

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000486-MR

WILLIAM F. ALLARD, D.M.D.

APPELLANT

v.

APPEAL FROM HANCOCK CIRCUIT COURT
HONORABLE TIMOTHY R. COLEMAN, JUDGE
ACTION NO. 18-CI-00126

BIG RIVERS ELECTRIC CORPORATION,
A KENTUCKY CORPORATION

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: LAMBERT, MAZE, AND L. THOMPSON, JUDGES.

LAMBERT, JUDGE: This is a condemnation action in which William F. Allard, D.M.D., has appealed from the interlocutory judgment and order entered by the Hancock Circuit Court on March 26, 2019, permitting Big Rivers Electric Corporation (Big Rivers) to take possession of certain property he owned. Allard also appeals from the order entered the same date denying his motion for a hearing

on Big Rivers' rights regarding the issuance of the interlocutory judgment. We affirm.

Big Rivers is a rural electric cooperative corporation that was organized and exists under Kentucky law and is a public utility that is authorized to engage in the generation, production, and transmission of electricity in Kentucky. As such, it has the authority to exercise the right of eminent domain. In July 2018, the Kentucky Public Service Commission (PSC) granted Big Rivers a Certificate of Public Convenience and Necessity in *In the Matter of Application of Big Rivers Electric Corporation for a Certificate of Public Convenience and Necessity to Construct and Acquire a 345 kV Transmission Line in Hancock County, Kentucky*, PSC Case No. 2018-00004. The object of this project was to mitigate grid congestion on part of the Mid-Continent Independent System Operator transmission system in Hancock County and to strengthen the 345 kV transmission backbone in the region. It was meant to improve Big Rivers' ability to import and export electrical power, facilitate economic expansion, and provide employment opportunities for Hancock County residents.

In order to implement the project, Big Rivers had to obtain easement rights-of-way and related easement rights from landowners, including Allard. Allard owned real property on Muddy Gut Road in Hancock County through which Big Rivers sought to construct the transmission line. Big Rivers reached an

agreement with Allard set forth in an agreement dated July 20, 2017, in which Allard granted Big Rivers an easement for the construction and operation of the transmission line on his property in exchange for the payment of \$81,000.00. In preparing for the construction, Big Rivers discovered a small cemetery on property not owned by Allard that was located in the right-of-way of the planned route of the transmission line. Because Kentucky Revised Statutes (KRS) 381.697 requires the protection of burial grounds, Big Rivers did not want to disturb the cemetery by constructing the line close to it. That and other concerns were raised in a November 20, 2018, letter to Allard. Big Rivers sought a modified easement that would cover a different path but would cover approximately the same amount of property as contained in the original easement. It offered Allard an additional \$5,000.00 for the new easement.

On December 7, 2018, Allard met with representatives of Big Rivers, where they discussed the offer outlined in the November 20, 2018, letter as well as Allard's proposal to alter the route to avoid a 300-year-old Chinkapin oak tree located along the path of the newly proposed easement. Big Rivers did not accept Allard's proposal. Allard responded with a written counterproposal a few days later, which included his proposed path change, among other modifications. In a letter dated December 14, 2018, Big Rivers responded to Allard's counterproposal and rejected it, noting that the requests he made had either already been rejected or

were never raised during the negotiation period for the easement agreement. It did, however, agree to change some of the language in the easement agreement, such as to reflect the correct law firm in the scrivener's certificate.

Based upon these factual allegations, Big Rivers filed a verified petition for condemnation against Allard on December 17, 2018, pursuant to KRS 279.110 and KRS 416.540-416.680, the Eminent Domain Act of Kentucky. Big Rivers requested that the court appoint three impartial commissioners pursuant to KRS 416.580 to determine the value of the land before and after the taking to determine the amount Allard should be awarded; that the commissioners file a written report with the clerk of the circuit court with their award; and that the court enter an interlocutory judgment pursuant to KRS 416.610, finding that Big Rivers had the right to condemn the easement and authorizing it to take possession of the easement upon payment of the compensation awarded by the commissioners. If Allard were to file exceptions to the amount of the commissioners' award, Big Rivers requested a trial by jury pursuant to KRS 416.620 to determine the proper amount of compensation that should be awarded.

