



**Njue v Kenya Electricity Transmission Company Limited (Environment & Land
Petition E008 of 2021) [2022] KEELC 14430 (KLR) (31 October 2022) (Order)**

Neutral citation: [2022] KEELC 14430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND PETITION E008 OF 2021**

BM EBOSO, J

OCTOBER 31, 2022

BETWEEN

JANE WAWIRA NJUE PETITIONER

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY
LIMITED RESPONDENT**

ORDER

1. Although this petition was reserved for judgment today, I will not render a judgment on it. Upon reading the entire record in this petition, and after deep reflection, I have decided to, instead, issue this order in relation to the question of jurisdiction of this court. The issue of jurisdiction was raised in the respondent's written submissions as the first ground of objection to the petition. The reasons for this turn of events will be outlined in the paragraphs to follow. I will outline a brief summary of the dispute before I issue my disposal order.
2. Jane Wawira Njue brought this petition on September 7, 2021 under the constitutional framework on the bill of rights. She also cited provisions of various domestic statutes, among them, the *Energy Act* 2019 and the *Land Act* 2012.. In addition, she cited articles 14(1) and 26 of the *International Covenant on Civil and Political Rights 1976*. The petition is supported with the petitioner's replying affidavit sworn on August 27, 2022. Through it, the petitioner seeks the following reliefs:
 - a. A declaration be and is hereby given that the suit property Thika Municipality Block 17/1855 is petitioner's property and is entitled to equal protection in law.
 - b. A declaration be and is hereby given that the respondent's action of entering and laying electricity transmission lines on Thika Municipality Block 17/1855 without notice and prompt payment to the petitioner is illegal trespass, arbitral and unconstitutional.



- c. A declaration be and is hereby given that the respondent's action of entering and laying electricity transmission lines is a violation of petitioner's fundamental constitutional rights under article 27, 35, 40, 47, 48 and 50 therefore null and void.
 - d. A declaration be and is hereby given that the respondent's action of entering and laying electricity transmission lines is a violation of articles 2, 3(1), 10, 19, 20, 22, 23, 24, 27, 35, 40, 47, 48, 50, 60, 64(a) 258 and 259 of the Constitution of Kenya therefore null and void.
 - e. A declaration that the respondent has violated sections 143, 144, 147 and 148 of the Land Act, sections 2, 3(c) 4, 6, and 7 of the Fair Administrative Actions Act, section 4, 5, 8, 9, 11, 14, 20, 21 and 23 of the Access to Information Act and sections 170,171,172,173,174,175,177,184 and 186 of the Energy Act.
 - f. An order of *mandamus* be and is hereby issued compelling the respondent to comply with the law and make due compensation on the suit property based on the petitioner's valuation report.
 - g. An order of *mandamus* be and is hereby issued compelling the respondent to execute a wayleave agreement with the petitioner within 45 days from the date of judgement or in the alternative and without prejudice an order of permanent injunction to issue compelling the respondent to remove the electricity transmission lines from the suit property .
 - h. General damages for trespass and continued trespass.
 - i. General damages for constitutional violations.
 - j. General damages for psychological and mental suffering for over 10 years.
 - k. Punitive damages for arbitrary depriving the petitioner right to her property for over 10 years.
 - l. Special damages at Kshs 501,430.
 - m. Diminution value @ 15% of value of property.
 - n. 100% compensation for the wayleave pursuant to article 40 (3)(b)(i) of the Constitution based on the petitioner's valuation report.
 - o. Cost of the petition.
 - p. Interest at court rates in h,I,j,k,l,m,n and o from the date of filing of this petition.
 - q. Such other orders or reliefs to issue pursuant to article 23(3) of the Constitution of Kenya.
3. The gist of the petition is that the petitioner is the registered proprietor of land parcel number Thika Municipality Block 17/1855, measuring approximately 0.0288 of a hectare (the suit property). The land is situated within Thika Municipality. The petitioner was registered as proprietor of the land on January 14, 2009.
 4. It is the petitioner's case that in the year 2014, while undertaking an inspection of the suit property, she found electricity transmission lines laid over the suit property. She proceeded to the Thika Office of the Kenya Power and Lighting Company (the KPLC) to enquire about the electricity transmission lines. She was advised by the KPLC to write a formal letter giving her contact address. She was to be subsequently contacted. She was, however, never contacted, despite going back to the KPLC Office several times to follow up on the issue. Worried that she was going to lose her property, and after struggling to raise funds, she hired an advocate who wrote to the respondent on September 17, 2020.



