



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CONSTITUTIONAL PETITION NO. 1 OF 2017

1. JULIUS N. MWONI

2. STEPHEN PETER MUTHUVI

3. BEN MUTUA MUNGEI

4. SAMUEL M. KUMANDA

5. NGUNO KITHAE

6. BONIFACE MBOYA MAANZO

7. KILONZO K. MATEI

8. DAVID MUSYOKA KALAI

(ON BEHALF OF OTHER RESIDENTS OF MWINGI SUBCOUNTY).....PETITIONERS

VERSUS

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED.....RESPONDENT

RULING

1. The Respondent herein, a State Corporation registered under the Companies Act erected an electricity transmission line known as **Kindaruma – Mwingi – Garissa 132 KN** which traversed the Petitioners' Parcels of Land. Subsequently, the Respondent compensated them. Following the event, the Petitioners were of the view that the amounts awarded were extremely low such that the agreement entered into could be awarded on account of the principle/doctrine of inequality of bargaining power, illegitimate economic duress, abuse of trust and confidence, breach of fiduciary duty, breach of public policy and fair play, constructive fraud and violation of standards of commercial morality. As a result they filed this Constitutional Petition seeking orders *inter alia* that:

(i) A declaration be made that the agreements to pay the Petitioner the sum paid on account of the way leave trace that traversed their properties is null and void.

(ii) An order be made for a reputable independent valuation company to be appointed by the Court to undertake a valuation of the Petitioner's properties for purposes of compensation.

2. The Respondent opposed the application and raised a Preliminary Objection on grounds that this Court lacks jurisdiction to determine the case and that the Petition is defective having failed to set out to a degree of precision the issue complained of, the constitutional provisions alleged to be infringed and the manner of they are alleged to have been breached pursuant to the law.

3. The application was canvassed by way of written submissions that I have taken into consideration, alongside pleadings and authorities cited.

4. The Respondents have raised a Preliminary Objection. As clearly pointed out, such an objection must be on a point of law. This was stated in the case cited by the Petitioners of **Mukisa Biscuits Manufacturing Co. LTD vs. West End Distrubutors (1969) EA 696** where **Sir Charles Newbold** stated that:

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite

improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.....”

5. The Respondent’s have stated that this Court lacks jurisdiction to hear and determine the matter as it contravenes the law as provided by **Section 13** of the **Environment and Land Court**.

6. A perusal and cogitation of the pleadings show that the Respondent took up the Petitioners’ land and went ahead to compensate them. Therefore the substance of the matter is land. **Article 165(5)(b)** of the **Constitution of Kenya, 2010 (Constitution)** provides thus:

“(5) The High Court shall not have jurisdiction in respect of matters—

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

Article 162(2)(b) of the **Constitution** provides thus:

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(b) the environment and the use and occupation of, and title

to, land.”

The **Environment and Land Court Act** that was enacted by Parliament and consequently established the Environment and Land Court, **Section 13(1)** provides thus:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”

7. It is apparent that the issue in this Petition relates to the Petitioners’ land that was traversed by way of creation of a way leave trace on the Petitioners’ land, registration of easements and compensation. The Petitioner further seeks an order that will pave way for valuation of the land. This dispute as clearly put which is as a result of use of land falls squarely under **Section 13(2)** of the **Environment and Land Act**.

8. In the case of **Matonya Tea & Coffee Company Limited vs. Shikara Limited and Another (2015) eKLR** it was held that:

“The reason why the constitution and the law establish different institutions and mechanisms for dispute resolution in a different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction under Article 165 to supervise bodies such as the 2nd Respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert issues in dispute into constitutional issues when it is not.”

9. In the case of **Republic vs. Karisa Chengo & 2 Others (2017) eKLR** the Supreme Court held that:

“It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matter “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”

10. I am also persuaded by the case of **Willmary Development Limited vs. National Land Commission and Another (2018) eKLR** where **Aburili, J** stated that:

*“On the first issue of whether this court has jurisdiction to hear and determine this matter relating to compulsory acquisition of land, It was submitted that in this case, Section 13(2) of the Environment and Land Court Act is unambiguous and confers on the Environment and Land Court jurisdiction to hear and determine disputes such as this, relating to compulsory acquisition of land. Further reliance was placed on the case of **Karisa Chengo & Others vs. Republic (2015) eKLR** where the Court of Appeal held that the jurisdiction of the High Court is limited such that it cannot exercise jurisdiction on matters falling within the jurisdiction of the two courts contemplated in Article 162(2) of the Constitution – hence, this court lacks the requisite jurisdiction to hear and determine the exparte applicant’s Judicial Review application which applications should be dismissed with costs.”*

11. From the foregoing I find that the Court with the jurisdiction to hear and determine the instant case is the Environment and Land Court.

12. I have been asked to consider and find that the Petition is defective. In the case of **Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) LTD 1989 KLR I** it was stated that:

“..... the 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 of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it is without jurisdiction.”

13. I have aforesaid that this Court lacks jurisdiction to determine the matter. It therefore follows that I am not seized of the authority to determine whether or not the Petition is defective. The Court seized of the authority to do so is the Environment and Land Court.

14. I have been asked by the Respondents to strike out the Petition. However looking at the nature of the case justice would demand that I refer the matter to the Court with jurisdiction. In the premises I hereby transfer the matter to the **Environment and Land Court Machakos** for hearing and determination.

15. Mention on the 24th day of **September, 2018** before the **Machakos Environment and Land Court**.

16. The order shall apply in High Court (Kitui) **Constitutional Petition No. 4 of 2017 Daniel Muthui Musungu & 8 Others vs. Kenya Electricity Transmission Company Limited**.

Dated, Signed and Delivered at Kitui this 27th ay of August, 2018.

L. N. MUTENDE

JUDGE