Allard filed an answer and counterclaim on December 21, 2018. He alleged that Big Rivers had failed to act in good faith, honestly, openly, sincerely, and without deceit or fraud, and that it had breached its duty of good faith and fair dealing. He alleged that Big Rivers had acted arbitrarily in seeking the new

easement and had violated his due process rights. In his counterclaim, Allard alleged trespass by Redwing Ecological Services, Inc., the company hired by Big Rivers to perform an environmental analysis of the proposed corridor; by TERRACON, the company hired by Big Rivers to perform siting, suitability, and other analyses of the proposed corridor; and by an unidentified surveyor Big Rivers hired to perform a survey. He alleged that they had all covered areas not included in the existing easement on his property. Allard also alleged bad faith in negotiating and fraud in the inducement for the original easement. Allard sought dismissal of Big Rivers' complaint and compensatory and punitive damages on his counterclaim.

Big Rivers moved to dismiss the counterclaim as impermissible pursuant to KRS 416.610 because an answer to a condemnation petition may only address the question of the right of the petitioner to condemn the property it sought to be condemned. Big Rivers later moved to remand this motion at a motion hour on January 22, 2019.

In January 2019, Big Rivers moved for leave to file a verified amended petition in order to correct the amount it had paid to Allard for the existing easement. Of the \$81,000.00 it paid to him, \$16,200.00 of that amount was for an interest in a separate parcel not at issue in the condemnation proceeding. It therefore changed the amount of compensation Allard received to \$64,800.00.

The circuit court granted the motion, and the verified amended petition was filed on January 22, 2019. The same day, the court entered an order appointing three commissioners. The report they filed described the property at issue and included the results of their evaluation. The fair market value before the taking was \$1,320,000.00; the fair market value after the taking was \$1,245,200.00; and the difference was \$74,800.00. Less the \$64,800.00 already paid to Allard by Big Rivers, the amount due was \$10,000.00.

In his answer to the verified amended petition, Allard stated that the commissioners improperly reduced the amount to be awarded for the new easement “by an amount of undetermined origin” from the original easement.

On March 13, 2019, Big Rivers filed a motion for an immediate interlocutory judgment granting it the right to condemn real property owned by Allard. It argued that it had established the right to condemn the property and disputed Allard’s claims related to trespass, the violation of his constitutional rights, and the propriety of the commissioners’ report. Allard moved for additional time to respond to the motion, stating that he had not been properly served with a copy of the commissioners’ report and that he intended to outline the constitutional issues related to Big Rivers’ attempted taking of his property. He stated he had a right to a trial or a hearing so that he could bring Big Rivers’ arbitrary actions to the attention of the court. He also argued that an appraisal must be done to

determine the proper amount of just compensation. Big Rivers objected to this motion.

On March 20, 2019, Allard filed a motion to strike any reference to offers or negotiations between the parties after the petition for condemnation was filed as these good-faith efforts must take place prior to the filing of the petition. He also moved to strike the commissioners' report filed February 15, 2019, due to the inclusion of the amount Big Rivers had paid him for another easement. He said that Big Rivers had agreed to replace that report with one filed in January 2019, but it was now arguing that the report filed in February 2019 was the correct report. In essence, Allard was seeking to eliminate the reference to the \$64,800.00 he was paid for the first easement. In his memorandum in support of his motion, Allard discussed the environmental effects the condemnation would have on the property (the loss of the oak tree) and the suggestion of an alternate route. Big Rivers objected to this motion, pointing out that Allard conceded there was no statutory requirement for a hearing in this case as he was not contesting its power to take and that the preservation of an oak tree does not warrant a hearing under KRS 416.610(4). Big Rivers went on to object to Allard's motion to strike the commissioners' report and any reference to settlement negotiations, stating that any valuation error could be corrected by a jury if necessary and that the negotiations were only provided as they might bear on its good-faith negotiations.

On March 22, 2019, Allard filed a response in opposition to Big Rivers' motion for an immediate interlocutory judgment. He sought a hearing regarding Big Rivers' abuse of its power of condemnation and his rights in relation to the oak tree. He continued to argue about the commissioners' report. He also raised an estoppel argument, in that Big Rivers had argued before the PSC that it had all of the easements necessary to construct the transmission line, then filed the condemnation action to seek another one.

At a hearing on March 26, 2019, Big Rivers contested Allard's motion for a hearing, stating that the hearing he was seeking was not about its power to take pursuant to the statute but about the proposed route. The route was not something that could be litigated in this court because Big Rivers had broad discretion to determine the route. Allard argued that Big Rivers already had a route and that the issue remained with the commissioners' report as to the amount of the award.

