Mwangi & 2 others v Kenya Elecricity Transmission Company & another (Environment & Land Case 24 of 2018) [2022] KEELC 4887 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4887 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT & LAND CASE 24 OF 2018

MC OUNDO, J

SEPTEMBER 22, 2022

BETWEEN

BENJAMIN KARIAMBURI MWANGI ..... 1ST PLAINTIFF

MARGARET WAMBUI MWANGI ..... 2ND PLAINTIFF

AFRISCAN (KENYA) LIMITED ..... 3RD PLAINTIFF

AND

KENYA ELECRICITY TRANSMISSION COMPANY ..... 1ST DEFENDANT

POWER CHINA GUIZHOU ENGINEERING COMPANY ..... 2ND DEFENDANT

JUDGMENT

1. The 1st and 2nd plaintiffs are the registered proprietors of land reference No Nyandarua/ Olaragwai/3432 and also owners of the 3rd plaintiff, a limited liability company herein. Their suit is premised on the fact that the 3rd plaintiff had been in the business of dealing with hepericum plant flowers since the year 2005. That the business had been booming with steady rising profit until the beginning of February 2017 when the 1st defendant decided to pass a high voltage power line emanating from the Olengalani/Turkana wind power project across the farm. That this process forced the 3rd plaintiff to shut down business due to the damage caused to the flowers and its irrigation infrastructure, thereby occasioning great loss to the 3rd plaintiff. Therefore *vide* a plaint dated the May 11, 2018, the plaintiffs thus sought from the defendants, damages to a tune of Ksh 1,673,875,786/= for the damage caused to crops and infrastructure on the flower farm that was on parcel of land No Nyandarua/ Olaragwai/ 3432.

2. Together with the plaint, the plaintiff filed an application seeking for interim orders of temporary injunction restraining the defendants jointly and severally whether by themselves and or through their servants, agents officers or any other person howsoever under their instructions, consent, authority and control, from interfering and/or dealing in any manner whatsoever with the applicant's parcel of

land reference No Nyandarua/Olaragwai/3432, or any part thereof whether by stringing power lines through it or otherwise. The said application was subsequently dismissed *vide* the court's ruling of July 4, 2018.

3. The defendants, by their statement of defence dated the June 19, 2018 had confirmed that indeed the 2nd defendant was an agent of the 1st defendant having been contracted under the EPC contract to construct a 436 Km Loiyangalani Suswa transmission line project which was to be commissioned on July 31, 2018. That via an easement contract dated the February 23, 2015 and signed by the 1st and 2nd plaintiffs, the 1st defendant had been granted access to the suit property for construction of the power lines. That the damages that had been caused to the plaintiff's flower farm during the tower foundation, civil and erection works, had been fully compensated. That they had also compensated the plaintiffs for structures, trees, limited loss of land use and for the relocation of the irrigation equipment and other power lines. That the compensation paid to the plaintiff pursuant to the acquisition of the way leave as at the time of filing the defense was Ksh 24,688,778/= The 2nd defendant denied having caused any damages on the 3rd plaintiff's irrigation infrastructure and the associated lighting systems as particularized by the plaintiffs.

4. After parties had complied with the provisions of order 11 of the *Civil Procedure Rules*, the matter had subsequently been set down for hearing.

Plaintiff's Evidence.

5. The plaintiffs' case was opened by Charles Mwangi on the June 12, 2019 who testified as PW1 to the effect that both the 1st and 2nd plaintiffs were his parents and that he was the managing director to the 3rd plaintiff as per the CR 12 which confirmed the directorship. He stated that he was familiar with the facts that had constituted the suit and went ahead to adopt his statement filed in court on the May 11, 2018 as his evidence in chief.

6. In cross examination, the witness confirmed that he was a director of the 3rd plaintiff which was registered in the year 2011, and that both the 1st and 2nd plaintiffs were proprietors to the suit land where the 3rd plaintiff was engaged in the planting of flowers. He also confirmed that although the 1st defendant had acquired a way leave over the suit land to put up power lines, yet he was not sure when the same had been acquired.

7. His evidence was that there had been no compensation paid for the whole area, although the 1st defendant had paid for the buildings that were on the way leave path as well as for the flowers where the pylon sat. He testified that the 1st payment had been for where the residential house was although he could not remember how much was paid, that the 2nd payment had been for the office block but again he could not remember the amount paid. He also confirmed that the defendant had paid Ksh 1.5 million for the pump house, and that the fourth payment had been for the amount of Ksh 4.1 million for the space occupied by the pylon. That the fifth payment of Ksh 704,500/= had been received by the 1st plaintiff through a cheque dated the May 16, 2015. That there had also been another cheque for Ksh 500,000/= dated the February 19, 2015 paid to the 1st plaintiff.

8. He confirmed that whereas some monies were paid to the 1st and 3rd plaintiffs, compensation for the main way leave area had also been paid although he could not remember indicating in the plaint the amount.

9. He also confirmed that although the 1st and 2nd plaintiffs had signed the grant of easement that gave the defendants access to the land yet the defendants had only paid for the flowers and buildings where the pylon sat but not for the main piece of land that measured 6.24 acres. That the whole acreage of the

suit land measured 40 acres wherein the way leave sat on the 8.08 acres land upon which the agreement gave the lease to the 1st defendant. It was his evidence that the defendants had acquired value for the bare land.

10. He also confirmed that *vide* an indemnity dated the February 24, 2015, the 1st and 2nd plaintiffs had identified KETRACO for the way leave in the sum of Ksh 2.4 million which money was only for the land and not for what was on the land.

11. When the witness was referred to the defence statement dated June 19, 2018, he confirmed that the plaintiffs had received Ksh 18,101,868/=.That on the October 31, 2016, they had been paid Ksh 3,191,940/= which was for the pump house, on February 11, 2016 they had been paid Ksh 494,470/= whereas on the August 24, 2017 they had been paid Ksh 4,168,000/= and the last payment was made of Ksh 526,000/=. He confirmed that they had been paid a total of Ksh 24,688,778/= and the amounts also indicated in the indemnity.

12. That payment was made for where the pylon sat, which was in the center of the farm and which portion could not be used for planting flowers anymore since the same used lights which went up to 14 feet high and could not be adjusted to spread the light evenly. That they had been planting flowers on ¾ land but could not now do the same as their kind of flowers could not grow under the power line.

13. He confirmed that they had been paid for the flowers where the pylon sat. That the whole area where the way leave passed was 60 meters with a length of about 600 meters. His further evidence was that the flowers that had been affected were 1,000,094 in number wherein about 7000 plants had been affected where the pylon sat. That there had been a total of 4,000,000 flowers growing wherein 1,000,094 flowers grew in the 8.08 acres. That they had grown flowers from the year 2011 – 2018.

14. He acknowledged that they had a license for the year 2016 and that at the time they filed suit, they had already applied for the license for the year 2017 and were awaiting to go for vetting. That they did not have a license for the 2017 because of the pending case. His evidence was that the case had also inhibited them from growing flowers from the main area. That on the August 18, 2017, KETRACO (1st defendant) had already stated to put up a pylon on the area so there had been no need to plant flowers on that area, he referred to the agricultural officers report dated August 18, 2017 which report was for the pylon area only and for which KETRACO had paid 4.1 million shillings for that area.

15. He continued to testify that there were two valuations reports wherein the one from the ministry of agriculture, dated April 11, 2017, gave a valuation of Ksh 11.7 million which sums he believed was not for the whole area. He testified that for one to produce the flower, it would cost Ksh 15/-, if sold, it would cost Ksh 35/- to Ksh 40/- depending on the season. That the flowers were for the year 2013 and would therefore produce for 10 years. He agreed that the valuation was done in the year 2017 and that the flowers still had another 3 years to go and therefore ideally the valuation of Ksh 11.7 million had been for the remaining 3 years. He testified that they had neither sought for this report nor for the one dated the August 27, 2017 but confirmed that they had been paid Ksh 4 million for the pylon area, for the 5 beds where they could no longer grow flowers since it was on the way leave.

16. His evidence was that it was not true that the pylon area was where the structure was and that they could not grow the same other flowers. That their specialty was growing the hypericum flower and that he did not know about growing any other kind of flower.

17. He further confirmed that the 1st and 2nd plaintiffs signed a way leave agreement, that it was their land, and if they were paid, he could get land elsewhere. That the 1st defendant had paid for the building and pylon area and that the 1st plaintiff was the owner of the company and land. That they had not been fully compensated and that was why they were suing for what was rightfully theirs.

