Wachu & another v Kenya Electricity Transmission Company Limited (Environment & Land Petition E008 of 2022) [2023] KEELC 18348 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18348 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION E008 OF 2022

EK MAKORI, J

JUNE 22, 2023

BETWEEN

OSMAN GUTU WACHU ..... 1ST PETITIONER

ISMAEL HUSSEIN ABDI ..... 2ND PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ..... RESPONDENT

RULING

1. A Preliminary Objection has been raised by the Respondent in this matter seeking that the entire Petition and Application dated 1st March 2022 be struck out on the following fronts:
   a. The Court has no jurisdiction to entertain the suit.
   b. The Petitioners have no *locus standi* to institute the proceedings.
   c. The Petition and Notice of Motion are fatally defective.
   d. The Petition has not met the threshold for a grant of injunctive or conservatory orders.
2. At the hearing hereof the court directed the parties to file their respective submissions on the Preliminary Objection and the authorities which they intended to rely on. They did comply and on the 15th of March 2023, counsels for the parties did highlight their submissions orally.
3. According to the Respondent, the gist of the Preliminary Objection is that the court does not have jurisdiction to hear and determine the Petition and Notice of Motion. The Petitioners' claim is for compensation, which is provided in Section 148 of the *Land Act* and Sections 173 (1), (3), and 175 of the *Energy Act* 2019. The compensation for wayleave acquisition and sub-station sites by the Respondent has no Constitutional underpinning.

4. The Respondents averred that the first adjudicative forum is the Energy and Petroleum Tribunal established under Section 25 of the *Energy Act* 2019 to hear and determine all disputes and appeals from the Energy and Petroleum Regulatory Authority (EPPRA) in matters relating to Energy and Petroleum under Section 9 of the Act and grant such equitable reliefs (injunction, penalties, damages, specific performance) pursuant to Sections 36 (1) and (5) of the *Energy Act* 2019.

5. Section 175 of the *Energy Act* 2019 and Sections 170 to 174 of the Act also guarantee the right to compensation for wayleave acquisition for setting up of energy infrastructure (Transmission Lines and Substations). The Tribunal should determine any dispute between parties as to the amount payable as compensation as it has first jurisdiction. In the event the Petitioners are aggrieved by the decision of the Tribunal, they are at liberty to file an appeal to this Court by dint of Section 37(3) of the Act. The Petitioners have not invoked the jurisdiction of the Tribunal as per the laid down procedures aforesaid.

6. From the foregoing, the Petitioners have no constitutional cause of action against the Respondent and ought to bring their claim by way of the Plaint at the appropriate forum. The issue of compensation can be aptly addressed through statutory legislation without resulting in Constitutional demands. The Notice of Motion being grounded on the Petition automatically fails too.

7. The Respondent submitted that the prayer for a conservatory order was not pleaded for in the Petition. The court was urged to discard the prayer. To buttress this, reliance was placed on the case of *Nganda Kalandi v Timothy Mutinda Nzioka* [2012] eKLR where the court declined to grant a prayer for an injunction that was not craved in the main suit.

8. The Respondent further averred that where there is a clear provision under Statute, the framework laid ought to be followed as enunciated by the Court of Appeal decision in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR

9. The Respondent proceeded further to state that in *Emmanuel Nyongesa & 34 others v County Government of Trans Nzoia* [2021] eKLR and *Ibrahim Wakhanyanga & 2 others v Chief Magistrate's Court Kakamega & 2 others; Attorney General for Land Registrar Kakamega (Interested party)* [2022] eKLR affirmed the Court of Appeal decision and held that courts lose their jurisdiction through the principle of constitutional avoidance.

10. Concerning referring matters to the Energy and Petroleum Tribunal by the exhaustion principle, the Respondent placed reliance on the case of *Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd* [2015] eKLR where the court referred a similar dispute on compensation to the defunct Energy Regulatory Commission, which has now been replaced with Energy and Petroleum Tribunal. The Respondent referred this court to the recent decisions of this Court in *Vitalis Ouma Osan v Kenya Power & Lighting Co. Ltd* [2021] eKLR and *Nathan Ombati Soire & 7 others v Kenya Power & Lighting Company Limited* [2021] eKLR, which decisions also dealt with the doctrine of exhaustion.