On March 26, 2019, the circuit court entered an interlocutory judgment and order finding that Big Rivers had the right to condemn the easement in real property owned by Allard; that the February 15, 2019, commissioners' report conformed to the provisions of KRS 416.580, subject to a separate order of the court entered that day; that Big Rivers was permitted to take possession of the easement upon payment of the compensation awarded in the commissioners'

report; and that if no exceptions were filed within 30 days, the Master Commissioner was to execute a deed of easement conveying the right-of-way across Allard's land to Big Rivers. A second order entered that day denied Allard's motions for a hearing, for extension of time, and to strike comments about negotiations after the filing of the petition. A third order addressed the amount of the award and Allard's objection to the reduction of the amount awarded as a credit from the easement previously negotiated between the parties. The court determined that it was beyond the scope of the commissioners' duties to deduct the amount previously paid and ordered that the award should be \$74,800.00 to conform with KRS 416.580. The issue as to whether Big Rivers should be granted a credit would be addressed upon proper motion and hearing. This appeal now follows.¹

On appeal, Allard argues that he was entitled to a hearing on Big Rivers' motion for an immediate interlocutory judgment, that the condemnation action should have been dismissed, and that Big Rivers should not have been granted immediate possession of the easement.

In 1976, the General Assembly enacted the Eminent Domain Act of Kentucky, codified in KRS 416.540-416.680. "The purpose of the act was to set

¹ In its brief, Big Rivers stated that Allard's brief did not comply with Kentucky Rule of Civil Procedure (CR) 76.12 in that it did not contain ample references to specific pages of the record. Allard corrected these deficiencies in his reply brief.

up a new and uniform condemnation procedure.” *Ratliff v. Fiscal Court of Caldwell County, Kentucky*, 617 S.W.2d 36, 38 (Ky. 1981). The term “[c]ondemn” is defined as “to take private property for a public use under the right of eminent domain” and the term “[c]ondemnor” is defined as “any person, corporation or entity, including the Commonwealth of Kentucky, its agencies and departments, county, municipality and taxing district authorized and empowered by law to exercise the right of eminent domain[.]” KRS 416.540(1) and (2). KRS 416.550 defines the right to condemn as follows:

Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670. It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability.

KRS 416.570 provides that the condemnor must file a verified petition setting forth the following information:

Except as otherwise provided in KRS 416.560, a condemnor seeking to condemn property or the use and occupation thereof, shall file a verified petition in the Circuit Court of the county in which all or the greater portion of the property sought to be condemned is located, which petition shall state that it is filed under the provisions of KRS 416.550 to 416.670 and shall contain, in substance:

(1) Allegations sufficient to show that the petitioner is entitled, under the provisions of applicable law, to exercise the right of eminent domain and to condemn the property, or the use and occupation thereof, sought to be taken in such proceedings;

(2) A particular description of the property and the use and occupation thereof sought to be condemned; and

(3) An application to the court to appoint commissioners to award the amount of compensation the owner of the property sought to be condemned is entitled to receive therefor.

KRS 416.610, in turn, sets forth the proceedings in eminent domain cases and provides for the entry of an interlocutory judgment if certain findings are made:

(1) After the owner has been summoned twenty (20) days, the court shall examine the report of the commissioners to determine whether it conforms to the provisions of KRS 416.580. If the report of the commissioners is not in the proper form the court shall require the commissioners to make such corrections as are necessary.

(2) If no answer or other pleading is filed by the owner or owners putting in issue the right of the petitioner to condemn the property or the use and occupation thereof sought to be condemned, the court shall enter an interlocutory judgment which shall contain, in substance:

(a) A finding that the petitioner has the right, under the provisions of KRS 416.550 to

416.670 and other applicable law to condemn the property or the use and occupation thereof;

(b) A finding that the report of the commissioners conforms to the provisions of KRS 416.580;

(c) An authorization to take possession of the property for the purposes and under the conditions and limitations, if any, set forth in the petition upon payment to the owner or to the clerk of the court the amount of the compensation awarded by the commissioners;

(d) Proper provision for the conveyance of the title to the land and material, to the extent condemned, as adjudged therein in the event no exception is taken as provided in KRS 416.620(1).

(3) Any exception from such interlocutory judgment by either party or both parties shall be confined solely to exceptions to the amount of compensation awarded by the commissioners.