18. The 2nd witness (PW2) Wilfred Galena Yako testified that he was a senior horticultural officer based in Nairobi and attached to agriculture and food authority in the horticultural crops directorate section. That he was a holder of a BSC in horticulture from Jomo Kenyatta University and had worked in this position for the last 3 years.

19. He proceeded to state that there had been an email sent to their director by one Mr Daniel Mukando of KETRACO on the February 12, 2018 requesting the head of directorate to release 2 officers to go and carry out a flower assessment, specifically hypericum at the 3rd plaintiff's farm. That he in the company of Gilbert from horticulture had then proceeded to the farm on February 14, 2018 where they had met with Mr John Muthoka, Mr Daniel Mukenga, Mr George Giatu, Mr Eliud Mwoki, all from KETRACO, Mr Peter Kiarie from the ministry of agriculture, Mr Charles Mwangi and Mr Sammy Mwangi from 3rd plaintiff company. That their work had been to assess the area where the way leave was to pass and thereafter come up with a report.

20. That they had been given a map by the surveyor of KETRACO indicating the parcel of land to be covered by the way leave based on which they had done their computation where they had come up with a report detailing the plant population that was to be affected by virtue of the passing of the way leave. That they had then shared the report dated the August 15, 2018 entitled ''Report on flower assessment done on February 20, 2014'', with KETRACO and the complainant. The witness went on to read the report on the findings and observations as well as their anticipation and the computation. He had confirmed that they had filed an earlier list for the pylon area which had been paid. That after they had shared the report, they had not received any response from KETRACO and neither was the said report challenged. That he had estimated the price and computation of compensation for the 1 million hypericum plants at Kshs 757,570,500/-.

21. In cross examination, the witness confirmed that they had produced two reports after they had been called upon to do the assessment. That the 1st assessment had been on the August 18, 2017 while the 2nd assessment was for February 15, 2018. He also confirmed that he had not looked at the report by the agricultural officer because he was not aware of it. His evidence also was that he was not aware of the principles governing compulsory acquisition but that they had based their assessment on commercial value.

22. That when he 1st visited the farm on the August 18, 2017, the pylons had not been erected. That they had been called upon because the pylon would be done on the bed that had flowers. That on the August 18, 2017 there were plants growing and that he had done the assessment on the area that was to be affected by the way leave. That he had not seen any lights on August 18, 2017 and that the certificate for horticulture for the 3rd plaintiff had expired. That as at August 18, 2017, the flowers were there, but were in a dormant stage which was normal for that kind of flower. That the husbandry of the farm as at August 18, 2017 was not noted because they had only gone to carry out the assessment as called upon by KETRACO.

23. His evidence was that when they carry out commercial investigations, they would base it on other farms doing the same. That they had interviewed the owner wherein they had gone by the standard recommended which was 40. That he had been guided to do an assessment of the crop damaged. That on the August 18, 2017 the damage had already occurred and KETRACO was already on site. That the report of August 18, 2017 was only in reference to the pylon and not the entire trace.

24. He confirmed not being in possession of the letter dated the August 18, 2017 but went on to confirm that on the said date, they were to assess the damage of the 5 flower beds that were affected by the digging of the beds for erection of the pylons. That the area that had been affected/spoilt was about

62 meters and the cost per stem of the flower was Kshs 30/-. That they did not subtract the cost of production from the actual cost of the flowers. The total lost as per their report of August 18, 2017 was Kshs 917, 600/=. He stated that the lighting structure was on the ground and that they had needed 13 meters height of the light to spread the light because if the same had been lowered, the spread of the light would be limited and not economical.

25. The witness was referred to the report of February 14, 2018; wherein he responded that the same did not include the pylon. That by that time, the power lines were up, they had rendered the place useless although grass could grow in that area. That his assessment was based on the hypericum crop only and that the total area as per the map provided by KETRACO had been for 8.8 acres which was the area that had been affected. That the 40 plants had been in assessment of what the optimum could grow in an ideal condition. That the life cycle could take up to 10 years plus. That the report had indicated that the life cycle could take up to 7 ½ years after which the crop would be discarded. He also stated that the flowers had been planted in the year 2013 and that the assessment was done in the year 2017 and 2018 which was a period of 4 and 5 years respectively.

26. His further evidence was that their calculations was based on the area affected which measured 6.4 acres as per the map provided. That they had taken two scenarios, the 1st assessment consisted of the area where there had been damage caused, while the 2nd scenario had been for the area where the crop could not grow again. He confirmed that they had neither taken into consideration the cost of production to subtract it from their calculations nor factored in the fact that another crop could grow. That further, they did not look into the 3rd plaintiff's book of accounts as he was not an accountant. That the figures herein give had been from an agronomic perspective.

27. In his re-examination and while making reference to the report of 2017, the witness stated that they went to the farm and assessed the pylon area based on instructions from KETRACO which was specific. He reiterated that there had been crops on the land in 2017 which were dormant as was normal in their stage of growth. That once the plants got out of the dormant stage, they could still be productive.

28. When he was referred to a report dated the February 14, 2018, he confirmed that the figures referred to the area that had been affected. He was also referred to the email of February 15, 2018, which he read aloud and confirmed that the instructions from KETRACO had been specific. That the specific flower had life expectancy which was 7 years. That he was not guided by the factor of whether another crop could grow on the ground. That the instructions were that the assessment would assist in compensation and that was why they had made their analysis and observations.

29. The 3rd witness (PW3) Gilbert Kipyegon testified that he was a senior horticulture officer who held a BSC Horticulture from the Nairobi University. He was referred to an email dated the September 5, 2018 to which he read out the instructions therein and confirmed that the same had emanated from Mr Daniel of KETRACO. He produced the email as Pf Exhibit 2.

30. He was then referred to a report made on the February 14, 2018, to which he confirmed that he had accompanied PW2 to the site where they had seen that the crops on the ground had been affected by the wind because the trees which had acted as wind protectors had been destroyed when creating the way leave. He confirmed that they had been given a map which they had used for the assessment. He also read out the findings/observations of the report as well as the computation and recommendations.

31. His evidence was that they had all signed the report and that they did not receive any challenge on the same. He produced the report as Pf exhibit 3.

32. In cross examination the witness stated that he had made two reports, one for the pylon on the August 18, 2017 and the 2nd one for the whole trace, based on instructions from KETRACO who were constructing the pylon and after the farmer had complained that the pylon was affecting his flowers. That at the time they went to the farm, the construction work had begun as the foundation for the pylon had been dug.

33. He was referred to the report dated August 18, 2017 at paragraph 5.0 wherein he read that "The whole farm looked neglected". He proceeded to state that they had used the optimum assessment of the crop wherein they had done the actual assessment. That although they had based their calculations on the measurements done yet the area had been neglected because of the damage caused to the wind breakers a fact which he had not indicated in the report.

34. That he was aware the farmer had been compensated for the pylon. He opined that KETRACO could also do their own assessment. is evidence was that there had been a first assessment of the way leave wherein it had been found that only 12,400 crops had been affected on an area measuring 62 meters square by 5 and that compensation had been Ksh 917,600/- at which time the pylon was under construction. His evidence was that he was not an expert on issues of compulsory acquisition, but that the whole farm was unattended.

35. When referred to Pf exhibit 3, the witness confirmed that the cable had not been laid, but the pylon had gone up. That this was the assessment of the whole way leave trace and it excluded the pylon in accordance with the map. That they had walked throughout the area and that when they did the calculation, they had excluded the area where there were structures built. He however was unable to pin point from the map the area where the pylon was put. He also confirmed that although he did not have a metrological report, yet they had their own way of assessing the wind damage. That at the first visit, although they had only gone to the pylon area, yet he had seen the trees that had been destroyed and although he had seen the damage on February 15, 2018, yet he did not see wind destroy the crops. That they had used a summary of 40 plants per square meter to do their calculations and that the farmer had stopped the crop production. He confirmed that they did not see the contract.

36. The witness was also shown the map to which he responded that the other areas were being farmed apart from the way leave trace. That in February it was dormant. That although they had interviewed the farmer, they had not looked at the accounts. He also confirmed that the farmer did not have a license and therefore he could not export the crop without one. That the activity by KETRACO affected 6 out of 8 acres. He further confirmed that they did not look at the agricultural officer's report and when referred to plaintiffs' document No 12 dated April 11, 2017, he confirmed that it had assessed the value of the damage at Ksh 11,000,700/- and that the reports were at variance although their report was an expert opinion.