- The said letter did not attract any response from the respondent. On October 2, 2020, her advocates wrote another letter to the respondent, requesting to be furnished with information relating to the “acquisition of the suit property”. The letter was copied to the Commission on Administrative Justice (the CAJ). The respondent did not respond to the letter.
5. The petitioner adds that on October 12, 2020, the CAJ wrote to the respondent requesting the respondent to comply with the request made in the preceding letter dated October 2, 2022. There was no response to the two letters. On November 9, 2022, the CAJ wrote a reminder to the respondent. This too did not attract a response from the respondent, prompting the CAJ to issue an order requiring the respondent to comply with the request for information within 7 days, failure to which the petitioner would be at liberty to approach the courts for redress.
 6. The petitioner contends that the CAJ’s order triggered a response from the respondent through a letter dated December 1, 2020, requiring the petitioner to contact the KPLC for compensation. At that point, the petitioner instructed her advocates to employ all alternative dispute resolution mechanisms to bring the matter to a closure. She contends that the respondent has frustrated all attempts to resolve the matter and has adamantly “remained” on the suit property and refused to give her the legal benefits that are guaranteed by the law.
 7. The petitioner contends that through its actions and omissions, the respondent has violated articles 2, 3(1), 259, 19, 20, 10, 60, 22, 23, 24, 25B, 40, 64, 27, 47, 35(1)(a), 48 and 50 of the Constitution of Kenya 2010. She further contends that the respondent has violated articles 14(1) and 26 of the International Covenant on Civil and Political Rights by violating the procedures and processes laid down for the acquisition of way leaves in Kenya.
 8. The petitioner has itemized and particularized the following alleged violations of the Constitution on part of the respondent: (i) unlawfully trespassing onto her land and refusing to compensate her, (ii) denying her the legal benefits provided by the law, (iii) denying her equal protection under the law, (iv) denying her access to information necessary for protection of her property rights; (v) adamantly remaining on her property despite refusing to compensate her; (vi) violating article 40 by arbitrarily trespassing onto her property and remaining there without making prompt compensation to her, (vii) disrespecting and failing to uphold and defend the Constitution; (viii) ignoring or neglecting national principles and values of the rule of law, human rights, non-discrimination, accountability, good governance and social justice; and (iv) discriminating against her by failing to follow the laid down procedures and processes for the creation of way leaves.
 9. The petitioner contends that as a result of the respondent’s violations, she has suffered the following special damages:
 - i. Valuation fees – Kshs 66,000.
 - ii. Legal costs on tracing the route of the way leave – Kshs 180,000.
 - iii. Logistics from Kenol to Thika Town (2014 to 2020) – Kshs 25,000
 - iv. Loan charged at 10 in order to file this petition – Kshs 220,000
 - v. Medical treatment expenses – Kshs 10430Total Kshs 501,430.
 10. The respondent opposes the petition through a replying affidavit sworn on February 16, 2022 by Johnson Muthoka, the respondent’s Senior Manager – Way Leaves Acquisition. He deposes that the petition herein has been instituted in bad faith, is ill-advised, misconceived, misplaced, scandalous,



frivolous, vexatious and a gross abuse of the court process. He adds that the petition is defective in that it does not meet the threshold set out in the Court of Appeal decision in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR and in the case of *Anarita Karimi Njeru v Republic* 1979 KLR. He contends that the petition has not set out with specificity any alleged contravention of the *Constitution* and does not demonstrate the alleged violations.