(4) If the owner has filed answer or pleading putting in issue the right of the petitioner to condemn the property or use and occupation thereof sought to be condemned, the court shall, without intervention of jury, proceed forthwith to hear and determine whether or not the petitioner has such right. If the court determines that petitioner has such rights, an interlocutory judgment, as provided for in subsection (2) of this section, shall be entered. If the court determines that petitioner does not have such right, it shall enter a final judgment which shall contain, in substance:

(a) A finding that the report of the commissioners conforms to the provisions of KRS 416.580;

(b) A finding that the petitioner is not authorized to condemn the property or the use and occupation thereof for the purposes and under the conditions and limitations set forth in the petition, stating the particular ground or grounds on which the petitioner is not so authorized;

(c) An order dismissing the petition and directing the petitioner to pay all costs.

“[T]he judgment referred to in KRS 416.610 as an ‘interlocutory judgment,’ was final and appealable as to the issue of the right to condemn and the right to immediate entry.” *Hagg v. Kentucky Utilities Co.*, 660 S.W.2d 680, 681 (Ky. App. 1983).

In *God’s Center Foundation, Inc. v. Lexington Fayette Urban County Government*, 125 S.W.3d 295 (Ky. App. 2002), this Court addressed the law related to eminent domain and our general standard of review in such cases.

It is undisputed that the LFUCG has the authority to condemn property through the sovereign power of eminent domain of the Commonwealth subject to the constitutional restriction that the taking be for “public use” and the condemnee receive “just compensation.” The taking of private property for a non-public use may also offend due process and the prohibition on the arbitrary exercise of power in Section 2 of the Kentucky Constitution. Generally, the condemning body has broad discretion in exercising its eminent domain authority including the amount of land to be taken. A

determination by the condemnor that the taking is a necessity is ordinarily conclusive, but the courts will review the condemning body's exercise of discretion for arbitrariness or action in excess of its authority. The condemnor's decision on the amount of land to be condemned will be disturbed only if it is unreasonable in relation to the public interest or welfare involved and the condemnor may consider the future, as well as the present, needs for the taking. Kentucky courts have also imposed a duty on the condemnor to negotiate in good faith the acquisition of the property prior to seeking condemnation. In *City of Bowling Green v. Cooksey*, [858 S.W.2d 190 (Ky. App. 1992)], the Court stated: "Under KRS 416.550, the condemnor cannot acquire the property in fee simple if it can obtain access or use of the property through other privileges or easements." The party challenging the condemnation, however, bears the burden of establishing the lack of necessity or public use and abuse of discretion.

Since this case was tried before the circuit court without a jury, we review the trial court's factual findings under a clearly erroneous standard and the legal issues *de novo*. Factual findings are not clearly erroneous if they are supported by substantial evidence. "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. Although the factors of necessity and public use associated with condemnation are ultimately legal issues, resolution of those issues encompasses factual matters subject to deferential review on appeal.

Id. at 299-300 (citations omitted). With this in mind, we shall consider Allard's arguments on appeal.

For his first argument, Allard contends that the circuit court should have held an evidentiary hearing on Big Rivers' motion for an intermediate interlocutory judgment based upon his allegations of lack of good-faith negotiations, fraudulent misrepresentations to the PSC, and necessity. Big Rivers points out that the circuit court properly held a hearing on March 26, 2019, after which it found that Big Rivers had the right to condemn the easement at issue.

Allard cites to *Idol v. Knuckles*, 383 S.W.2d 910, 911-12 (Ky. 1964), in support of his argument that he is entitled to an evidentiary hearing, specifically to this statement:

Subsection (5) of KRS 99.420 provides in part:

‘* * * Any issue raised in the answer or other pleading filed, putting in issue the right of the agency to condemn the property shall be promptly heard and decided by the court, without a jury. * * *.’

This subsection specifically entitles the petitioners to a hearing in the circuit court. However, the Agency contends that the circuit court is required to enter an interlocutory judgment pursuant to the provisions of subsection (9) of this statute even though the issue raised by petitioners' answer has not been heard. If this contention were upheld it would permit the taking, and possible damage, of petitioners' property before any hearing and determination of the right to condemn as provided by subsection (5). We do not believe that the legislature intended such an illusory determination of this right.