37. He also confirmed that for the area occupied by the pylon, the farmer had been compensated Ksh 4 million and that the said area could be used for other purposes. He testified that the hypericum could grow as high as 1 meter and that the standard position where the lights ought to be was 13 meters high. That the lights could be put on the rest of the farm but not under the way leave. That once the lights were removed, the crops would be damaged. That they had used the selling price in Europe to arrive at their figure. He confirmed that in 2 years there had been no costs of production and that they neither calculated the said costs of production nor had they excluded taxes from their computation.

38. Upon being re-examined, the witness responded that he was a government officer and that the instructions had been sent to a government entity. That the report was not an individual report but a government report which had been made in 2017 and had not been disputed. He confirmed to having been made aware of the compensation made to the 3rd plaintiff.

39. He reiterated that the initial report had been for the pylon area and that the same had served it's purpos and was done away with. That in regard to the report of February 14, 2018, he had gone through the path of the way leave trace in the company of participants indicated in the report. That the observations were made as a result of an agreement by all participants to which they had not received any complaint regarding the report. That the pylon area was not included in what they had valued in the 2nd report. That the farm seemed unattended and that they had all seen the effect on the parcel of land. That the neglect had been caused by the wind which had damaged the flowers in the absence of the tress and that the damage had been part of the cost.

40. He confirmed that the report had been commissioned by KETRACO and that by the time they made the 2nd report, the plants were dormant, which was part of their growth although it did not mean they were damaged. That he had been made aware of the report by the ministry of agriculture and that the reports had been made independently and therefore need not to have been similar.

41. He also reiterated that the hypericum flower had a production life spun and if it was affected now, their future would be affected. That they had computed the number of years left which was 2 ½ years and were they to consider the cost of production, it would not make a difference since it would be minimal bearing in mind that the plant was already on the farm.

42. When examined by the court, the witness responded that after they had compiled the report, the three of them had just signed it and sent it to the other participants.

43. The fourth witness (PW 4) Mr Peter Kahungi Kiarie, a ward agricultural extensive officer working in Nyandarua county as a chief agricultural assistant officer testified that on the April 11, 2017 he had gone to 3rd plaintiff's/Afriscan farm, after being called by an officer at KETRACO, where he went to do an assessment on the damage caused on the said farm. That on arrival, he had found that KETRACO had dug 4 holes as a foundation for concrete pylons. That some flower heads had been affected by the machinery wherein they had counted 5 damaged beds measuring the length of about 65 meters. After his observations, he had made his report dated April 11, 2017 which he had sent to Mr Mukanda of KETRACO via email. He read out the findings from the report and proceeded to state that after calculating the value of the damaged 5 beds, he had come up with a figure of Ksh 11,700,0000/- He produced the report as Pf exhibit 4.

44. That another report had been made on the May 2, 2017 under the request of Mr Mukanda of KETRACO which report had been for the whole area that was to be affected by the way leave lines. The number of beds were 405 and were not damaged but would be damaged at the time the lines would be erected. That the length of most beds had been 50 meters and there had been a variety of flowers e.g;

    i. Magical pumpkin

    ii. Magical green

    iii. Magical reads

45. That the flowers had been in beds of 1m x 50 meters. (Reads the observations). His evidence was that they had used the cost of Ksh 15/- per stem in two sessions. That they used a production of 3 years wherein they had found a loss of Ksh 729,000,000/- after the damage. That he had given his report, which he produced as Pf exhibit 5, to KETRACO since they were the ones who had requested for assessment.

46. In cross examination, the witness stated that he had participated in the making of the report produced as Pf exhibit 3 but that the participants did not write their names and neither did get a draft copy to authenticate the same.

47. When referred to Pf exhibit 4, the witness confirmed that the instructions had been from Mr Daniel of KETRACO instructing them to go and assess the damage at a time when the pylon was under construction. That the damage to the small area occupied by the pylon, was Kshs 11,700,000/-. He also confirmed that report had no land reference number.

48. The witness was also referred to the map, to which he pointed out the place where the pylon was constructed and confirmed that there had been no road to the pylon. That although the map showed a road, he had not seen the same. That the pylon was partially on a homestead and partially on the farm. That there had been no flowers in the homestead and that the flowers had been planted in 2013.

49. When referred to Pf exhibit 5, the witness stated that it had been of a different farm, on another block, where flowers had been planted in 2014.

50. He however stated that the flowers were to be destroyed during the putting up of the lines. That when he first visited the farm, he had found laborers tending it but on the second and third time, he had not met any laborers. He confirmed that he had not checked whether the 3rd plaintiff had a license nor their accounts but that the total area to be affected was 6 acres and that the whole farm had three varieties of hypericum flowers.

51. He conceded that the global figure in Pf exhibit 5 was less than the global figure in Pf exhibit 3 and that at the time he had made his 1st assessment on May 2, 2017 he had been alone. That the subsequent reports had been through their combination. He also stated that although he had a certificate in general agriculture and had been contracted by KETRACO, yet he had no letter of proof to that effect.

52. When he was further referred to Pf exhibit 3, his response was that the assessment had been for the whole area. That there had been flowers planted in 2013 and others in 2014. That the value of the flowers in Pf exhibit 3 was shown as Ksh 30/- whereas the value of the flowers in Pf exhibit 5 was at Ksh 15/- and that the cost of the production had not been factored.

53. The witness was also referred to Pf exhibit 2 to which he responded that he had been called by Mr Mukenda to accompany the other parties. That they had prepared the report together wherein he had signed it through scan after he had been sent a copy and having gone through it. That it had been after deliberation that they had come up with the figure. He acknowledged having done the 1st report alone and that it had been based on his view alone in comparison to the exhibit herein which had been done jointly. That the 2nd report had been done at a time when the flowers were dormant and the assessment had been for purpose of compensation.

54. In re-examination, the witness confirmed that he had produced Pf exhibit 4 and 5 which reports he had made regarding the suit parcel of land and that he had made them earlier than the ones they had jointly made. He also confirmed that he had not shared his reports with the agriculture and food authority.

55. When he was referred to Pf exhibit 3, he reiterated that the remaining life spun was 2 ½ years and that they did not consider the life spun but had indicated 3 years. That he physically visited the site where the lines would pass and there had been no definite instructions on where to assess. That he was a ward agricultural extensive officer and that their work included following the records kept by farmers. He was categorical that he was not a member of the price regulatory board but confirmed that the agriculture and food authority were the regulating board. He also confirmed that although there had been a variance between his report and the agriculture and food authority report, the same

was not so big. That it was not a must for the reporting values to tally since the assessments were from independent parties. That KETRACO had only requested him for assistance.

56. The plaintiffs thus closed their case.

Defence Evidence.

57. The defence evidence was adduced by Mr Johson Kitemanga Muthoka to the effect that he was a public officer working with KETRACO as the senior manager in-charge of way leave acquisition. He adopted his statement filed on May 21, 2018 as his evidence in chief. He also sought to rely on the list of documents filed by the defence on June 21, 2018 as his list of exhibits.

58. He then proceeded to testify that KETRACO had embarked on building a power line in Olaragwai wind power generator which was a private wind generator owned by lake Turkana wind power, a local consortium. That the line was 436 km long from Olaragwai to Suswa near Mai Mahiu with a generator that had a capacity of 310 megawatts and that the corridor of the line was to be 60 meters wide. That it was not true that they had entered forcefully into the plaintiffs' land. That in October 2013, and in accordance to section 144 of the *Land Act*, they had issued a public notice through the National Land Council, of their intension to acquire a way leave from Oloiyangalani to Suswa wherein they had indicated all the parcel of land that was to be affected, their total parcel areas, the affected areas and their owners from the search in the land registries.

59. That the suit land herein was part of the parcels of land to be affected. That they had then taken copies of advertisement to the ground where they had served the affected person physically and those who were at the chief's camp. He produced the copy of the advertisement dated the October 14, 2013 as Df exhibit 1. That they had then held public meetings with affected persons as well as with all large farm owners including the plaintiffs herein wherein they had started land negotiations which ended up with an agreement on compensation on the 3 items as follows;

    i. Land for way leave- they would not acquire land fully, neither would they purchase the land, but they were just to use it by overflying the corridor. That the basic rate used in the whole country was 30% of the open market value of the affected area, wherein in this case they had computed the compensation of land based on the valuation of land retained by independent valuers. That they had agreed with the land owners on the amount payable and had actually paid them after signing the way leave agreement giving them consent to enter and construct on the land.

    ii. Building structures found within the corridor-. These were valued and offered to property owners who had then accepted the payments made to them.

    iii. Crop/trees damage – that on this particular farm, they had damaged some trees with permission of the owners wherein after they had valued the trees, based on the Kenya forest service rates and offered the rates to the owners who had accepted it, they had been paid.

