



REPUBLIC OF KENYA



Kenya Electricity Transmission Company Limited v Gathirwa (Environment and Land Appeal 43 of 2021) [2023] KEELC 18673 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 43 OF 2021**

**JO OLOLA, J
JULY 14, 2023**

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ... APPELLANT

AND

JOHN KARIUKI GATHIRWA RESPONDENT

(Appeal arising from the Judgment of the Honourable Nelly Kariuki, Principal Magistrate delivered on 21st October, 2021 in Nyeri CMELC Case No. 15 of 2018.)

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable Nelly Kariuki, Principal Magistrate delivered on 21st October, 2021 in Nyeri CMELC Case No. 15 of 2018.
2. By an Originating Summons dated 5th December 2016, John Kariuki Gathirwa (the Respondent) stated that a portion of land measuring approximately 0.81 acres comprised in the parcel of land known as Ndaragwa/Kianjogu/Block 1/108 had been appropriated by the Kenya Electricity Transmission Company Limited (the Appellant) and that he ought to be compensated. Accordingly, the Respondent sought for the determination of the following questions:
 1. Whether the Defendant who had offered to pay Kshs.650,000/- per acre of land appropriated by the Defendant could after taking over the land change the amount payable;
 2. Whether the later offer for compensation at Kshs.210,600/- per acre and which was offered is reasonable and whether it does not amount to (an) arbitrary decision by the Defendant;
 3. What ought to be the right compensation and how would it be arrived at?; and
 4. Who should pay the costs?



3. The Originating Summons was supported by an Affidavit sworn by the Appellant wherein he averred that the said L.R No. Ndaragwa/Kianjogu Block 1/108 was registered in the name of his father the late Gathirwa Gathara. The Respondent further asserted that the Appellant had constructed power lines on a portion of the said parcel of land measuring 0.81 acres during the years 2015 and 2016.
4. The Respondent asserted that they met with the Appellant's representatives and agreed on a compensation rate of Kshs.650,000/- per acre. In spite of the said agreement, in June 2016, the Appellant informed him that the amount payable was Kshs.210,000/- for the portion measuring 0.81 acres. Despite his protests, the Appellant had failed to explain the undervaluation.
5. In a Replying Affidavit sworn on its behalf by its employee John Macharia on 25th February 2019, the Appellant contested the Respondent's position asserting that contrary to the Respondent's claims, the transaction involving the suit property was not an outright purchase but compensation for limited loss of use of land and acquisition of a way leave.
6. The Appellant further asserted that the sum of Kshs.650,000' - per acre was the value of the land if the same were to be sold.
It further asserted that the area affected by the transmission line was 0.81 acres, representing 40% of the 2.01 acres parcel of land and hence the sum of Kshs.210,000/- which was proposed as compensation.
7. The Appellant further asserted that the Respondent's claim lacked merit and that the Respondent had no locus standi under the Law of Succession Act and the Civil Procedure Rules to institute the suit.
8. The matter was placed before the Honourable Nelly Kariuki, Principal Magistrate who upon hearing the Parties and in a Judgment dated and delivered on 21st October, 2020 did find that the Appellant had indeed made an offer of Kshs.650,000/- per acre as compensation and proceeded to award the Respondent the sum of Kshs.526,500/- with costs and interests.
9. Aggrieved by the said finding and determination, the Appellant lodged the Memorandum of Appeal herein dated 10th November, 2021 seeking to have the Judgment set aside on the following grounds:
 1. That the Learned Magistrate erred in law and fact in awarding the decretal sum to the Respondent without proof of valid letters of administration;
 2. That the Learned Magistrate erred in law and fact by allowing an intermeddler to institute the suit on behalf of the estate of the deceased without valid Letters of Administration;
 3. That the Learned Magistrate misinterpreted the law on compensation of Wayleaves and limited loss of land;
 4. That the Learned Magistrate erred in law in disregarding the Appellant's submissions on how to calculate compensation for the wayleave trace;
 5. That the Learned Magistrate erred in law and fact in deciding that the Appellant made an offer of Kshs.650,000/- per acre as compensation without any evidence to support the offer;
 6. That the Learned Magistrate erred in law and fact by arriving at an award not based on any judicial precedent or authority; and
 7. That the Learned Magistrate grossly misdirected herself in treating the Appellant's submissions on limited loss of use of land superficially thus arriving at an erroneous decision.