He also cites to *Cartmell v. Urban Renewal and Community Development Agency of City of Maysville*, 432 S.W.2d 445, 447 (Ky. 1968), for this holding: “It is our conclusion that the effect of KRS 99.420(14) is to deny an appeal challenging the agency’s right to condemn. We have observed that once the circuit court affords a hearing and renders a judgment sustaining the agency’s right to condemn, the interlocutory judgment is then appropriate.” However, the citations in both of these cases are to old versions of KRS 99.420, which currently states:

Whenever in the opinion of the agency, land or other property, right of way or easement over or through any property is needed by the agency in order to accomplish the purposes of KRS 99.330 to 99.510, it may by resolution authorize the purchase or condemnation in the name of the agency, of the land or other property, or right of way or easement necessary for the purpose, and may proceed to condemn and acquire the property pursuant to the Eminent Domain Act of Kentucky.

Finally, Allard cites to *City of Bowling Green v. Cooksey*, 858 S.W.2d at 192, for this statement: “If unable to reach an agreement, the condemnor must file a petition pursuant to KRS 416.570. The landowner having filed a response contesting the condemnation is entitled to a hearing before the trial court regarding the petitioner’s right to condemn.”

We have reviewed these cases cited by Allard, but we agree with Big Rivers that none of them requires an evidentiary hearing in addition to the hearing held by the circuit court in this case. The circuit court certainly heard Allard’s

arguments with respect to Big Rivers' right to take the easement at the March 26, 2019, hearing. It did not find these arguments persuasive and ultimately granted Big Rivers' motion for an interlocutory judgment. There was no need for, nor right to, another hearing in this case. Accordingly, we find no error or abuse of discretion in the circuit court's denial of Allard's motion for an evidentiary hearing.

Next, Allard argues that Big Rivers' condemnation petition should have been dismissed based upon estoppel (for fraudulently representing facts to the PSC), arbitrariness (for failing to honor the original easement), lack of necessity, and the failure to negotiate in good faith.

First, we agree with Big Rivers that estoppel does not bar it from condemning Allard's property.

[O]nly in exceptional circumstances is estoppel invocable against a governmental agency. See *Maryland Casualty Company v. Magoffin County Board of Education*, Ky., 358 S.W.2d 353 [(1961)]. Secondly, estoppel almost never is invoked against condemnation by a governmental unit. See *Chesapeake & Ohio Ry. Co. v. Greenup County*, 6 Cir., 175 F.2d 169 [(1949)]. This is because the power of condemnation is not susceptible of abridgement even by specific agreement. See *City of Louisville v. Milton*, Ky., 247 S.W.2d 975 [(1952)]; *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796 [(1924)]. It would seem also that ordinarily there should be little equitable basis for an estoppel against a condemnation, because the condemnee is entitled to be paid, in the condemnation proceeding, the full market value of the property taken from him. So,

in order to invoke an estoppel in the instant case, exceptional and extraordinary equities would have to be found.

Urban Renewal and Community Development Agency of Louisville v. International Harvester Co. of Delaware, 455 S.W.2d 69, 72 (Ky. 1970). At the March 26, 2019, hearing, counsel for Big Rivers stated that the PSC had been informed about the need for a modified easement, and Allard had been compensated.

Second, Big Rivers did not act arbitrarily when it petitioned the court to condemn the modified, but overlapping, easement in order to avoid a small cemetery found along the original route. Allard's citation to *City of Owensboro v. McCormick*, 581 S.W.2d 3 (Ky. 1979), is inapplicable here because the taking was to benefit a private citizen, not for a public use. The *McCormick* Court held:

Naked and unconditional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of governmental authorities is repugnant to our constitutional protections whether they be cast in the fundamental fairness component of due process or in the prohibition against the exercise of arbitrary power. Ky.Const. Sec. 2.

Id. at 5-6. Here, Big Rivers is a public utility that has statutory authority to produce electricity in Kentucky for the benefit of its citizens. Allard has failed to establish that Big Rivers acted arbitrarily in this regard.

Third, we find no merit in Allard's lack of necessity argument. He posits that Big Rivers could have gone ahead with the original easement and moved the cemetery, or it could have chosen to build through a different route that would not affect the oak tree. However, "the condemning body has broad discretion in exercising its eminent domain authority including the amount of land to be taken." *God's Center*, 125 S.W.3d at 299 (citations omitted). It is not within the power of Allard to dictate the route the transmission line should take.