60. His evidence was that they had only one tower location and that during its construction, some flowers had been damaged. That the said flowers were wilted, cut flowers and that whereas the plaintiffs had presented their assessment of the damage caused as Kshs 11,000,000/-, they had their own assessment of Ksh 4,168,000/- That they had subsequently negotiated with the plaintiffs who had accepted their offer wherein they had been paid. That it was therefore not true that they had entered onto the suit land by force. That they had been in communication with the plaintiffs all this time as per the proof of payments they had made. That it had been one Mr Mwangi (1st plaintiff who was seated in court) who had received the payments as follows;

i. 1st payment was for Kshs 15,101,868/- for buildings

ii. 2nd payment was for Kshs 3,191,940/- was paid on October 31, 2016 again for buildings.

iii. 3rd payment was for Kshs 494,470/- for the trees was paid on February 11, 2016.

iv. 4th payment was for Ksh 4,168,000/- for flowers was paid on August 24, 2017

v. 5th payment was for Kshs 526,000/- was paid on June 22, 2017 for relocation of water irrigation pipes.

61. That the total amount paid had been Ksh 24,688,778/= He produced the proof of payments as Df exhibit 2(a-e) and proceed to testify that it was while they went on with the construction, that the plaintiffs started making further demands for compensation on flowers which were yet to be damaged. That the rest of the flowers had not been damaged and that as at the time he was testifying, the line was up and running.

62. He also stated that although several valuation reports had been made on the undamaged flowers by government officers, the fact was that they could pay only where/what they had damaged. That as the time he was testifying they had not damaged any flowers as alleged, yet the line was up and powered.

63. That the plaintiffs used to send them copies of the assessment reports which they had disputed because they were only bound to pay only what they had damaged. That they did not consider the reports because they had not damaged the said flowers. That despite a correspondence wherein the plaintiffs made many assumptions that the farm was running, yet they had photographs that depicted that the flowers were wilted and therefore there had been nothing to pluck or harvest. That secondly, the plaintiffs did not have a license from Kenya Flower Council from 2014 and therefore the flower farm was not a going concern.

64. That they had expressed their disapproval of the assessment to the agricultural and food authority *vide* a letter dated the February 21, 2018 herein produced as Df exh 3 because the plaintiffs had demanded for compensation of Ksh 1.6 billion and that was how the matter had ended up in court. He was categorical that they had paid all the compensation that was due to the plaintiffs. That the first negotiations had been for the areas they had damaged, but later the plaintiffs had approached them seeking the huge compensation.

65. That on the May 10, 2018, they had met at KETRACO offices where the issue of further compensation had been discussed but had ended up as a stale mate because what the plaintiffs had demanded had not been agreeable with their policies. He produced the minutes of the meetings as Df exhibit 4. That after the said stalemate, the next thing they heard was that the plaintiff was in court pursuing the undamaged flowers.

66. During his cross-examination, the witness confirmed his name and position with KETRACO and that he had was aware of the dispute before court. That the same was based on forceful acquisition as per the plaintiff's claim at paragraph 17 of the plaint where they had stated that the defendants had forcefully entered on their (plaintiffs') land and therefore they had sought for the court to restrain them (KETRACO). That the plaintiffs had also sought for compensation of damages which they had already paid.

67. That the plaintiffs' prayer for compensation was non-existence. That in fact the dispute herein was for compensation but given the circumstance of the company policy, this compensation could not be given as there existed a resettlement policy in the company which was a public document found on the KETRACO portal.

68. He confirmed that as a way leave manager for KETRACO, its co-mandate was to construct power transmission lines. That he held a degree in Land Economics from Nairobi University, a Master's degree in urban and regional planning from Nairobi University, and a diploma from the ISK. That he was also a registered and professional licensed land valuer for close to 30 years.

69. That they had paid for the flowers that they had destroyed after valuation, the valuation report which he did not possess in court. His evidence was that in order to compensate for anything, there ought to be a valuation and the valuation in this instance, had been done on the plaintiffs' flowers by agriculture and food authority which valuation had been sanctioned by the plaintiff.

70. When referred to the Plaintiffs' exhibit 4 and 5 dated April 11, 2017 and May 2, 2019 respectively, he confirmed that as per paragraph 1 of Pf exhibit 4, the letter had been addressed to the manager KETRACO whereas paragraph 1 of Pf exhibit 5, the same was addressed to KETRACO in reference to their request. That the reports had been forwarded to KETRACO *vide* a letter dated the February 16, 2018 and as per their request. He also confirmed that many documents had been sanctioned by KETRACO but from the contents of the documents, they had fully compensated the plaintiffs.

71. That they had compensated Ksh 4,000,000/= when erecting the tower for the damaged flowers, but the plaintiffs sought for compensation for flower that had not been damaged. That at the time they came to court, the stringing had not been done. That the flowers and trees had been assessed after damage had occurred and this was for control mechanism. That the value of the trees remained the same whether they were cut or not. The re-settlement policy framework for which he had been part of the people who prepared it, was also clear that compensation for the crop and trees was after the damage.

72. When referred to Pf exhibits 3, 4, & 5, he confirmed that the list of participants in the flower assessment report showed that he had participated in the making of the report. That he was in communication and KETRACO had protested *vide* a letter dated January 21, 2018, herein produced as Df exhibit 3 when the valuation reports were given to them.

73. That the letter did not indicate that it had been received, and the copy was not stamped. That there must have been another copy. That KETRACO had instructed the agriculture and food authority which was a government body in-charge since they were dealing with flowers for export. That the plaintiffs could not make their own assessment if they wanted to deal with electricity because they had to either ask KPLC or KETRACO. He confirmed that the stringing process had been completed. That Pf exhibit 3 explained how valuation of flowers is done. That were a flower to get destroyed, there would be a bud to count. That valuation was based on the area.

74. He was referred to paragraph 14 of their defence wherein he read and stated that they had tabulated and compensated the plaintiff Kshs 24 million. That paragraph 16 of the said defence talked of a possibility of future damages but they had managed to string without damaging anything although he did not have a report to that effect.

75. At this juncture the plaintiff's counsel applied for notice to produce the resettlement policy framework for the 1st defendant so that he could recall the witness to cross–examine him on the same. The application was granted wherein the defence witness was stood down for further cross–examination and re–examination. The defence hearing was then rescheduled for further hearing for the March 31, 2020, but due to the covid-19 pandemic and subsequent transfer of the court, the matter could not proceed on the date scheduled.

76. The defence hearing, on further cross-examination then proceeded on the November 2, 2021 wherein the witness, Mr Muthoka who had been stood down was reminded that he was still on oath wherein he proceeded on cross examination to state that he had filed the settlement framework dated October

25, 2011 and that he was familiar with the executive summary which stated the objectives of the re-settlement framework.

77. When referred to the next consideration at paragraph 1 page 6 of the document, he stated that it indicated that there must be valuation of loss of use or assets. That he was aware that crop damage was also to be assessed. The value to be assessed was on a report by the agriculture and food authority or a ward agricultural extensive officer. That there had been valuation prior to resettlement. That the valuation was not submitted as the matter before court was a claim over the crops and there was a valuation report on the crops. That they had been instructed according to the re-settlement policy frame work and the assessment was to be on a market value. By consent the resettlement policy framework was produced as the Df exh 5

78. In re–examination, the witness confirmed that he was a registered valuer in Kenya and that he had worked with KEPRACO since February, 2010 as senior manager in charge of the entire process of acquisition of way leaves.

79. That the valuation process included

    i. Building structures within the 6-meter corridor

    ii. Crops/trees damage

    iii. Way leave paid at 30% value of affected areas.

80. That this did not limit his ability to determine the value of crops. That for the trees, they had involved the Kenya Forest Service. That at page 7 of Df exh 5 the government rates were to be decided from Agriculture and Food Authority(AFA) whereas the trees were to be valued by the Kenya Forest Service. That he did not rely on reports placed before court because there were inconsistencies where one report used a rate of Kshs 15/= per stem while the other had used 30/= per stem. That the report produced as Pf exhibit 4 was from Nyandarua county and he would not rely on such a report. His assertion was that the cost per stem was Kshs 15/=. That the report produced as Pf exhibit 5 from Kaimbaga valued the stem at Kshs 15/=. The report produced as Pf exhibit 3 and dated the February 14, 2018 was from AFA where it had given the value as Ksh 30/= per stem.