10. As the first appellate Court, this Court is mandated to re-evaluate the evidence before the Trial Court as well as the Judgment and to proceed to arrive at its own independent Judgment whether or not to allow the Appeal. As was stated in *Selle & Another -vs- Associated Motor Boat Company Limited & Others* (1968) EA 123, a first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and to make conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.
11. Accordingly, I have carefully scrutinized the Record of Appeal as well as the Judgment of the Learned Trial Magistrate. I have similarly carefully perused and considered the submissions and authorities placed before the Court by the Learned Advocates representing the Parties herein.
12. By the Originating Summons dated 5th December 2016, the Respondent accused the Appellant of appropriating a portion of the suit property measuring 0.81 acres for purposes of constructing electric power lines thereon.
13. It was the Respondent's case that they met with representatives of the Appellants and agreed on a compensation rate of Kshs.650,000/- per acre. He told the Court that despite that agreement, the Appellant had after constructing the power lines on the land reneged on the agreement and that the Appellant was now offering compensation of Kshs.210,000/- for the portion on which the power lines had been constructed.
14. On its part, the Appellant did not deny entering into negotiations with the Respondent's family. It was the Appellant's case that contrary to the Respondent's assertions, the transaction involving the suit property was not an outright purchase but compensation for limited loss of use of land and acquisition of the way leave.
15. While conceding that the figure of Kshs.650,000/- featured in their discussions, the Appellant told the Court that the said sum was the agreed value of one acre of land if the same were to be sold in the area where the power lines were to pass. It was however their case that the area affected by the transmission line was 0.81 acres and that the same represented 40% of the entire parcel of land and hence their offer of Kshs.210,000/- as compensation to the Respondent.
16. Having analysed the evidence, the Learned Trial Magistrate concluded as follows at Paragraphs 6 to 8 of her Judgment:
 6. While it is not in question that the sum of Kshs.650,000/- per acre was discussed by both Parties, the question that emerges is whether this amount was for full acquisition of the land or compensation for limited loss of use. The Defendant categorically stated that they only appropriated 40% of the suit land as a way

leave trace for purposes of building their electricity infrastructure and that is why they offered compensation for limited loss of use. However, in his cross-examination, Mr. Macharia stated that they had agreed or based their compensation at Kshs.650,000/-. In his evidence in chief, he stated verbatim as follows:

“We got a valuer who advised the value of the compensation. We only used 40% of the land. A valuation was done in 2014 which was declined. National Land Commission did another valuation at Kshs.500,000/-. We reviewed the amount with stakeholders. That is how we arrived at Kshs.210,600/-“

To my understanding Mr. Macharia was rightly referring to compensation for limited loss of use of land and not full compensation as claimed in the Defendant's



pleadings. The fact that two valuations were done and reviews of the proposed amounts done to reduce the amount to the disputed offer rightly imply that an offer of Kshs.650,000/- per acre was made to the Plaintiff as claimed.

7. As a State Organ the Defendant is bound by Article 10(2) (a) of *the Constitution* 2010 which states the National Values and Principles of Governance, namely good governance, integrity, transparency and accountability. Having earlier made the offer of Kshs.650,000/- per acre, the Defendant ought to have involved the Plaintiff as a stakeholder in the process of the review of the amount involved as they could not in good consciousness proceed with the putting up of infrastructure without his and his family's consent. I therefore find that the respondent did indeed make an offer of Kshs.650,000/- per acre compensation to the Plaintiff for limited loss of use of land.
8. In summary, I hereby enter judgment for the Plaintiff against the Defendant for the sum of Kshs.526,500/- with costs and interest of the suit to be borne by the Defendant.”
17. For a start, I was unable to find the basis for the award of Kshs.526,500/- by the Learned Trial Magistrate. That figure does not appear anywhere in the Respondent's pleadings and a figure akin to that only featured for the first time during the Respondent's testimony in Court where he is captured at Page 71 of the Record testifying as follows:

“Ketraco (the Appellant) did not compensate my father. They were to do so i.e Kshs.650,000/- per acre. They reduced the amount from Kshs.650,000/- to Kshs.210,000/- without official communication. They did the change when I went to visit them at the office after construction. I refused the offer due to breach of contract.

I expected Kshs.526,600/- from the Defendant. They put up power lines. You cannot construct a house or anything under the power line. I cannot plant trees. They issued a circular preventing any action on the land afterwards. It is too risky to do anything.”
18. As can be seen from that testimony, there was no explanation offered whatsoever as to why the Respondent expected to be compensated at Kshs.526,600/-. That being the case, the Learned Trial Magistrate ought to have offered some justification for the said figure in her Judgment.
19. As it were, the Respondent did not produce any document to support his claim that the Appellant had agreed to compensate them at the rate of Kshs.650,000/- per acre. Even if that were so as the Learned Trial Magistrate appeared to accept, there was no dispute that the Appellant had not appropriated one acre of land but a portion measuring 0.81 acres thereof.
20. In his Witness Statement filed in the Trial Court and on which he relied at the trial, the Appellant's Land Economist and Valuer John Macharia Gathari (DW1) had explained the basis of the compensation at Paragraph 8 of his Statement as follows:

“8. The compensation for way leave is for limited loss of use of land which was computed as follows:

The affected area is 0.81 acres of 2.01 acres so the impact is 40%. Compensation equals 650,000 x 0.81 acres x 40% which gives a sum of Kshs.210,000/-.”
21. As it were, the above calculation was clearly based on the assumption as the Respondent put it that the total value of an acre for his land was Kshs.650,000/-. The Respondent did not contest that only 40%



of his land was taken up by the transmission lines and he neither provided another valuation for the land nor any basis to impeach the formular provided by the Appellant.

22. That being the case, this Court was persuaded that the Learned Trial Magistrate had misdirected herself and erred in arriving at the conclusion that the Respondent had proved his case and/or that he was entitled to compensation in the sum of Kshs.526,500/-.
23. Accordingly, this Appeal is allowed with the result that the Judgment delivered on 21st October, 2021 is set aside in its entirety. The same is replaced with an order dismissing the Respondent's suit in the Lower Court.
24. Each Party shall bear their own costs for both the suit and the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 14TH DAY OF JULY, 2023.

In the presence of:

Ms. Opiyo for the Appellant

Ms. Mwangi for the Respondent

Court assistant – Kendi

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J. O. Olola

JUDGE

