



Prigal Limited & another v Kenya Electricity Transmission Co. Ltd (Constitutional Petition 4 of 2021) [2023] KEELC 18044 (KLR) (20 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18044 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
CONSTITUTIONAL PETITION 4 OF 2021**

**A OMBWAYO, J
JUNE 20, 2023**

BETWEEN

PRIGAL LIMITED 1ST PETITIONER

MICHAEL MWANGI MUTURI 2ND PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO. LTD RESPONDENT

JUDGMENT

1. The petitioners commenced the present suit *vide* the petition dated 17th February 2021. The petitioners sought the following prayers;
 - a. A declaration that the Petitioner's rights enshrined In the Bill of Rights have been grossly violated and/or infringed by the Respondents in the manner set out herein.
 - b. An Order directing the Respondents to forthwith promptly pay in full Just way leave compensation in the sum of Ksh 65,797,788.00 to the Petitioners for way leave through properties known as L.R. No. 5212/16, 5212/17, 5212/18 and L.R. No. 5212/19 situate in Naivasha Sub-county In Nakuru County in terms of the letters of offer dated 18.12.2020 by the Respondent to each of the Petitioners herein as set out at paragraph 15 of the Petition hereof.
 - c. Interest on (3) above at commercial rates from 24/12/2020 until payment in full.
 - d. In default to (2) and (3) above, an order of permanent injunction and or prohibition to restrain the Respondent herein either by themselves, through their servants and or officers acting on their instructions from trespassing onto, constructing the 400/220/132kv Olkaria-Lessos-Kisumu transmission line through and or within the Petitioners properties known as L.R. No. 5212/16, 5212/17, 5212/18 and L.R. No. 5212/19 situate in Naivasha Sub-county in



Nakuru County and/or in any way interfering with the Petitioners lawful use, possession and developments on the suit property in contravention of Statute and *the constitution* of Kenya.

- e. Any other relief that the court may deem fit to grant in the circumstances of the petition.
2. The petitioners aver that the 1st petitioner was the registered owner of L.R No. 5212/16, 5212/17 and L.R No. 52512/19 while the 2nd petitioner was the registered owner of L.R No. 5212/18.
3. The Petitioners also aver that the suit properties were subdivisions of L.R No. 5212/168 (originally 5212/20) comprised of the grant registered as IR No. 181051/1 situated in Naivasha sub-county.
4. In December 2020, the respondent sought wayleave corridor through the suit properties for the construction of its 400/220/132kv Olkaria-Lessos-Kisumu transmission line. That they offered to compensate the petitioners Ksh 65,797,788/=.
5. That on 29th January 2021, they were surprised to receive a notification that their wayleave compensation had been withheld because there was a Gazette Notice No. 1716 of 22nd February 2022 which indicated that the title to L.R No. 5212 had been revoked by the National Land Commission.
6. That they moved to court in Nakuru ELC Petition No. 8/2019 (Consolidated with ELC Petition No. 24 of 2019) *Prigal Ltd & Prosperity Ltd & NLC & 2 Others* where orders were issued on 8th October 2019 and 19th November 2019 staying the execution of the said gazette Notice.
7. That the actions of the respondent to withhold the said compensation were baseless and ultra vires Section 173(3) of the *Energy Act* as no work could commence unless compensation was made. That the actions of the respondent violated the provisions of the *Land Act*, *the Constitution* and the *Energy Act* by failing to pay the wayleave compensation. The petitioners then set out particulars of violations of constitutional and fundamental rights and freedoms.
8. The petition was supported by the supporting affidavit of Igal Elfezouaty a director of the 1st petitioner. He reiterated the contents of the petition and deposed that the respondent was merely refusing and obstructing compensation in violation of the petitioners' rights.
9. The petitioners filed a supplementary affidavit sworn on 2nd December 2022 on 24th January 2023 by Igal Elfezouaty. He deposed that it was not disputed that the petitioners and the respondent had negotiated and agreed upon Ksh 65,797,788.00 as wayleave compensation for the respondent's 400/220kv DC Olkaria-Lessos-Kisumu transmission project through the petitioners properties. He also deposed that the respondent was granted the said wayleave and had been utilizing the suit properties since February 2021 to date. He further deposed that the respondent failed to pay the said compensation on the grounds that there was a pending ownership dispute. That the court in its judgement delivered on 28th September 2022 in Nakuru ELC Petition No. 8 of 2019 consolidated with ELC Petition No. 24 of 2019 quashed Gazette Notice No. 1716 of 22nd February 2019 that purported to revoke the petitioners titles to the subject properties and so there was no dispute as to the ownership of the suit properties. That the respondent has still declined to pay the petitioners which has violated their rights.
10. The respondent filed a Notice of Preliminary Objection to the petition dated 1st February 2023 on 2nd February 2023 on the following grounds;
 - a. The petition does not meet the threshold of a Constitutional petition.
 - b. The petitioners have remedies provided for them under several statutes and invoking a constitutional petition is an abuse of the process of this court.