11. The Respondent concluded that the suit herein is a nullity as there are sufficient statutory provisions under the *Energy Act* 2019 and the *Land Act* 2012 to address the issue of compensation. Further reliance was placed on the decision of *Macfoy v United Africa Co. Ltd* [1961] 3 All ER which was cited with approval in Phoenix of E.A. Assurance Company Limited (*Supra*) where the court held that a suit filed in a court without jurisdiction or contrary to any laid down procedure is a nullity. The court was urged to dismiss the suit.

12. The Respondent submitted that the locus to commence proceedings on behalf of communities residing in Biksidera and Kalkacha sub-locations within Tana River County, that allegedly have persons residing on the unregistered community land within Tana River County, is a preserve of the County Government or the Governor of Tana River under Article 63(3) of *the Constitution* as read with Section

6 (1) of the *Community Land Act*. The Petitioners are not trustees of community land or holders of the office of the County Governor Tana River.

13. Additionally, the Petitioners have allegedly filed a representative suit on behalf of the communities residing in Biksidera and Kalkacha sub-locations within Tana River County. The Petitioners have not attached any authority from the other community members residing within the said locations they allege to represent and have not even stated where they reside within the alleged sub-locations. The Petitioners should have at least brought letters from the area chief or local administration in this regard. In absence of the letters from the local administration or minutes of the communities' meetings, the Petitioners should be deemed as strangers.

14. As it stands, without the authority, the Petition before this court relates to the Petitioners' case to the exclusion of other members of the previously mentioned communities. In this regard, the Respondent relied on the case of *Shadrack Mwamuu Nzioka & 2 others (suing on their behalf as officials of Crescent Self Help Group) v Tropical Blooms Limited* [2020] eKLR where the court held that parties who have not given authority to a person to plead or file suit on their behalf cannot be said to be parties to a suit.

15. The court was urged to take judicial notice of the proceedings in Malindi ELC Petition 09 of 2021 *Said Buya Mbaraka & others v Ketraco, County Government of Tana River, and the National Land Commission*. The issues brought through this Petition (compensation to communities residing in unregistered community land within Tana River County) and prayers sought will be aptly addressed in the said case as the County and the Governor represent them. This Petition is therefore sub-judice.

16. The Petitioners contended that the Preliminary objection is misconceived and bad in law. It is submitted that Article 22 of *the Constitution*, provides that every person has a right to approach the court for redress whenever the person feels his rights have been violated or threatened to be violated and that a person can act for the interest of others. This is further buttressed under Rule 4(2)(ii) of the *constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013.

17. On the issue of *locus standi* the Petitioners submitted that in the case of *Kakisegei Clan v Katemuge & another; AG (Interested Party)* [2020] eKLR the court held that any member of an affected community could sue to forestall infringement of any rights in respect to unregistered land and not the Governor or County Government alone had such standing.

18. The Petitioner submitted that the Preliminary Objection has not met the threshold laid in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, that the objection has not raised pure points of law, and that the facts relied on are contested and disputed. Issues like the exhaustion of internal dispute resolution mechanisms raised are issues for trial. That the objection raised is not purely on points of law as held in *Sella Rose Anyango v Attorney General & 2 others* [2021] eKLR.

19. The Petitioners further submitted that the objection raised lacks specifics, particularly in grounds 2, 3, and 4, thus defective and should be dismissed. The case of *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2004] is cited.

20. On the constitutional underpinning of the issues raised in the Petition, the Petitioners stated that the case of *Summayya Athmani Hassan v Masinde Simidi* [2019] eKLR is not applicable since it dealt with Employment and Labour Relations issues. The current Petition is hinged on constitutional infringement and violations.

21. At this point, the issues, which stand for determination, are whether the Preliminary Objection raised has merit and whether the current Petition and the pending Application should be dismissed in limine.