81. His evidence was that the policy provided for compensation for damaged crops and that they had damaged crops at the lower location in an area that was 12 meters by 12 meters at 0.05 acre. That the way leave was about 8 acres. He reiterated that they had negotiated with the owner, as the policy allowed them to negotiate, and had agreed at Ksh 4,168, 000/- which they had paid vide a cheque dated August 24, 2017and the owner had accepted and allowed the work to proceed. Later the owner had asked for 11,000,000/= which they had disputed and negotiated with the management while relying on the valuation reports.

82. That although the valuation reports were not binding to them, yet they had to re-evaluate them and check if they were consistent with what was to be paid. That he had met with the project affected persons and that was how they had ended up agreeing on all the items he had mentioned and the crop damage. That he was not aware that damage was caused by hailstones. That they had sought to cut down trees which was agreed and payment was effected. That they were not responsible for subsequent damage after they cut trees. That they had held an occasion to look at the plaintiff's accounts and that was the document that had helped them to calculate the damage of the area they had used.

83. That they had looked at the financial statement of Afriscan Kenya Ltd annual year and financial statement ended December 31, 2018 filed on May 28, 2018 which guided them with reference to the revenue sale of flowers as follows;

i. They earned Ksh 63.89 million in 2016 – gross whereas in 2015 they earned Ksh 56.36 million gross. The report contained details of expenses.

ii. The cost of sales in 2016 was Ksh 18.1 million whereas in 2015 it was Ksh 22.1 million

iii. Direct production cost in 2016 was Ksh 18.03 whereas in Ksh 2015 it was 25.05

iv. Selling and distribution expenses in 2016 it was Ksh 16.29 million whereas in 2015 it was Ksh 24.88 million

v. Administration expenses in 2016 it was Ksh 2.77 million whereas in 2015 it was Ksh 5 4.92 million

vi. Other operating expenses in 2016 was Ksh 3.55 million whereas in 2015 it was Ksh 2.6 million

vii. The total of the expenses cost in 2016 was Ksh 39.15 million whereas in 2015 it was Kshs 40.74 million

viii. The amount of acreage under cultivation was 10 hectares and 25 acres.

ix. The amount of stems sold was not shown.

84. That for the way leave, they had acquired 8 acres whereas the extent of the physical damage was 0.05 acres. That the flowers under the way leave covered 6 acres and that was how they had arrived at Ksh 4,168,000/-. He produced the financial statement as Df exhibit 6. That there was no stinging at the time and no damage had been caused when they did the stringing. That after the stringing, they had not received any demand for payment.

85. That the financial statement guided them after they looked at the plaintiff's gross earning wherein they had subtracted the total expenses. That they thereafter applied the same on the acreage effected which was 0.05 acres and that gave them a good guidance. That as per their policy, the plaintiff had been compensated a total of 24,668,778/= which it acknowledged receipt.

86. That the report had clearly stated that the flowers had been neglected, a fact which they had also considered. The earnings were to be reduced to the present value factor not future earnings. That they had also looked at the condition of the flowers at the time.

87. When referred to Pf Exh 3 (page 4 table 1 5.1.1) he had responded that it was to calculated by dividing 25.252 34m^2 x 40 which would give 631 stems. That it was therefore not correct to say that the plants were 1,010,094.

88. His closing remarks was that they had compensated the plaintiffs for what they had damaged and after the plaintiffs sought for Ksh 11.7 million, they had negotiated and agreed at Ksh 4,168,000/= which they had paid. That they never damaged anything else after that. The defence then closed its case.

89. At the close of the defence case, parties had been directed to file and exchange their written submissions within 21 days each wherein the matter was to be mentioned to confirm compliance and to take a date for judgment on the December 15, 2021. Parties did not comply until the March 9, 2022 when the plaintiff filed their submissions. The defendants filed their submissions in response on the April 21, 2022. I shall summarize the same as herein under;

Plaintiffs' Submissions;

90. The plaintiffs' submission was that the suit herein was based on the fact that that whereas the 1st and 2nd plaintiffs were the proprietors of the suit land, the 3rd plaintiff was a company that grew flowers

on the said land and had been in the flower business since the year 2011 when it was established. That sometime back, the defendants had acquired a way leave on the plaintiffs' property for purposes of erecting pylons for passing electric wires over the plaintiffs land pursuant to which they had only compensated the plaintiffs for damages caused to the flowers within the pylon areas/base, the buildings on the plaintiffs land, the cut trees, and the relocation of irrigation system.

91. That it had been in the process of erecting the pylons, that the defendants had cut down trees over the plaintiffs property which trees had prior acted as wind shields to the plaintiffs flowers, protecting them from the strong winds in the area which the farm was situated. There was no compensation to the said cut down trees and neither was there compensation for the damages caused on the farm during and after the process of stringing of the wires, an observation which the court had made in its ruling of July 4, 2018.

92. The plaintiffs framed the issues for determination as to whether they were entitled to compensation for damages accrued during the stringing process as well as damage occasioned by the cutting of trees which caused the plaintiffs flower farm to have a wind path that exposed the flowers to strong winds that were prone in the area.

93. The plaintiff relied on the provisions of section 148 of the *Land Act* which provided for payment of compensation, as well as on the 1st defendant's re- settlement policy clause 7.2.3 in regard to crop damage valuation and compensation, to submit that the present suit involved a flower farm for which the defendants had cut down the trees that stood on the way leave, and which trees had acted as the shield against strong winds to the flowers, without compensation.

94. That after cutting down the trees, the hail nets that had been erected to protect the flowers in the farm had also been blown away exposing the flowers to damage by the strong wind and hailstones with the result that the same (flowers) looked neglected.

95. That although the defendants have denied having damaged the flowers during the stringing process, yet it was curious that in anticipation of the same, the 2nd defendant had enlisted the services of the Agriculture and Food Authority (AFA), which was the regulating statutory body that was concerned with matters that concerned flowers and crops in general, to conduct a valuation of the affected area in the presence of the representatives of the 1st defendant and thereafter filed their assessment report dated February 15, 2018, which report was never challenged by the 1st defendant.

96. That the said report had placed the damage assessment at Ksh 757,570,500/=. Although the defendants attempted to introduce a letter protesting the said report, that there was no communication to that effect, received by the Agriculture and Food Authority (AFA) and although the defendants have also denied there being any damages caused during the stringing process, yet they did not produce any assessment of the status of the farm as at the completion of the said process.

97. That the 1st defendant's re- settlement policy at clause 7.3.3 provided for crop damage and the compensation rates were derived from their respective district agricultural officer in this case PW 4, the ward extension officer had made the assessment of the flower damage which came up to the tune of Ksh 757,000,000/= which was not impeached by the 1st defendant.

98. That since destruction of flowers unlike trees, could not be the established by counting the stumps after being cut off or destroyed, their assessment for valuation including the stems, ought to be established prior to their destruction.

99. The plaintiffs submitted that the 1st defendant ought to have tabled before court a valuation and assessment report after the stringing process for comparison with the original assessment reports by

both the Agriculture and Food Authority (AFA) and the ward extensive officer for it was not enough for the 1st defendant to come to court and declar by word of mouth that there had been no damage caused to the plaintiffs' flower farm after the stringing process.

100. That once the power lines had been set up, it rendered the area covered by the way leave, which measured 6 acres, useless and no flower farming activity could be carried out therein. That since the hypericum flowers grow under 18 hours of light, it meant that the plaintiff was to erect lights to sustain the 18 hour light requirement and that the lights were to be at a height of 14 meter with an average allowance of 5 meters for the purposes of adjustment by the plaintiffs' personnel. The 2nd defendant's power lines that carry extremely high voltage were placed at the 27 meters height and therefore the plaintiffs activities would not be carried out underneath the same.

101. That contrary to the defendants' allegation that the plaintiffs flower farm was weltered, the evidence of PW2 and PW3 spoke to the contrary to the effect that at the time of the valuation, the flowers had been at the dormant stage which was normal. That further it had not been true that the plaintiffs' flower farm was not an ongoing concern because they did not have a license to trade in flowers. indeed it had been revealed through the evidence of PW1, that the procurement of a license was a process that had to go through vetting scheduled by the regulator and that while awaiting a current license, since they had the license of the previous year, they were allowed to trade in the flower business for a specified period of time while awaiting issuance of a current license. That it had been while they awaited the license of the year in question, that the defendants interrupted their business.