- c. The petitioners' claim is a simple claim for money which should not be canvassed by way of a debt claim rather but has been disguised as a violation of constitutional rights.
11. The respondent also filed a replying affidavit sworn by Johnson Muthoka on 1st February 2023 on 2nd February 2023. He deposed that the petition is an abuse of the court process and the petitioners should have filed an ordinary statement of claim for compensation rather than a petition. That the compensation was withheld on account of a challenge to the petitioners titles based on an advisory by the National Land Commission on revocation of their titles. That the respondent had issued to the petitioners letters of offer which had not been accepted. That the transmission lines have been constructed and completed. That the court had ordered the respondent to deposit in an interest-bearing joint account the sum of Ksh 65,797,788.00 pending determination of the issue of ownership of the suit properties. That the petitioners did not complete the due process for compensation to be paid. That the petitioners have a claim on account of an entity known as Morendant Limited which was reflected as the owner of L.R No. 5212/19 and yet was not a party in the present proceedings. That even though judgement was delivered in Nakuru ELC Petition No. 8 of 2019 consolidated with ELC Petition 24 of 2019 validating the petitioners title, a Notice of Appeal had been filed by one of the parties in the said suit. That it would not be prudent that the petitioners be compensated when the dispute over their ownership was still lingering and so the petition should be struck out.
12. The petitioners filed a further supplementary affidavit sworn by the 2nd petitioner on 8th February 2023 on 13th February 2023. He deposed that it was not disputed that the respondent gave the petitioners letters of offer dated 18th December 2020. He also deposed that the petitioners accepted the said offers on 24th December 2020 and 30th December 2020 and returned them to the Respondent. That the respondent took possession and completed the transmission line on the suit properties. That the allegations by the respondent that the petitioners never accepted the letters of offer was an afterthought. That the respondent in an affidavit sworn on 4th March 2021 and filed on 5th March 2021 indicated that it was ready to pay the petitioners as soon as the issue of ownership was resolved. He reiterated that the issue of its ownership of the suit property had been resolved in Nakuru ELC petition No. 8 of 2019 consolidated with ELC Petition No. 24 of 2019 and no stay of execution of the decree been granted. That the respondent flouted its own procedures by taking over the suit properties for a public purpose without just compensation and without intent to register easements over the property. That the allegation that there was a third party claim by Morendat Ltd is an afterthought and that their petition raises a reasonable cause of violation of their right to property.
13. The petitioners filed their submissions dated 11th January 2023 on 17th January 2023 where they identified two issues for determination; whether their rights were violated and whether they should be compensated.
14. On the first issue, the petitioners relied on Article 40(3) of *the Constitution* of Kenya, Section 111 of the *Land Act* and the case of *Modern Coast Builders & Contractors Limited v National Land Commission* [2021]eKLR and submitted that the respondent is in occupation of the petitioners property and yet it had refused to pay the wayleave compensation. The petitioners also submitted that the respondent's reason for withholding way leave compensation which was that there was an ownership dispute was an afterthought and baseless. It was the petitioners' submissions that judgement in Nakuru ELC petition No. 24 of 2019 had been entered that quashed the Gazette Notice No. 1716 of 22nd February 2019.
15. On the second issue, the petitioners submitted that since their ownership of the suit property had been confirmed, they are entitled to compensation and relied on the case of *John Peter Mwangi v National Land Commission & another* [2019] and Section 148(5) of the *Land Act* and sought that the petition be allowed as prayed.