As held by Law JA. in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* [1969] thus:

> "...so far as I'm aware, a preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

22. The thrust of the Preliminary Objection rests straight on the jurisdiction of this court, as held by Nyarangi JA.in *Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd* [1989] eKLR:-

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

23. The Preliminary Objection raised by the Respondent attacks the jurisdiction of this court to entertain the Petition and the Application. It has to be addressed in a moment. It has the potential of disposing of the entire suit or core of its substratum.

24. The jurisdiction of the court has been attacked on these fronts – under the doctrine of abstention or exhaustion, the Petitioners lack locus standi to sue on behalf of the communities residing within Biksidera and Kalkacha sub-locations within Tana River County, the Petition has no constitutional underpinning, and should have been filed elsewhere and that there is another pending matter before this court Malindi ELC No. E009 of 2021 which has already resolved(sic) the issues raised in this Petition.

25. The Petitioners filed their Petition dated 1st March 2022 seeking:

    a. A declaration that the Respondent has infringed and breached the Community's constitutional rights provided for under Articles 40, 47, and 63 of *the Constitution* of Kenya.

    b. A permanent injunction restraining the Respondent from alienating or in any manner interfering with the unregistered community parcels situated at Biksidera and Kalkacha sub-locations within Tana River County.

    c. A declaration that the Respondent's purported acquisition of unregistered community parcels situated at Biksidera and Kalkacha sub-locations within Tana River County is unconstitutional.

    d. An order for assessment and valuation of unregistered community parcels of land situated at Biksidera and Kalkacha sub-locations within Tana River County.

    e. General and exemplary damages for violation of the community's rights and fundamental freedoms under *the constitution*.

    f. Costs and interest thereon.

    g. The Petitioners also filed their Notice of Motion dated 1st March 2022 under a certificate of urgency seeking; a temporary injunction and conservatory order against the Respondent

from carrying out any construction works or acquiring and alienating unregistered community parcels situated at Biksidera and Kalkacha Sub-Locations within Tana River County.

h. The Petitioners also sought an order for assessment and valuation of the unregistered community land.

i. Both the Petition and the Notice of Motion were supported by the Affidavit sworn by Osman Gutu Wachu on 1st March 2022.

26. The Respondent in the Preliminary Objection has attacked the multifaceted nature of the Petition. The Petitioner's claim is for compensation, which is provided in Section 148 of the *Land Act* and Sections 173 (1), (3), and 175 of the *Energy Act* 2019. The compensation for wayleave acquisition and sub-station sites by the Respondent has no Constitutional underpinning. Section 148 of the *Land Act*, No. 6 of 2012 provides as follows:

148. Compensation in respect of public right of way

1. compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damage suffered in respect of trees crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.

2. Compensation relating to a wayleave or communal right of way shall not be paid to a public body unless there is a demonstrable interference of the use of the land by that public body.

3. Damage caused as a result of the creation of a wayleave shall include any preliminary work undertaken in connection with surveying or determining the route of that wayleave, and whether the trees, crops, or buildings so damaged were included in the route of the wayleave as delineated in the order of the Cabinet Secretary.

4. The duty to pay compensation payable under this section shall lie with the State Department, county government, public authority, or corporate body that applied for the public right of way, and that duty shall be complied with promptly.

5. If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may make any additional costs and inconvenience incurred by the person entitled to compensation.

27. The averment by the Respondent that the Energy and Petroleum Tribunal as established under Section 25 of the *Energy Act* 2019 to hear and determine all disputes and appeals from the Authority in matters relating to Energy and Petroleum under the Act and can grant equitable reliefs (injunction, penalties, damages, specific performance) pursuant to Sections 36 (1) and (5) of the *Energy Act* 2019, is apt. The

roadmap laid there resonates with the decision and holding in the case of *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR where the court held:

> We adopt and uphold the general principle in the persuasive authority in Barbara De Klerk (*supra*) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to find a cause of action directly on *the Constitution* without challenging the legislation in question. That principle has been reinforced by the Supreme Court in the Communications Commission case (*supra*).