102. That the Agriculture and Food Authority (AFA), being a statutory body established under section 3 of the *Agriculture and Food Authority Act*, the exercise of their mandate was unimpeachable save for instances where their actions and/or omissions would be subject to judicial review. The 1st defendant purported to challenge the decision of the AFA in the assessment report in court without making a formal challenge as required by the law. The credibility of the said AFA was therefore not be impeached.

103. Since there was unchallenged expert opinion by the Agriculture and Food Authority (AFA) that the damages had been made to the flowers during and after the stringing process, it was then imperative that the plaintiffs' case should succeed with costs and the court awards the damages as sought.

Defendants' Submissions.

104. In opposing the plaintiffs' case, the defendants reproduced the averments made in their defence before proceeding to frame their issues for determination as follows;

    i. Whether the plaintiffs are entitled to orders of injunction.

    ii. Whether the plaintiffs are entitled to damages for the damaged crops and irrigation infrastructure on the aforesaid parcel of land and flower farm on the aforesaid parcel of land known as No Nyandarua/Olaragwai/ 3432 being Ksh 1,673,875,786/- and

    iii. Whether this honorable court has jurisdiction to entertain this suit.

105. On the first issue for determination, it was the defendants' submissions that the plaintiffs were not deserving of the prayers of injunction has sought in the first prayer of their plaint. That the case involved the acquisition of a way leave by the 1st defendant for construction of power lines over the parcel of land owned by the 3rd plaintiff, in a process that began in 2013 when an advertisement was made by the National Land Commission in respect to the provisions of section 144 of the *Land Act*. Subsequently, an easement agreement had been entered into between the 1st defendant and the 1st and 2nd plaintiffs which agreement had been signed on February 23, 2015 together with an indemnity. Thereafter access

to the suit land was granted and the construction of the transmission lines began. The plaintiff could not therefore complain that the defendants were trespassers onto the land and therefore cannot seek from the honorable court an order of injunction to issue against the defendants.

106. The defendants conceded that although the 1st defendants' agent had damaged some flowers on the suit land when setting up the island base, yet the plaintiffs had been fully compensated as per the documentary evidence dated the June 19, 2018 and filed on June 21, 2018.

107. The defendants further conceded that pursuant to the payment of the compensation for the damaged flowers, the pending issue was on damages caused during the stringing process which process had been completed during the hearing of the suit wherein no further damages had been caused. It was their submission that nothing stopped the plaintiff from amending their plaint to seek compensation for damages caused during the stringing process. To this effect, there was no suit before the court because in principal one could not sue for anticipated damages.

108. The defendants relied on the provisions of article 40(3) of the *Constitution* as well as section 148(1)(4) and (5) of the *Land Act* to submit that indeed the 1st defendant had compensated the plaintiffs for the actual damage caused to the flower farm during the tower foundation, civil works and erection works, for the structures, trees, the limited loss of land use and for the relocation of the irrigation equipment under the power line, to the tune of Ksh 24,688,778/=. That the 1st defendant could not pay the plaintiffs for future damage occurrence as fair and just compensation ought to have been based on actual valuation in line with the prevailing market value which in this instance would not be carried out until the alleged damage happened.

109. The defendants also submitted that the plaintiffs' flower farm was not a going concern as at the time the 1st defendant entered onto the suit land, the plaintiff did not hold a valid flower export license, its license No L11/04343 having expired on June 30, 2016 as depicted in the report dated the August 18, 2017 which was submitted by the Agriculture and Food Authority (AFA). That there had been no renewal of the said license which had been valid for the period starting July 1, 2015 and ending June 30, 2016, and neither had there been any license for the subsequent years.

110. The defendants further submitted that in the audited statements of account, the value assigned to the flowers in the statement of financial position indicated as biological assets in 2016 was Ksh 24,542,503/= wherein in the year 2015 it had been Ksh 35,023,007/=. That the 3rd plaintiff in the year under review earned a revenue of Ksh 63,896,535/= in the year 2016 whereas in the year 2015, it had earned Ksh 56,35,522/=. That it was therefore not justifiable that the plaintiff now seeks for Ksh 1,673,875,786/=. That the four million shillings assessed and awarded on account of the damaged crops was too generous in the circumstance.

111. The 1st defendant disputed the reports made by the ward agricultural extensive officer dated April 11, 2017 and May 2, 2017 as well as the ones made by the Agriculture and Food Authority (AFA) dated August 18, 2017 and February 14, 2018 for reasons that the said reports had been made on the assumption that:

    i. All the flowers within 60m way leave trace would be destroyed during the stringing of the transmission line.

    ii. In anticipating that the flowers to be damaged, they had used an assumption that the crops were grown under good agricultural principles and practices which was not the case.

iii. Despite the crops in question having appeared to be un-attended to, the 2nd report by the Agriculture and Food Authority had completely ignored the observation without any justifiable explanation despite the 1st report having been prepared just six months earlier.

iv. That there was a flower business destined for the european market which was not the case.

v. The figures used in calculating the sales and net profit were missing in the 2nd report. The expected sales figures used were applied in a hypothetical situation ignoring all costs associated with them in normal business which for a flower business were normally very high. Further, costs of inputs, equipment, transport, packaging, additional lighting, water, licensing, etc were not factored in the report.

112. The defendants relied on the affidavit sworn on May 22, 2018 by one Johnson Muthoka in answer to the application dated the May 11, 2018 to buttress their submissions that the reports submitted by the plaintiff were not reliable because they were contradictory and based on an apprehension of the facts as to what was meant to be compensated. That the court could not rely on such assumptions to determine the quantum for compensation.

113. That as stated in the compensation policy of acquisition of way leaves, what was liable for compensation was the actual and ascertainable damage to crops, trees and structures as the flowers had already wilted when the defendants entered the land to construct the payload base. However the defendants after assessment of the wilted flowers had compensated the plaintiffs on the damage occasioned on the 0.44 acres of the 6.24 acres covered by the crops, to a tune of Ksh 4,168,000/= which had been accepted by the 3rd plaintiff. The plaintiffs were now under a misguided notion that they should be compensated for the entire flower farm when the true position was that structures, crops and trees were to be compensated only if they were directly affected by the project, besides the 1st and 2nd plaintiffs had signed an indemnity dated February 27, 2015 binding themselves to indemnify the 1st defendant against any suits in respect of the property pending the agreement for the grant of easement which had duly been executed by them.

114. The defendants relied on the decided case in *Wrigles Company (East Africa) v Attorney General & 3 others* [2013] eKLR to submit that the court cannot rewrite what had already been agreed upon by the parties as set out in the agreement.

115. The defendants also submitted that the plaintiffs did not call any metrological expert evidence to authenticate their claim that the cut down trees had created a wind tunnel that had caused the hail nets to be blown off causing the flowers to be exposed to adverse weather. That indeed the plaintiffs had been offered Ksh 494,470/= before the trees had been cut as compensation which the amount they had accepted. Again, the 1st and 2nd plaintiffs had signed an indemnity binding themselves to indemnify the 1st defendant were an order to be made against them on this account. That indeed the 1st report from AFA was to the effect that flowers were withered and unattended to and further that they had a life span of two years. It was therefore the defendants' submission that in 2017 there had been nothing to damage and therefore there was no compensation due.

116. The defendants further submitted that there had been no attempt by the plaintiff to show how the colossal figure of Ksh 513,277,780/= had been arrived at when they claimed that the way leave had caused damage to the infrastructure. No bill of quantities had been submitted, no loss assessment report had been submitted and no valuation had been done. The damages for compensation ought to have been proportional and fair taking into consideration public interest and therefore nothing justified the plaintiffs' claim for additional money which was baseless and *mala fide*. Reliance was placed on the decided case in *Gitobu Imanyara & 2 others v the Attorney General* [2016] eKLR where

the court had relied on a decision by the Supreme Court of Canada in *Vancouver (city) v Ward*,2010 SCC 27,[2010]2 SCR 28.

117. In conclusion the defendants submitted that the plaintiffs' plaint lacked merit and formed a classical description of an abuse of the court process and the same therefore ought to be dismissed with costs.

Determination.

118. I have also considered the plaintiffs suit, the defendants defence, the parties' respective submissions and the authorities cited in support and in opposition thereof. Before I embark on analyzing the evidence adduced herein, it must be remembered that evidence adduced in an ordinary trial by which it is tested through cross examination is to be distinguished from affidavit evidence which under our *Evidence Act*, can only be used in interlocutory applications although the court has power to call for the deponent to give oral evidence and also be cross-examined on it. The orders of injunction are mainly intended to preserve the subject matter with a view to have expeditious determination.