And fourth, we disagree that Big Rivers failed to negotiate in good faith. The record establishes that Big Rivers worked to negotiate the modified easement with Allard prior to filing the petition, and this included offering additional money above what it had already paid Allard for the original easement. And Big Rivers continued to offer Allard even more money after it had filed the petition.

Therefore, we hold that the circuit court did not commit any error in granting the motion for an interlocutory judgment.

Finally, and while this argument is contained in the conclusion section of his brief, we disagree with Allard's assertion that Big Rivers did not have the right to take immediate possession of the property. Pursuant to KRS 416.610(2)(c), Big Rivers was entitled to immediate possession once it paid the

amount awarded by the commissioners. Allard, on the other hand, cites to the Supreme Court of Kentucky's opinion of *Ratliff, supra*, to support his argument:

The condemnor can proceed to achieve whatever construction and/or destruction that was the purpose of the petition for condemnation. A possible remedy to prevent the immediate taking is set forth in *Stillpass v. Kenton County Airport Board, Inc., Ky.*, 403 S.W.2d 46 (1966). This may or may not be an adequate remedy as far as the condemnee is concerned. It certainly is not, however, as protective to the right of a condemnee as an immediate appeal, which preserves the status quo, and which, we believe, is demanded by Ky.Const., Sec. 115, the provisions of which were known by the 1976 General Assembly. While the word "interlocutory" normally implies a non-appealable order, such an order (no matter what it is called) can be appealed if a matter is finally litigated by the judgment, or if it operates to divest some right in such manner as to put it out of the power of the court to place the parties in their original condition. *Commonwealth et al. ex rel. Reeves v. Unknown Heirs of Brown, Ky.*, 249 S.W.2d 52 (1952). See also, CR 54.02.

We believe that if the right of immediate possession (and all that such implies) is exercised, in many instances, even if an appellate court later reverses the trial court's determination of the condemnor's right to take, that the condemnee cannot be returned to his same position. For example, see the *Cartmell* cases, *supra*. Moreover, if the mandated appeal is made after the taking, the condemnor could easily suffer by a condemnee's action in "laying under the log" and allowing excessive damages to accrue, prior to appeal.

The balancing of the equities of condemnor and the private citizen whose property can be taken is not an easy one. Certainly, the new eminent domain statute is, putting it kindly, inartfully drawn. However, prominent

in the foreground, and tipping the scales, is the mandated appeal set out in Ky.Const., Sec. 115, *supra*. We believe that the provisions of KRS 416.610(4) referring to an interlocutory judgment because of the above reason, allows an immediate, expedited appeal, by the condemnee of the question of the condemnor's right to take. There is no doubt but that a losing condemnor has this right also.

In the instant case, the condemnee made no effort to use the procedure set out in *Stillpass*, and apparently made no effort to have the final judgment of the trial court address the right of the condemnor to take her property. However, we have reviewed the testimony before the trial court concerning the right to take and, although there is some conflict, it is very clear that the selection of the route of the transmission lines and the purpose for which they were built is for a public use and is therefore proper and well within the power of the condemnor. Ky.Const., Sec. 242; KRS 416.540 *et seq*.

Ratliff, 617 S.W.2d at 39. The former Court of Appeals set forth the proper remedy in *Stillpass* as follows:

The landowners did, of course, appeal from the county court judgment in the condemnation case, and in the circuit court they raised the issue of the appellee's right to condemn, as they had the right to do, and moved for an injunction against the taking of possession until that question could be determined. This was the orderly and correct method of proceeding. When the right to take is in issue, and if the owner will be irreparably injured by an immediate loss of possession, he may ask for and is entitled to a temporary injunction at any time after he perfects an appeal to the circuit court.

Stillpass, 403 S.W.2d at 48. We note that Allard did not seek an injunction as suggested in *Ratliff* or post a supersedeas bond to stay enforcement of the

interlocutory judgment pursuant to Kentucky Rule of Civil Procedure (CR) 62.03 and CR 73.04. And we agree with Big Rivers that *Ratliff* did not abrogate KRS 416.610(2)(c) or any part of the Eminent Domain Act. Therefore, we find no merit in Allard's argument that, once he appealed the interlocutory judgment, Big Rivers did not have the right to take possession of the easement upon the payment of the award.

For the foregoing reasons, the judgment and order of the Hancock Circuit Court are affirmed.

ALL CONCUR.

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