28. Section 175 of the *Energy Act* 2019 and Section 170 to 174 of the Act also guarantees the right to compensation for wayleave acquisition for setting up of energy infrastructure (Transmission Lines and Substations. The Tribunal should determine any dispute between parties as to the amount payable as compensation as it has first jurisdiction. In the event the Petitioners are aggrieved by the decision of the Tribunal, they are at liberty to file an appeal to this Court by dint of Section 37(3) of the Act. The Petitioners have not invoked the jurisdiction of the Tribunal by the laid down procedures. I agree with the Respondent on this point.

29. Numerous decisions have been quoted to support the assertion that the first port of call has to be the Energy and Petroleum Tribunal See, for example, *Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties)* [2023] eKLR where the Court of Appeal extensively discussed the doctrine of abstention when there is another organ mandated by law to arbitrate on a matter, that other organ should be the first port of call. In this case, The Energy and Petroleum Tribunal should be the first adjudicative organ mandated by statute in dealing with compensation in case of compulsory acquisition to set up energy infrastructure including wayleaves as in this case. The Court of Appeal in the Abidha Nicholus Case (supra) stated that the envisaged complaint resolution mechanism in the *Energy Act* is three-tiered. The first is to raise a complaint with the Energy and Petroleum Regulatory Authority (EPPRA), the successor of the Energy Regulatory Commission (ERC). The second tier is the Energy and Petroleum Tribunal under section 36 of the Act by way of an Appeal. The third tier under section 37(2) of the Act is an appeal to the ELC. The court took a journey through several decisions on the doctrine of abstention, with of course the leading pronouncement being *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 Others* [2020] eKLR, Petition 3 of 2020 where the Supreme Court held:

> " ...It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised its discretion to hear and determine the Petition.
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> (51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination if there would be other appropriate legislatively mandated institutions and mechanisms.
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> (52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in *Railroad Commission of Texas v Pullman Co.*, 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The

doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.

(53) Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected.

(54) The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance..."

30. The position taken by the Supreme Court in the Kibos Case is also elucidated by the apex Court in *United Millers Limited v Kenya Bureau of Standards and 5 Others* [2021] eKLR, as follows:

"(25) Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in *Peter Odour Ngoge v Francis Ole Kaparo & others*; SC Petition No. 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of *the Constitution*. From the foregoing, we find no difficulty in concluding that the issues before the High Court, as well as the Court of Appeal, did not either involve the interpretation and application of *the Constitution* or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped

in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.

(26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.

(27) In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine Petition No. 4 of 2021 or the instant application for conservatory or stay orders."

31. The Kibos doctrine on abstention as I can call it, is then to the effect that where a claim in a Petition or Suit is multifaceted as the one we have here, the best approach to take is to reserve the constitutional issues to await the determination of the primary adjudicative authority as pronounced by the Supreme Court.

32. The position on judicial abstention goes hand in hand with constitutional avoidance as held in the Court of Appeal decision in *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR (*supra*).

33. As already stated, the *Energy Act* has laid a sufficient framework to deal with the issue of compensation. It is my view that that path has to be followed.

34. In this Petition then, the route provided by the *Energy Act* on disputes resolution mechanism of this nature has to be followed. The Petitioners have not shown that they have charted that pathway.

35. I then come to the next issue as to whether the Petitioners have the necessary locus standi to propagate this Petition on behalf of the community residing in the unregistered parcels situated at Biksidera and Kalkacha Sub-Locations within Tana River County. The Respondents are of the view the Petitioners have no capacity. Under Article 63(3) of *the Constitution* as read with Section 6 (1) of the *Community Land Act*, it is the County Government or the Governor in this case the Tana River County who can bring up a suit of this nature. The Petitioners are not trustees of the unregistered community land or holders of the office of the County Governor of Tana River. I agree too with the Respondent on this point.

