



**Njoroge v Kenya Electricity Transmission Co. Ltd (Land Case Petition
E2 of 2022) [2022] KEELC 3365 (KLR) (15 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE PETITION E2 OF 2022
FM NJOROGE, J
JUNE 15, 2022**

BETWEEN

ROSE EMMA MUTHONI NJOROGE PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO. LTD RESPONDENT

RULING

1. The petitioner vide Notice of Motion dated 12/4/2022 seeks the following orders:
 1. Spent.
 2. That pending the hearing and determination of this Application inter-partes or further orders of the court, an order do hereby issue directing the respondent to forthwith promptly deposit into court the sum of KES. 13,583,581.20 being the offered compensation to the Petitioner for way leave through the Petitioner's property known as LR. No. 425/87 situated at Naivasha Sub-county in Nakuru County.
 3. That the Application be fixed for inter-partes hearing at the earliest date possible.
 4. That pending hearing of this Petition, an order do hereby issue directing the Respondent to forthwith promptly deposit into court the sum of KES. 13,583,581.20 being the offered compensation to the Petitioner for way leave through the Petitioner's property known as LR. 425/87 situated in Naivasha Sub-County in Nakuru County.
 5. That the Petition filed herewith be certified urgent and be heard on priority basis.
 6. That the costs of the application herein be paid by the respondent.
2. It is the case of the petitioner, as stated in the application, that the LR No 425/87 (hereinafter referred to as "the suit land") measuring 6.071 ha. belongs to her; that she intended to develop it and



obtained a development plan to that effect but the respondent whose construction of an electric power transmission line through the suit land rendered it unsuitable for the proposed project and offered Ksh 13,583,581 as compensation therefor. Subsequently the respondent is claimed to have taken possession thereof and completed its transmission line project but failed to pay the proposed compensation, and the plaintiff is said to be suffering substantial and irreparable loss for deprivation of the suit property for a public purpose without just and full payment. The respondent is said to have violated the provisions of articles 27,47 and 40 of the Constitution of Kenya 2010. It is also stated that in line with Articles 40(3) and (4) of the Constitution, Section 173 of the Energy Act and Part VIII of the Land Act 2012 the respondent ought to deposit the sum of Ksh 13,585,581 into a compensation fund or a joint interest earning account to secure statutory interest payable on the funds since the date of taking possession which was on or about 4/12/2020.

3. The respondent's response is by way of a sworn affidavit of Samuel Kirera, the respondent's land economist dated 19/5/2022 and filed on 23/5/2022. The deponent states that the petitioner is not the registered proprietor of the property and the petition discloses no constitutional cause of action against the respondent; that there is no contract between the petitioner and the respondent; that the court can not ascertain the petitioner's interest in the suit land before hearing of the petition; that the petitioner had no beneficial or proprietary interest in the main parcel from which the suit land was carved and the said rights vested in a third party (Panda Development Company Ltd, herein after called "Panda") who owned the land before its subdivision which occurred after the acquisition of wayleave exercise, yet the petitioner has failed to demonstrate any nexus between the suit property and the Panda. The respondent further asserts that the suit land is now registered in the name of one Igal Roni Elefezoutaly and it is he that should claim compensation rather than the petitioner. Further, that the petitioner has withheld the title to the suit land yet compensation is payable only upon presentation thereof; that the petitioner acquired the transfer on 28/1/2022 and so lacks beneficial ownership at the time of the project, and still lacks; that the letter of offer is not addressed to her and that no promises have been made to the petitioner by the respondent or correspondence exchanged between them.
4. The petitioner filed a supplementary affidavit on 30/5/2022.
5. In her supplementary affidavit she averred that the respondent's replying affidavit was filed out of time and without leave. However, just as I will consider the supplementary affidavit, I decline to expunge the replying affidavit in the interests of justice. The other contents of the supplementary affidavit are that: the petitioner has demonstrated that she is the proprietor of the suit land awaiting title thereto; that the respondent indeed made her an offer; that there is no contract because she declined the unreasonable offer; that in any event the lack of a contract is occasioned by the respondent who should not rely on it to deprive her of her benefits; that she is in occupation and use of the property and it has been undeniably affected by the respondent's project; that there is no delay in filing the application and there is no limitation in the filing for relief for constitutional violations; that she acquired the land in 2017 but the vendor met his demise before executing the transfer; that there is no reasonable ground that has been advanced to impeach her title and that there is no relief provided for under the Energy Act and the Land Act hence the constitutional petition herein.
6. In her submissions filed on 6/05/2022, the petitioner averred that the respondent has trespassed on her property and installed power lines and it is liable to pay. Citing *Giella vs Cassman Brown & Co Ltd* [1973] EA 358 and *Mrao Ltd vs First American Bank of Kenya* [2003] KLR 125, she stated that averred that the respondent promised full compensation of Ksh 13,538, 581.20 through a letter dated 18/12/2020; that she has demonstrated the existence of her property rights and interest; that those facts have not been disputed by the respondent; that sections 173 and 175 of the Energy Act expressly provide that the compensation payable shall be deposited into a compensation fund which



the respondent has failed to do. Citing *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR, it is also averred that the petitioner has demonstrated that she stands to suffer irreparable harm by deprivation of her property without just and full compensation. The respondent's project is said to have rendered the premises unsuitable for human occupation, hence barring the petitioner from developing the same as she had intended and that the balance of convenience otherwise tilts in favour of the petitioner. The case of *Prigal Ltd & Michael Mwangi Muturi v Kenya Electricity Transmission Company Ltd* [2021] eKLR is cited in support of the application.