11. The deponent deposes that the respondent is a state corporation duly incorporated under the *Companies Act* and charged with the mandate of building, operating and maintaining high voltage electricity lines and associated substations that form the back-bone of the National Transmission Grid, in line with Vision 2030 and pursuant to Sessional Paper No 4 of 2004 on Energy. He adds that the respondent is charged with the responsibility of improving the quality and reliability of electricity supply throughout the country; transmission of electricity to areas that are currently not connected to the national grid; evacuation of power from planned generation plants; providing a link with neighbouring countries in order to facilitate power exchange; and development of electricity trade in the region, among other responsibilities.
12. He adds that, in line with the above mandate, the respondent set out to construct the 132 KV Kilimambogo – Thika – Githambo Transmission Line to evacuate electricity from the geothermal generation plants by ensuring supply of cheaper, reliable and sustainable geothermal power to the central region of Kenya, thereby enabling the region to engage in business without worrying about power outages any more. The project begun in 2010 with sensitization of land owners likely to be affected by the project and undertaking transmission line mapping and survey. He contends that the cut-off date for the purpose of compensating the land owners who were to be affected by the project was 2010. He adds that the purpose of a cut-off date is to prevent illegal enrichment methods where land owners intentionally disappear for years then resurface to claim unreasonable sums of money as compensation.
13. Mr Muthoka deposes that the respondent normally negotiates with land owners to grant rights of way over their land, to enable construction of electricity transmission lines. In return, the land owners are compensated for limited loss of land use based on the value of land per acre at the project cut-off date and the impact of transmission line on the property. He adds that the compensation figure is arrived at by multiplying the impact by the value of land per acre (VA) by the affected acreage (AA). The impact (I) is the affected acreage (AA) divided by the total acreage of the land multiplied by 100%. He adds that the minimum impact used to calculate compensation is 30% of the value of the acreage affected by the transmission line where the impact is below 30%. Where the impact is above 30%, that impact is used in calculating the compensation payable.
14. He deposes that the compensation is made in respect of only limited loss of land because the respondent does not compulsorily acquire the way leave trace, contending that the respondent only acquires an easement over the wayleave trace. He adds that there are only two restrictions on activities to be conducted under the trace: (i) no planting of trees/crops that at maturity exceed 12 feet in height; and (ii) no construction of any form of structures under the trace.
15. Mr Muthoka adds that on November 18, 2010, representatives of the respondent, together with representatives of KPLC, engaged representatives of residents of Athena Estate, within Thika Town, where the suit property is located. He contends that it was mutually agreed by the said representatives that owners of the affected properties were to be paid just compensation of Kshs 350,000. He states that the respondent compensated owners of all the affected properties except the petitioner who could not be traced. It is the case of the respondent that failure to compensate the petitioner was occasioned by the untraceability of the petitioner. Mr Muthoka contends that the petitioner deliberately disappeared on the cut-off date in a bid to resurface later so as to unjustly enrich herself by claiming exorbitant



- compensation. He contests the petitioner's allegation that she became aware of the installation of the electricity transmission lines in the year 2014.
16. The deponent contends that the respondent only became aware of the petitioner's claim late in the year 2020 when the petitioner's advocate wrote letters dated September 17, 2002 and October 2, 2020. There had been no prior approach from the petitioner to the respondent or to KPLC. He contends that upon receipt of the petitioner's claim, the respondent had to liaise with the Chief Way Leaves Officer of KPLC to ascertain the veracity and credibility of the petitioner's claim of proprietary rights over the suit property. He contends that during that period, the petitioner, vide a letter dated November 17, 2020, maliciously misrepresented to the CAJ that the respondent was non-responsive, prompting the CAJ to write to the respondent letters dated October 12, 2020, November 9, 2020 and November 23, 2020. He adds that the respondent dutifully responded to the said letters through a letter dated December 1, 2020.
 17. He contends that the respondent explained to the CAJ that the project commenced in 2011 and was completed in 2013; that the way leave corridor is 40 metres and the suit property is wholly within the wayleave corridor; that all other properties within the way leave were valued between 2011 and 2012 and the owners were duly compensated at Kshs 350,000 each, which amount was the valuation per plot as at the cut-off date which was 2011; that the respondent engaged all the affected property owners through community sensitization meetings which led to an agreement for the compensation payable per plot; and that the letter of offer relating to the suit property was available; and that the suit property was among the properties that were not physically occupied.
 18. Mr Muthoka contends that the petitioner rejected the offer and demanded Kshs 20,961,000 as compensation, a figure that he contends is grossly exaggerated, inflated, unreasonable, and amounts to unjust enrichment. He denies trespass. He also denies the special damages itemized by the petitioner.
 19. The petition was canvassed through written submissions dated March 16, 2022, filed by M/s S K Oloo & Co Advocates. The respondent opposed the petition through written submissions dated June 6, 2022, filed by M/s Muluvi Mitau & Associates. The first ground of objection to the petition relates to the jurisdiction of this court to hear and determine the dispute in this petition.
 20. There is no doubt about the centrality of jurisdiction in Kenya's civil legal system. Nyarangi JA underscored the significance of jurisdiction in the case of *Owners of Motor Vessel Lillian "S" v Caltex Oil (Kenya) Ltd* [1989] eKLR in the following words:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
 21. Because of the centrality of jurisdiction in our justice system, I will first dispose the issue relating to the jurisdiction of this court to adjudicate this dispute.
 22. The respondent's position on this issue is that the petitioner alleges breach of sections 170, 171, 172, 173, 174, 175, 177, 184 and 186 of the *Energy Act* by the respondent. The respondent contends that under section 36 of the *Energy Act*, the Energy and Petroleum Tribunal established under section 25 of the Act is the primary adjudicatory body vested with original jurisdiction to hear and determine this dispute. Counsel for the respondent has cited various decisions to support the respondent's