36. On the Representative capacity of the Petitioners, nothing was attached to give them consent to bring up this Petition. The Petitioners were of the view that the Architect of our constitution allows any party to bring a claim of this nature on behalf of the community. On this issue, I am persuaded by the decision quoted by the Respondents - *Shadrack Mwamuu Nzioka & 2 others (suing on their behalf as*

officials of Crescent Self Help Group) v Tropical Blooms Limited [2020] eKLR: where Angote J. held as follows:

> " The applicability of Order 1 Rule 8 and Order 1 Rule 13 of the Civil Procedure Rules have been considered by the courts. In the case of *Free Pentecostal Fellowship in Kenya v Kenya Commercial Bank* (1992) eKLR, the court held as follows:
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> > "The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of or against all the members of the body or bodies. Where there are numerous members, the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 Rule 8 of the Civil Procedure Rules..."
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> 21. In the case of *Kahindi Katana Mwango & Another v Cannon Assurance K. Ltd* (2013) eKLR, this court stated as follows:
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> > "Indeed, Order 4 Rule 4 of the Civil Procedure Rules requires that where the Plaintiff sues in a representative capacity, the Plaint shall state the capacity in which he sues. The Plaintiff's Originating Summons does not state whether the Jeuri Community Based Organization, through the two Plaintiffs, suing on behalf of 41 others is a representative suit or not. That, in my view, renders the suit incurably defective. As at the time of filing the suit, the Plaintiffs were under an obligation to show the written authority entitling them to sue on behalf of "Jeuri Community Based Organisation" or on behalf of 41 others in accordance with the provisions of Order 1 Rule 13 of the Civil Procedure Rules, 2010. The Applicant cannot just annex a list of the inhabitants on whose behalf he purports to be acting which is not signed by any of the persons listed therein."
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> 22. The Plaintiffs in this suit have filed the suit in their own capacity and on behalf of an organization calling itself Crescent Self-Help. Although the members of the Crescent Self-Help Group have not given the three Plaintiffs written authority to swear Affidavits and plead on their behalf, the 2nd and 3rd Plaintiffs have done so.
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> 23. To the extent that the three Plaintiffs have pleaded that the suit is brought on their own behalf, and the other two Plaintiffs having given the 1st Plaintiff authority to sign the Affidavit on their behalf, this suit is sustainable, but only in respect to the three Plaintiffs, and not any other member of Crescent Self Help Group.
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> 24. The other members of the Group that never gave the 1st Plaintiff written authority to swear and plead on their behalf cannot be said to be parties to this suit as Plaintiffs."

37. There is nothing on record to show that the petitioners have any authority from the community or body or group of persons to represent them in this Petition. Therefore, the Petitioners lack standing, in this case, to propagate this claim on behalf of others whose identity is unknown. The question which arises is if compensation were to be ordered who are these other community members to benefit?

38. This court's attention was drawn to the pendency of Malindi ELC No.E009 of 2021. The suit had been pending before Odeny J. I have had an occasion of perusing the file. The Petition in that matter was similar to this one where some parties had approached the court on behalf of over 300,000 members of different communities within 11 locations namely Ndera, Kalkacha, Chifiri, Bura, Hosingo/Hirimani, Chwele, Dakanotu, Sala, Mororo, Madogo, and Saka traversing more than 1748.93 acres of unregistered Community Land under the County Government of Tana River by virtue of Article 63(3) of *the Constitution* and Section 6(1) of the *Community Land Act*.

39. An out-of-court settlement was reached whereby a sum of Kshs, 171,394,662.71/- was paid to the members of the communities alluded as compensation for limited loss of land use, the compensatory sum being the cumulative value of land in areas traversed by the Garsen-Hola-Bura-Garissa Transmission Line. The money was deposited in the account of the lawyers acting for the Petitioners. On application for joinder of the County Government of Tana River and The Governor, the court held it was germane to do so and ordered the monies to be deposited in a special earning account to be run by the County Government of Tana River. That settled the matter.

40. The same lawyers here represented the Petitioners in Petition No 9 of 2021. The issues raised here were the same as those in that Petition. The joinder of Tana River County and its Governor was necessary to act as trustees for the benefit of that large number of residents. The Petition dealt with Energy infrastructure traversing that wide area, including what is pleaded here.

41. The Preliminary Objection raised herein as a whole is germane it is allowed with the net effect that the entire Petition and the pending Application dated 1st March 2022 are hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS DAY 22ND OF JUNE 2023

E.K. MAKORI

JUDGE

In the presence of :

Mr. Chiboli for Respondents

Ms. Omwamba for Petitioners

Court Clerk: Happy