7. In *Prigal (supra)* the petitioners had claimed to be owners of the land. The National Land Commission revoked title to the mother title from which the lands the petitioners' title had sprung, but a court order suspended the revocation gazette notice. Mutungi J allowed the application and gave orders for deposit of the compensation sum in a joint interest earning account. In that case it was stated as follows:

“Pursuant to the above constitutional provisions in the event the petitioners' titles are upheld, the respondent would mandatorily be required to compensate the petitioners. The Respondents were prepared to make the compensation to the petitioners and in that regard negotiated and agreed the quantum of the compensation. The Respondent has entered onto the land and has constructed the high voltage transmission line traversing the parcels of land claimed/owned by the petitioners. In the event the petitioners are decreed the owners of the suit properties they will be entitled to be paid adequate and prompt compensation by the Respondent for the use of portions of their land. The compensation ought to be made at the point the land is acquired.”

8. The court continued as follows:

11. It is my considered view that both the interest of the petitioners and the Respondent can be served if the respondent is required to pay the compensation into an interest earning bank account operated jointly by the representatives of the petitioners and the Respondent pending the determination of the ownership dispute respecting the suit parcels of Land. Under such an arrangement the petitioners will be entitled to have the money released to them together with the accrued interest if the properties are decreed to them. The compensation amount will not diminish but will grow owing to application of interest. On the other hand, if the properties are decreed to be government property, the Respondent will recoup the money together with the accrued interest and will thereby have safeguarded public funds.

12. In the premises. I make an order directing the respondent to have the agreed compensation amount in the sum of Kshs. 65,797,788.00 for Wayleave through properties known as LR Nos. 5212/16,5212/17,5212/18 and 5212/19 situate in Naivasha Sub-Country, Nakuru County, deposited in a joint fixed interest earning account at Kenya Commercial Bank Ltd and/or Co-operative Bank of Kenya Ltd to be opened and operated in the names of the parties' counsels' firms herein.”

9. In the present instance the petitioner claims to be in occupation of the suit land. As in the *Prigal case (supra)* the respondent disputes the petitioner's title. However, in the instant case the respondent goes further and denies having promised the petitioner any compensation. They however admit that their project was carried out and that it affected the suit land while it was part of a larger parcel. They do not insist that compensation for the larger parcel was paid. It avers that regarding the mother title, a valuation of Ksh 3,750,000/- per acre was returned in accordance with its resettlement policy framework (RPF). However, after the valuation the officers of the respondent returned to the land with the purpose of delivering the offer and engaging with the representatives of the then owner of the land but they were informed that the land had been subdivided by its owner. Later 2 of the resultant sub-



plots were merged to form another parcel, LR NO 425/84 from which the suit property was carved. Just as in the Prigal case (supra) the respondent doubts the petitioner's title in the present case. It states that in the circumstances the petitioner has no beneficial or proprietary interest in the land. However, I have noted the deed of release and discharge refers to parcel LR no 425/64. The respondent manifests knowledge that that parcel was amalgamated with another parcel that also emanated from the mother title to produce parcel LR No 425/84 which was the subdivided to create the suit land. The nexus between the mother parcel and the suit land is clear, but the respondent has misgivings regarding the nexus between the estate of the deceased and the petitioner. Regarding this doubt the petitioner points to the deed of release and discharge dated 22/3/2019 between her and the executors of the estate of the deceased. I have appreciated the fact that the respondent is not being sought to pay the moneys directly to the petitioner but to have the same deposited into an interest earning account to safeguard or secure statutory interest payable on the funds since the date of taking possession on or about 4/12/2020.

10. I am persuaded that this case is no different from the *Prigal case (supra)*. In the event. In the face of so much subdivisions and amalgamation of the land for which compensation was initially offered, and there being no denial that compensation had been offered, it is possible that all that remains may be a question of proper apportionment premised on acreage. Land is an immovable asset and has registration details and it would always be possible to identify who has what interest in the suit land.
11. In the final analysis I find that the instant application has merit and since the need to protect interest from the principal sum has been expressed by the petitioner, this court finds it necessary to order that the sum claimed to be deposited not in court but in a bank. Consequently, I order as follows:
 - a. That pending hearing and determination of this Petition the respondent shall within a period of 30 days from the date of this order have the sum of KES. 13,583,581.20 for Wayleave through properties known as LR No. 425/87 situate in Naivasha Sub-Country, Nakuru County, deposited in a joint fixed interest earning account at Co-operative Bank of Kenya Ltd to be opened and operated in the names of the parties' advocates' firms herein. The account shall remain in force pending the determination of the petition herein and/or until further orders of the court.
 - b. The costs of the instant application shall be in the cause.

It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH DAY OF JUNE, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