- objection to the jurisdiction of this court. The petitioner elected not to reply to the respondent's written submissions in which the question of jurisdiction was raised.
23. I have reflected on the issue of jurisdiction. The gist of the petitioner's claim is that the respondent has laid electricity transmission lines over her land but has failed to give her prompt compensation for that. The respondent is one of the entities in the energy sector licensed by the Energy and Petroleum Regulatory Authority to build, operate and maintain electricity transmission lines. It is therefore a licensee within the meaning of section 2 of the [Energy Act](#) 2019.
24. Section 36(3) of the [Energy Act](#) grants the Energy and Petroleum Tribunal original civil jurisdiction on any dispute between a licensee and a third party or between licensees. The petitioner is one such third party. Further, section 36 grants the Tribunal jurisdiction to award damages. This court is therefore in agreement with counsel for the respondent that this being a dispute about compensation in relation to electricity transmission lines laid over the petitioner's land, the primary adjudicatory body to hear and determine the dispute is the Tribunal established by Parliament under section 25 of the [Energy Act](#). Clothing this dispute as a constitutional petition does not in any way divest that jurisdiction from the Tribunal.
25. Our courts have oftentimes stated that where Parliament has, through statute, provided a clear procedure for seeking redress, that procedure must be followed. Prior to the promulgation of the [Constitution](#) of Kenya 2010, the Court of Appeal reiterated this principle in [Speaker of the National Assembly v James Njenga Karume](#) [1992]eKLR in the following words:-
- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
26. The Supreme Court of Kenya rendered itself on this principle in the case of [Benard Murage v Fine Serve Africa Limited & 3 others](#) [2015] eKLR as follows:-
- “Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”
27. Not too long ago, the Court of Appeal [Makhandia J A] emphasized this principle and stated the following regarding multifaceted pleadings in [Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others](#) [2020] eKLR [the Kibos Distillers case]:
- “To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that is [Speaker of the National Assembly v James Njenga Karume](#)[1992] eKLR where



it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

28. Consequently, my finding on the question of jurisdiction of this court to adjudicate this dispute is that this court is not the proper adjudicatory body to hear and determine the dispute in this petition.
29. I will, however, not strike out the petition. I will instead defer to the principle laid down by the Supreme Court of Kenya in the case of *Benson Ambuti Adega & 2 others v Kibos Distillers & 5 others*. The Supreme Court of Kenya rendered itself thus:

“ 54. The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the petition. However, once it had established that the ELC did not have jurisdiction to hear and determine the petition, the appellate court should at that juncture have issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institution for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void *ab initio* and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”

30. The result is that this court will down its tools by remitting this dispute to the Energy and Petroleum Tribunal for adjudication. I accordingly direct that this file be remitted to the said Tribunal. The Tribunal will be at liberty to give directions relating to additional filings which the parties will be required to make for the purpose of aligning the present documentations with the procedures and formalities of the Tribunal. The order reserving a date for judgment in this petition is accordingly vacated. Because the dispute in this petition arose out of a public project and the said dispute is yet to be conclusively determined, parties will bear their respective costs relating to the proceedings in this court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF OCTOBER, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Opiyo and Mr Oloo for the Petitioner

Muluvi [logged in but muted] for the Respondent

Court Assistant: Ms Osodo