119. Indeed Lord Diplock in the case of *Siskena* 1977 3 All E.R at page 824 stated as follows;

> "A right to obtain an interlocutory injunction is not a cause of action, it cannot stand on its own. It is dependent on their being a pre existing cause of action against the defendant arising out of an invasion, actual, or threatened by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him which may or may not include a final injunction."

120. From the evidence adduced, the 1st and 2nd plaintiffs herein are the registered proprietors of parcels of land No Nyandarua/Olaragwai/3432, (hereinafter referred to as the suit property) measuring 14.29 hectares and also owners of the 3rd plaintiff, a limited liability company herein which had been in the business of exporting and/or dealing with hypericum plant flowers gown on the suit property.

121. The mandate of the 1st defendant was to plan, design, develop, maintain and operate the Republic of Kenya's national electricity transmission grid. The 2nd defendant was an agent of the 1st defendant having been contracted under the EPC contract to construct a 436 Km Loiyangalani Suswa transmission line project which was to be commissioned on July 31, 2018.

122. It was thus not in dispute that via an easement and indemnity contract dated the February 23, 2015 and February 27, 2015 respectively, which were both signed by the 1st and 2nd plaintiffs, the 1st defendant was granted easement to part of the suit property measuring 60 meters wide in 8.03 acres, as a way leave trace for the construction of the power lines.

123. Not disputed further is the fact that vide the easement and indemnity contract dated the February 23, 2015 and February 27, 2015 respectively, the plaintiffs had accepted a consideration of Ksh 1,204,500/= being the full and final compensation for the loss of use of the land, where they had bound themselves and had undertaken to indemnify the 1st defendant herein referred to as KETRACO in respect of any suit and/or claim that would arise in respect the agreement for grant of the easement that they had duly executed regarding the property.

124. From the summation of the evidence, it is also not disputed that there had been damages caused to the plaintiff's flower farm during the tower foundation, civil and erection works, and although the

defendants' case is that they had fully compensated the plaintiffs for structures, trees, limited loss of land use and for the relocation of the irrigation equipment and other power line pursuant to the acquisition of the way leave, to a tune of Ksh 24,688,778/= which monies had been received and acknowledged by the plaintiffs, the plaintiffs on the other hand have lay claim that they were not fully compensated.

125. The plaintiffs' claim is that the defendants only compensated them for the damage caused to the flowers within the pylon areas/base, the buildings on the plaintiffs land, the cut trees and relocation of the irrigation system although in the process of erecting the pylons, the defendants had cut trees in the plaintiffs' property, which trees had been acting as wind shields to the plaintiffs flowers, thus exposing them to hail storms. That there was no compensation on the after effects of the cut trees. That there was also no compensation for the damages caused to the farm during the preparation of the stringing of the wires and after the stringing process.

126. In their evidence, the plaintiffs asserted that pursuant to the construction of the way leave, it had subsequently affected the growth of the flowers underneath the way leave trace because the defendants had cut down trees that had acted as wind breakers. That an attempt to put hail nets was thwarted as they were blown off by the heavy winds thus exposing the flowers to damage. Secondly, that the presence of the way leave made it impossible for the plaintiff to put up any infrastructure and/or associated lighting systems underneath which further affected the growth of the flowers which needed sufficient light.

127. The plaintiffs' case is that as a result of the construction of the way leave, they had closed business because of the damage to the flowers on parcel No Nyandarua/Olaragwai/ 3432 and as such were seeking compensation to a tune of Ksh 1,673,875,786/= from the defendants. That if they were not compensated, that there be an injunction against defendants restraining them, their servants, agents, or any other person howsoever under their instructions, consent, authority and control from interfering in any manner whatsoever with the plaintiffs' parcel of land reference No Nyandarua/Olaragwai/3432.

128. The defendants have remained steadfast that they had fully compensated the plaintiffs, and that there had been no damage caused to the flowers during and after the stringing process and therefore there was nothing owing.

129. From the facts herein above sated, what the court needs to determine is as follows:

    i. Whether there was any damage caused to the flowers and irrigation infrastructure during and after the stringing process, that the defendants should compensate the plaintiffs.

    ii. Whether the plaintiffs' flower business was an ongoing concern and/or whether the construction of the way leave caused the closure of the business.

    iii. Whether the plaintiffs are entitled to orders of injunction.

    iv. Whether this honorable court has jurisdiction to entertain this suit.

130. Whereas the 1st defendant is a state owned corporation registered under the *Companies Act*, cap 486 Laws of Kenya and regulated under the *State Corporations Act*, cap 446, Laws of Kenya, the 2nd defendant is an agent of the 1st defendant by dint of being a contractor under an EPC contract for the construction of 436 Km Loiyangalani Suswa transmission line project which was commissioned on July 31, 2018.

131. Article 40 (3) of the *Constitution* provides as follows:-

> "(3) The state shall not deprive a person of property of any description, or any interest in; or right over property of any description unless the deprivation –
>
> a. results from an inquisition of land or a conversion of an interest in land or title to land in accordance with chapter five; or
>
> b. is for public purpose or in the public interest and is carried out in accordance with this constitution and any act of parliament that –
>
> i. requires prompt payment in full of just compensation to the person; and
>
> ii. allows any person who has an interest in; or right over, that property a right of access to a court of law."

132. Section 144 (1) of the *Land Act*, provides as follows:-

> " Unless the commission is proposing on its own motion to create a way leave, an application, for the creation of a way leave shall be made by any state department, or the county government, or public authority or corporate body to the commission."

133. In the case of *Machareus Obaga Anunda v Kenya Electricity Transmission Co Ltd* [2015] eKLR. Justice S Okong'o set down the procedure for acquisition of a way leave as follows:

'Section 144 (4) of the *Land Act* provides that an applicant for a way leave shall serve a notice of its application for the creation of a way leave to all persons occupying the land over which the way leave is sought, the county government within whose jurisdiction the land is situated and any other interested person. After service of the said notice, the commission is supposed to publish the application along the route of the proposed way leave. Section 146 of the Act requires the commission to consider all representations and objections received pursuant to the said notices and recommend to the cabinet secretary whether to carry out a public inquiry into the representations and objections or refer the application for the way leave to the county government or to initiate and facilitate negotiations with the persons who have made representations on the application with the applicant with a view of reaching a consensus on the application. The cabinet secretary is supposed to determine whether or not to create away leave after considering as the case may be the recommendation of the commission, or the advice of the county government or the outcome of any negotiations that may have been reached between the applicant for the right of way and those who had made representations or objections. If the cabinet secretary decides to create a right of way, it shall make an order to that effect which order shall among others be published in the Kenya gazette. Once the order is made, any person who had made representation or objection to the application for the creation of a right of way may appeal against the decision of the cabinet secretary to the court on a point of law.'

134. Section 148 (1) of the *Land Act* provides as follows

> Subject to the provisions of this section, 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 way leave, 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.

135. From the above provisions, it is clear that the Act has an elaborate procedure to be followed when one wants to create a way leave over private land. From the evidence adduced herein there is no doubt that the case involved the acquisition of a way leave by the 1st defendant for construction of power lines over the parcel of land owned by the plaintiffs. An advertisement had been made by the National Land Commission (Df exhibit 1) on October 14, 2013 wherein they had indicated all the parcels of land that were to be affected, their total parcel areas, the affected areas in accordance to the provisions of section 144 of the *Land Act*.

136. Subsequently, the 1st and 2nd plaintiffs had signed an easement and indemnity contract dated the February 23, 2015 and February 27, 2015 respectively, wherein they had accepted a consideration of Ksh 1,204,500/= being the full and final compensation for the loss of use of the land, where they had bound themselves and had undertaken to indemnify KETRACO in respect of any suit and/or claim that would arise in respect of the property regarding the agreement for grant of the easement that they had duly executed. There is no issue thereof on whether or not the defendants had obtained an easement on the plaintiff's property. Indeed access to the suit land had been granted wherein the construction of the transmission lines had begun and was subsequently completed.

137. It is important to point out here that a way leave trace was constricted that affected part of the suit property being 60 meters wide and measuring about 8.03 acres. This being a public right of way, the law governing its creation is section 143 of the *Land Act*. Section 143 (2) defines the public right of way as follows;

> " A public right of way may be –
>
> (a) a right of way created for the benefit of the national or county government, a local authority, a public authority, or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions referred to in this Act as a way leave; or
>
> (b) a right of way created for the benefit of the public referred to in section 145 if this Act as a communal right or way.