16. The petitioners also filed supplementary submissions dated 23rd February 2023 on 28th February 2023. The identified the following issues for determination; whether the petitioners are the proprietors of the suit properties herein, whether the petitioners claim by way of a constitutional petition herein is properly before court and if not, what is the consequence, whether the respondent is acquiring ownership rights over the suit properties or merely overriding interests and whether the petitioners are entitled to compensation.
17. On the first issue, the petitioners submitted that they have demonstrated that they are the owners of the suit properties and which ownership was affirmed by the court in {abbr{title Environment and Land Court } ELC petition No. 9 of 2019 consolidated with ELC Case No. 24/2019// that resolved the dispute over the suit properties which judgement has not been set aside.
18. On the second issue, the petitioners relied on Article 40(3) and (4) of *the Constitution* of Kenya and submitted that it is not disputed that the respondent had sought wayleave over the suit property which was granted to them but they have failed to compensate them hence they have violated Article 40(3) of *the Constitution* of Kenya by depriving them of their use of the suit property.
19. They also relied on the cases of *RC v KKR* [2021] eKLR and sought that the court protects their rights as provided for under Articles 27 (1), (2) and 40 of *the Constitution*.
20. The petitioners further relied on the cases of *David Gitau Thairu v County Government of Machakos & 2 Others* [2020] eKLR, *Trusted Society of Human Rights Alliance v Attorney General & 2 Others* Civil Appeal No. 290 of 2012, *Christabel Akinyi Onyango v Kenya Airports Authority* [2014] and submitted that this court is the proper forum to hear their case and there has been a violation of their rights.
21. On the third issue, the petitioners relied on Article 40(3) of *the Constitution* and submitted that each deprivation of property must be compensated promptly regardless of its nature. The petitioners also submitted that the compensation in the present matter was for a wayleave which was an overriding interest that deprived the petitioners their right of enjoyment of the suit properties.
22. On the fourth issue, the petitioners submitted that an order of compensation was available under Article 23(3)(e) of *the Constitution* of Kenya. The petitioners also submitted that they accepted the respondent's letters of offer on 24th December 2020 and 30th December 2020 after which the respondent took possession of the suit properties and put up and completed the transmission lines. The petitioners further submitted that they are therefore entitled to be compensated. They relied on the case of *David Gitau Thairu v County Government of Machakos & 2 others* [2020] and sought that their petition be allowed as prayed.
23. The respondent did not file any submissions to the petition.

Analysis and determination

24. After considering the petition, the responses thereto and the submissions, it is my view that the following issues arise for determination;
 - a. Whether this court has the jurisdiction to determine the present petition.
 - b. Whether the petitioners are entitled to the orders sought in their petition.
25. On the first issue, the respondent raised a preliminary objection to the petition and alleged that it did not meet the threshold of a constitutional petition as the petitioners claim was for money which should have been canvassed by way of a debt claim. The petitioners on the hand argued that the



respondent's actions of taking possession of the suit property and constructing transmission lines without compensating them violated their rights under *the constitution*.

26. The court in the case of *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* [2021] eKLR while dealing with a similar matter as the present suit, held as follows;

“28. A perusal of the amended petition filed on 26th February 2021 reveals that it was averred at paragraphs 7 to 10 thereof that the 1st respondent offered the petitioner compensation on 4th November 2020, that the petitioner communicated back that the offer was neither sufficient nor just and that the parties then engaged in communication with a view to agreeing on the quantum of compensation. Although the petitioner has claimed that the 1st respondent infringed on its right to property as guaranteed by Article 40 by proceeding with construction of the line without its authority, the dispute between the parties is simply one of compensation. If the petitioner is paid a just compensation, no more issue would arise. I do not see any constitutional angle to the dispute, much the same way that a vendor of land cannot file constitutional petition claiming that a purchaser who has not paid the purchase price has infringed on his right to property as guaranteed by Article 40. That kind of a case would certainly not fit within the constitutional jurisdiction of the court.

29. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of *the Constitution* by filing a petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3). The “compensation” contemplated by Article 23 is in regard to denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22 and not compensation in respect of wayleave.”

27. Similarly, in the present matter, the petitioners in their petition stated that they were the owners of the suit properties and that they had granted the respondent a wayleave corridor through the suit properties and they were to be compensated Ksh 65,797,788.00. The petitioners indicated that the respondent failed to pay them on the ground of a dispute over the ownership of the suit property which as indicated, was resolved in Nakuru ELC Petition No. 8 of 2019 as consolidated with ELC Petition No. 24 of 2019 that quashed Gazette Notice No. 1716 of 22nd February 2019 that purported to revoke the petitioners titles to the subject properties in its judgement delivered on 28th September 2022.

28. It is my view therefore that given that the issue of ownership had already been determined, the only issue that remained for determination was on compensation.

29. The court in the case of *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* (*supra*) further held as follows;

“31. Determination of quantum of compensation in respect of wayleave is not a matter for the constitutional court. There exist ample statutory options for resolving such a dispute. By way of example, Section 148 (5) of the *Land Act*, 2012 as well as *Land (Assessment of Just Compensation) Rules 2017* (LN 283 of 2017) make ample provision for resolving the kind of dispute that the petitioner has presented to this court without recourse to the constitutional jurisdiction of the court.

32. In view of the foregoing discourse, I find that this court, sitting as a constitutional court, does not have jurisdiction to determine this matter.”



30. In conclusion therefore, the respondent's preliminary objection succeeds and the petition is hereby struck out. The petitioners are at liberty to file an ordinary suit if need be. Costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 20TH DAY OF JUNE 2023.

A. O .OMBWAYO

JUDGE

