the valuations and surveys of the properties which are a subject of the matter before the Tribunal. It was not necessary to attach the voluminous valuations for all the other project affected persons since these were not relevant to the matter at hand.

33. The issues raised by Counsel for the Respondent, namely the time lapse (six years from 2012 to 2018 when a formal complaint was made by the Complainants to the Respondent and now nine years since 2012); the developments on the suit land which were made by the Respondent and the change of status of the locality from Sub-County in 2012 to now Town Council thus significantly altering the value of properties in the locality are persuasive. The formal complaints of the Complainants to the Respondent, Exhibits CE5 and CE8 do not mention the size of land which the Complainants now claim to be 2 acres and 1 acre respectively. During cross examination the Complainants stated that the sizes of land were not included in the formal complaints because they expected to raise the issue of size during discussions with the Respondent. The size of land is a central issue in this matter and we find that the explanation given by the Complainants on this issue is not convincing. Furthermore, no independent valuation was tendered by the Complainants to concretize their contention.

34. The Complainants had an opportunity to take their complaint to the Grievances Committee which was set up to handle complaints under the Project. Had they utilized that opportunity, the issue of land size would have been resolved at that time, before construction of structures on the suit land, by engaging an independent surveyor. Nine years later, with structures on the suit land, it would be a nightmare to identify the boundaries of the previous various parcels of land. The reasons given by the Complainants during cross-examination that they did not go to the Grievances Committee because its head, RW2, had threatened them, are not convincing. They ought to have made the effort to submit their complaints to this Committee which was set up for the purpose of resolving such issues.

35. The idea of the Complainants comparing the value of their land to the value of the Project developed on the said land as indicated in their formal complaints to the Respondent is misguided and ill conceived. In her complaint, Exhibit CE5, CW1sugests a monthly rent of Shs.1,00,000/= for her land or a purchase price of Shs.100 million while CW3 under Exhibit CE8 demanded for Shs. 500,000/= monthly rent for the land or an additional Shs.50 million. CW3 also suggested to refund to the Respondent the money originally paid to him by the Respondent so that the Respondent removes the Power plant from the suit land. These demands are obviously ridiculous and are nothing but after thoughts after seeing the transformation of the face of the lands, already sold.

36. In a nutshell, we are persuaded by the submission of Counsel for the Respondent. It is untenable to open up the valuation issue nine years later when developments have been made on the suit land which makes it difficult to trace the original boundaries of the different parcels of land and also given that the status of the locality has changed from Sub-County to Town Council making the resultant values very different and definitely higher than what they were in 2012.

Determination of the issues

37. On the balance of probabilities, the Complainants have failed to convince this Tribunal of a need and efficacy of conducting of a re-evaluation of the suit land nine years after the original valuation was conducted. From the evidence brought before the tribunal by both parties, it is our opinion that the valuation exercise was carried out in a transparent manner involving local councils of the area. A Grievances Committee was put in place to handle any residual issues arising out of the land acquisition process which the Complainants chose not to engage. The Complainants in their wisdom opted to ignore this Committee and raised complaints to the Respondent six years later. **The Tribunal therefore declines to grant a re-evaluation, convinced that there was proper evaluation.**

Conclusion

38. In conclusion, the Complaint is dismissed. It is the Tribunal's ruling that each party should meet its costs.

We so order.

Charles Okoth - Owor .....
Chairman

Anaclet Turyakira.....
Vice Chairman

Eng. Paul Mubiru.....
Member

Date: .....May 2022.