138. And section 145(4) provides;

> " A way leave shall authorise persons in employment to or who are acting as agents of or contractors for any of the organizations, authorities and bodies to enter on the servient land for the purpose of executing works, building and maintain installations and structures and in setting all such works, installations and structures on the servient land and to pass and re-pass along the way leave in connection with purposes of those organizations, authorities or bodies."

139. From the above provision, the plaintiff's agents are allowed to enter the servient land and undertake construction of power lines and indeed, construction of the power lines had been done.

140. It is also clear that the plaintiffs had been compensated an amount of Ksh 24,688,778/= for structures, trees, limited loss of land use and for the relocation of the irrigation equipment and other power line as well as an amount of Ksh 1,204,500/= as indemnity, sums which had been agreed upon after the negotiations with the plaintiffs.

141. The plaintiffs now say that the compensation was inadequate because further damage was caused to the flowers during and after the stringing process. They have produced as evidence Pf exh 3, an assessment report dated the February 14, 2018, by the agriculture and food authority stating that the compensation due was Ksh 757,570,500/=, Pf exh 4, a flower damage valuation report dated the April 11, 2017 from the ward agriculture extensive officer in the ministry of agriculture, livestock and fisheries who indicated the damage caused to the flowers as Ksh 11,700,000/=, the 3rd report produced as Pf exh 5 was dated the May 2, 2017 again from the ward agriculture extensive officer in the ministry of agriculture, livestock and fisheries who indicated that the damage caused to the flowers was Ksh 729,000,000/=. However in their plaint, the plaintiffs have sought for compensation to a tune of Ksh 1,673,875,786/=

142. It is clear from the evidence adduced by PW3, who had accompanied PW2 to the site and who were the makers of Pf exhibit 3 dated the February 14, 2018, that the assessment had been for the whole way leave trace excluding the pylon and in accordance with the map. That at the time the said report was made, the cables, which is referred to as stringing, had not been laid, (emphasis mine) although the pylon had gone up. Indeed a summation of the evidence adduced by PW2, PW3 and PW4 who were the makers of Pf exh 3 was to the effect that the report was based on future damage to be caused to the flowers during the putting up of the lines (stringing). They also conceded that the report did not factor in the cost of the production.

143. Common sense dictates that if Pf exhibit 3, an assessment dated the February 14, 2018 was done before the stringing exercise, which is the cause of action claimed by the plaintiff, then such assessment and any other assessments made prior to this report (Pf exhibit 4 and 5) would be of no relevance to the said claim. Of interest to note is that since the plaintiffs claim is based on damages caused to the flowers during and after the stringing exercise, whereas the defendants' defence is that no damage had been caused during and after the stringing exercise, it was incumbent of the plaintiffs to have tabled before court, a valuation and/or assessment report of the status of the farm as at the completion of the said stringing process as was required law.

144. The provisions of sections 107, 108 and 109 of the *Evidence Act* are clear and explicit to the effect that:

> S. 107 -Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> S. 108 -The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
>
> S. 109. -The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

145. In *Halsbury's Laws of England* 4th Ed at Para 662 (page 476) it is stated.

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established."

146. As noted herein above, the provisions of the law lends credence to the legal dictum that ''he who alleges must prove.''

147. I have also taken note of the 3rd plaintiffs annual year and financial statement ended December 31, 2018 which was filed on May 28, 2018 and produced as Df Exbit 6. It is worth noting that the revenue sale of flowers in the plaintiff's farm, that measured 40 acres as per the evidence of PW1, was as follows;

i. In 2016 gross earning was Ksh 63.89 million whereas in 2015 they earned Ksh 56.36 million gross.

ii. The cost of sales in 2016 was Ksh 18.1 million whereas in 2015 it was Ksh 22.1 million

iii. Direct production cost in 2016 was Ksh 18.03 whereas in 2015 it was Ksh 25.05 million

iv. Selling and distribution expenses in 2016 was Ksh 16.29 million whereas in 2015 it was Ksh 24.88 million

v. Administration expenses in 2016 was Ksh 2.77 million whereas in 2015 it was Ksh 5 4.92 million

vi. Other operating expenses in 2016 was Ksh 3.55 million whereas in 2015 it was Ksh 2.6 million

vii. The total of the expenses cost in 2016 was Ksh 39.15 million whereas in 2015 it was Kshs 40.74 million

viii. The amount of acreage under cultivation was 10 hectares in 2015 and 25 acres in 2016.

ix. The amount of stems sold was not shown.

148. In the present case, the way leave had occupied about 8 acres, there had been no report provided of the damage caused before or during the stringing exercise. That said and done how then could it be possible, upon considering the plaintiffs' revenue sale of flowers as herein above captioned, that they now claim for compensation of Ksh 1,673,875,786/= when no evidence had been placed before the court stating clearly how the plaintiffs had arrived at this colossal sum. That aside, evidence has also been adduced that as at August 17, 2017, the plaintiff only possessed a license for the year 2016 and that the flower farm was weltered, was at a dormant stage, and "the whole farm looked neglected." Without a license for the year 2017, and there being no evidence adduced to the contrary could it be said that the 3rd plaintiff was an ongoing concern? I think not. The damages so sought by the plaintiffs ought to not only be specifically claimed (pleaded) but also strictly proved because they would be a reimbursement to the plaintiffs for what they had actually lost and/or spent as a consequence of damage complained of.

149. In *Kenya Ports Authority v East African Power & Lighting Company Ltd* [1982] eKLR, the court held that:

> "……proof of actual damage was an essential ingredient of the tort of negligence, and that there is no cause of action in negligence, or in cases involving strict liability, unless actual physical damage is done to the person or property of the Plaintiff."

150. In *Joseph Kimani Gatheca v Gatundu South Water and Sewerage Company* [2018] eKLR, the court held as follows:

> "Compensation for negligence as was in the case of *Rylands v Fletcher* (supra) that he relied upon envisages damage or loss as having occurred before compensation is paid. It does not deal with a speculative scenario. In other words, compensation cannot be paid for a future

event which it is not known when or whether the same will occur. The basis of a claim for negligence is that there must be damage or a loss for compensation to be paid."

151. I have also considered the fact that after the 1st and 2nd plaintiffs had executed a grant of easement dated the February 23, 2015 in favour of KETRACO, they had subsequently indemnified KETRACO via an indemnity agreement executed on February 27, 2015 accepting a consideration of Ksh 1,204,500/= being the full and final compensation for the loss of use of the land. Hence through the said indemnity, the 1st and 2nd plaintiffs had bound themselves to indemnify KETRACO in respect of any suit and/or claim that would arise in respect of the property regarding the agreement for grant of the easement that they had duly executed. Both the plaintiffs thus had a legal agreement to hold the 1st defendant blameless and/or not liable in respect of any suit and/or claim that would arise in respect of the property.

152. I have also looked at clause 11 of the grant of easement agreement and the same is to the effect that:

''Any dispute or difference of any kind between the parties then connection to or arising out of this agreement or the breach, termination or validity hereof shall be settled by reference to a single arbitrator to be agreed on within seven days of service.....

The award shall be in writing and shall set forth in reasonable details the facts of the dispute and the reasons for the tribunal's decision.

The award in such arbitration shall be final and binding upon the parties and a judgment thereon may be entered in any court having jurisdiction for its enforcement, and the parties renounce any right of appeal from the decision of the tribunal in so far as such the renunciation and validly be made.''

153. It is clear from the above stated, of the intentions of the parties to the easement created via their agreement dated the February 23, 2015 pursuant to which, in the instant case, there had been no evidence that the dispute herein, between the parties to the easement, had been ''settled by reference to a single arbitrator''. Indeed no award has been filed.

154. The Court of Appeal in *National Bank Kenya Limited v Pipeplastic Samsolit (K) Limited & another* [2002] 2.EA 503 held that a court of law cannot rewrite a contract between the parties and that the parties were bound by the terms of their contract unless they could prove that coercion, fraud or undue influence was used to procure the contract. No evidence on coercion, fraud or undue influence was tendered in the instant case.

155. Besides the amount claimed for compensation by the plaintiffs being excessive and unreasonable, and there having been no proof of evidence of the damage and/or how such amount was arrived at and further, keeping in mind that the laying of the power lines did not take away the plaintiffs' land, but only restricted them from growing trees/crops which exceed about fourteen feet from the ground within the trace area of the power line, I find that the plaintiffs' suit lacks merit and the same is herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 22ND DAY OF SEPTEMBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE