



**Mubei v Kenya Electricity Transmission Co. Limited & 2 others (Environment & Land Case 141 of 2019) [2023] KEELC 18832 (KLR) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18832 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 141 OF 2019**

**A OMBWAYO, J  
JULY 11, 2023**

**BETWEEN**

**KENNETH KIPKIRUI MUBEI ..... PLAINTIFF**

**AND**

**KENYA ELECTRICITY TRANSMISSION CO. LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Kenneth Kipkirui Mubei (hereinafter referred to as the plaintiff) has sued the Kenya Electricity Transmission Company, National Land Commission and Attorney General (hereinafter referred to as the defendants). The plaintiff alleges that at all material time relevant to this suit he was and is the lawfully registered owner of the suit property known as LR No 13287/42 measuring approximately 21.36 hectares. The plaintiff states that on or about October 8, 2018 the 1<sup>st</sup> defendant herein egregiously and without any notice of inquiry and/or notice of intention to acquire the plaintiff's parcel of land awarded a contract for the construction of the 400/222kv DC way leave Olkaria- Lessos-Kisumu transmission line with a view to evacuate electricity from the geothermal generation plants of Olkaria to help strengthen the link between the eastern and the western parts of the national grid. The way leave trace of 60 meters wide corridor transmission line traverses approximately 4.647 acres over the plaintiff's parcel of land.
2. On or around the year 2015/2016 the defendants fraudulently and only on partial compensation of an alleged 70 % of the full value ordered the plaintiff to bring down structures that he had put up on the subject property along the corridors of the wireline.
3. The defendants in a bid to compulsory acquire a portion of the plaintiff's property have maliciously, fraudulent and illegally undervalued the said 4.647 acres of land at a paltry Kshs 6,970,073.25 a



sum which does not meet the current open market value of the portion of the property majorly to unlawfully deprive the plaintiff of his entitlement to benefit from his lawful proprietorship.

4. On or about February 22, 2019 the defendants capriciously and egregiously gave a notice through the Kenya Gazette of their intention to acquire the plaintiff's property for the construction of the Olkaria-Lessos- Kisumu 400/220/132KV without consulting the plaintiff, without fully compensating him, without according him commensurate compensation and without any prior notice to the plaintiff.
5. The plaintiff avers that the defendants have continuously taken him through malicious, fraudulent and illegal acts and which acts have prejudiced his entitlement to quiet enjoyment and possession of the subject property.
6. The plaintiff avers that the defendants have committed to compensate on account of the intended compulsory acquisition of the subject property however the commitment by the defendant's to compensate him for loss of user over the portion of his property on the basis of an unsubstantiated and irregular valuation of the property is mere pittance, unlawful and not fair and/or suitable compensation as is by law required.
7. The plaintiff avers that the defendants have trespassed on and have forcefully put up wire line on the said land parcel without any legal authority or express permission of the plaintiff as the legal owner and without affording the plaintiff any compensation. That as a result of the defendants' malice and illegality, the plaintiff has suffered immense loss.
8. The plaintiff prays for a declaration that he is the lawful owner of the suit property and entitled to all beneficial interests on the property and that the value of the subject property assigned by the defendant is below the current market value of the subject property.
9. The plaintiff further prays for a commensurate and full compensation for loss of user of the subject property as per the current market value of the property. The plaintiff believes that a permanent and temporary injunction against the defendants until the plaintiff is fully compensated will suffice. Lastly, he prays for damages for loss of user and mesne profits plus costs of the suit.
10. The 1<sup>st</sup> defendant filed a statement of defence whose import is that the plaintiff shall be required to validate his title to enable full compensation. He states that the 1<sup>st</sup> defendant does not compulsory acquire land but acquires way leave through properties. According to the 1<sup>st</sup> defendant in acquisition of wayleave over property, the proprietor remains the owner of the property as opposed to compulsory acquisition were proprietary's shifts to the person on whose behalf to government acquires on public interest. The 1<sup>st</sup> plaintiff acquired wayleaves right over the property but did not compulsory acquire to land. The 1<sup>st</sup> defendant avers that the plaintiff was offered Ksh6, 970,073.25 as fair compensation of the loss of user of the land. The 1<sup>st</sup> defendant denies any fraud on 1<sup>st</sup> plaintiff. He denies trespass. The 1<sup>st</sup> defendant alleges that the compensation was done accordingly and that the acquisition of way leave was done on behalf of the Government of Kenya. The 1<sup>st</sup> defendant prays that the suit be dismissed with costs.
11. The 3<sup>rd</sup> defendant filed defence denying the allegation against him of fraud malice and illegality. The 3<sup>rd</sup> defendant denies any responsibility for any loss damage to the plaintiff.
12. When the matter came for hearing PW1, Kenneth Kipkirui Mibei, a farmer living in Ngata in Nakuru relied on his statement and documents that were adopted as evidence in chief and exhibits respectively and are on record. On cross examination he states that he knew that the 1<sup>st</sup> respondent was acquiring an easement in the property and that there has was a public baraza to that effect. He states that the acquisition has caused him limited use of the land. The easement has limited his use of a chopper that



- he normally hires to be dropped at the property. He was paid some compensation for the property due to the easement but he does not understand the formula used. He was paid for the structures on the land and that was to be paid for the full value of the property. On cross examination by M/s Shirika, learned senior state counsel, he agreed that the property was not compulsorily acquired by the state.
13. PW2, Joseph Mungatia Inoti, a valuer since 1992 valued the land acquired by the 1<sup>st</sup> defendant as the easement measuring 4.647 acres. Out of 52.8 acres. The land has agreement. He valued the land at Ksh.31,300,000/=.
  14. PW3, James Mutinda Mulika is an electrical contractor in Electrical Engineering. He has worked with KPLC as a utility Contractor Engineering for Suswa sub-station for Olkaria. He investigated the power line running across the plaintiffs land. The plaintiff's house is 46 metres from the line. The height of the tower is 60 metres. The base of the tower to the house is 43 metres. He states that because of the Electronic magnesium there could be electro magnesium effect due to the line. This affects the TV and radio network. One cannot occupy the home due to radiation and poor network. He states that the house can be demolished and the plaintiff to be compensated. On cross examination he states that the difference between the pylons is 200 metres and in the plaintiff's land there is only one pylon. He did not interview any tenant as he found none in the house.
  15. PW4 Bernard Kibiwott relied on his statement that was adopted by this court as evidence in chief. He is the farm manager. According to the witness the parcel of land has one high voltage line. He has lost tenants because of the power lines. The house was once occupied by an Italian couple.
  16. PW5, Timothy Kiprop a security officer at the residence gave evidence and his statement was adopted as evidence in chief. On cross examination, he states that he has worked at the farm since October 2020 to date. The wires were placed in 2021. When he entered the farm there was a white man living in the house. He left in 2020. He left due to the wires. His boss has been using a chopper. He still lands in the premises but far from the power lines.
  17. DW1, called Matilda Mwanyumi, a land economist and valuer who has worked with KETRACO for 13 years. She is a registered valuer and estate agent with E.A.R.D. She relied on her statement, which was adopted as evidence in chief. She produced the documents in her list of documents as exhibits. She states that the width of the corridor is determined by the voltage. The higher the voltage the wider the corridor. This is to enable a safe area. Compensation is computed regard on the impact on the land by the transmission lines. They pay 30% of the value of the land. They can't pay for the full value of the land.
  18. On cross examination by the counsel for the plaintiff she states that she had never visited the suit land and that she is a valuer but has no expertise on Electricity and Electronics. She does not have a valuation report. The amount referred to in her document is only for the land. She admits that one can't plant trees along the corridor. The value for 4 acres would be 20 million. The value for ¼ an acre would be 1,500,000/=. The total valuation would be reduced by 70 %. The payment would be 30% of the total value.

## Submissions

19. The plaintiff submits that he is entitled to compensation because his property was illegally compulsory acquired. He relies on section 111 of the *Land Act*. The plaintiff further cites section 148 of the *Land Act* that deals with compensation in respect of public right of way. The plaintiff submits that the defendants undervalued his land. The plaintiff does not oppose the use of the land for purposes of



construction of high voltage power lines but he seeks for compensation. The plaintiff claims to have been using the land for agriculture and for rental purposes.

20. The 1<sup>st</sup> defendant submits that the valuation of the plaintiffs property was properly evaluated at Kshs5,000,000 per acre. The plaintiff was given notice of the acquisition on May 27, 2015 in the people daily newspaper. The 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant called people and deliberated the acquisition in public baraza and therefore there is no evidence of fraud illegality and undervaluation.
21. The 1<sup>st</sup> defendant submits that the open market value of Ksh5,000,000 per acre was proper. The compensation for Kshs6,970,073.25 is not for compulsory acquisition but for limited loss of user. The formula of calculating the compensation is based on the percentage of unusability of the land. That is, if the area affected is 30% of the land and below, 30 % of the value will be paid. Hence an amount of 30 % of 20,000,000 was paid. According to the 1<sup>st</sup> defendant the plaintiff was adequately compensated. The defendant concludes that the plaintiff is not entitled to damages for loss of user.

### Analysis

22. To begin with the plaintiff is not opposed to the acquisition of public right of way on the land by the 1<sup>st</sup> defendant and therefore it will be an academic exercise to inquire into how the land was acquired whether it was fraudulent illegal or unfair. In any event the plaintiff has been partially compensated by the 1<sup>st</sup> defendant. The issue before this court is purely for compensation. It is clear from the evidence on record that the High Voltage Transmission line is in operation and it would not be logical to stop it as it traverses many parcels of land from Olkaria to Lessos and to Kisumu. It is a fact that the plaintiff is the owner of the suit parcel of land measuring 52.8 acres. It is clear that the 1<sup>st</sup> defendant has acquired easement rights in respect of 4.647 acres of the parcel of land. The land is valued at Kshs5, 000,000/ = per acre by the 1<sup>st</sup> defendant. The total value according to the 1<sup>st</sup> defendant was Kshs20, 000,000 reduced by 30 percent plus 1,500,000. On the other hand, the plaintiff engaged expert valuers known as Prime Valuer who valued the property at Kshs31,300,000. Section 148 (1) of the Land Act, Act No 6 of 2012 provides:-

S.148. (1) “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 wayleave, 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.”

S. 148 (5) “If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.”

23. I have considered the application on record and do find that it is not clear how the 1<sup>st</sup> defendant arrived at a valuation of Kshs5, 000,000 per acre. On the other hand, the plaintiff engaged the services of Prime Valuer experts in valuation who came up with a value of Kshs31, 300,000. On cross- examination. Mr. Joseph Mungatia Inoti stated that the terms of reference was to assess the open market value and that his terms of reference could have been different if he was to assess for limited use.



24. I do find that the plaintiff placed the value of the 4.637 acres at 31,300,000 wrongly based on market rates when what was to be valued was loss of user, whereas the defendant placed it at Kshs21,500,000 without a valuation report, and whereas the 1<sup>st</sup> defendant did not give a formula of arriving at Kshs 5, 000, 000 per acre hence totaling to 21,500,000, the plaintiff has a formula despite the fact that he was valuing the property at the open market value and yet the 1<sup>st</sup> defendant was acquiring the property not compulsorily and was allowing the plaintiff limited use of the property such as planting of certain crops and grazing cows.
25. To balance between the two valuations, this court finds that a figure of Kshs15, 000,000 would be a sufficient compensation due to the fact that the plaintiff will be allowed limited use of the parcel of land. The court in arriving at the figure has considered the fact that the plaintiff's usage of the land will be limited because he cannot utilize the land fully by planting trees or erecting any structure.
26. Ultimately, this court issues a declaration that the plaintiff is the lawful owner of the suit property and entitled to all beneficial interests on the property subject to the easement created by the 1<sup>st</sup> defendant.
27. The court further issues a declaration that the value of the subject property assigned by the 1<sup>st</sup> defendant is below the current market value of the subject property.
28. This court finds that the plaintiff is entitled to a commensurate compensation for a limited loss of user of the subject property.
29. The plaintiff cannot be granted a permanent and temporary injunction against the defendants until the plaintiff is fully compensated due to public interest and that the power lines are already in use. I do decline to grant mesne profits as the plaintiff will be adequately compensated for loss of user. I do grant the plaintiff Kshs15, 000,000 for loss of user. Cost of the suit to the plaintiff.

Judgment dated, signed and delivered virtually at Nakuru this 11<sup>th</sup> day of July 2023.

**A O OMBWAYO**

**JUDGE**

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