



Ndiangui v Kenya Electricity Transmission Co Ltd (Environment and Land Constitutional Petition E13 of 2021) [2023] KEELC 20125 (KLR) (19 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E13 OF 2021
A OMBWAYO, J
SEPTEMBER 19, 2023**

BETWEEN

MIRIAM WANJIRU NDIANGUI PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO LTD RESPONDENT

JUDGMENT

1. The petitioner commenced this suit vide the petition dated 6th August 2021. The petitioner sought the following prayers;
 - a. A declaration that the respondent has violated the petitioner's constitution rights protected under Article 40 of *the Constitution*.
 - b. A declaration that the Respondent should compensate the petitioner at current market rates of the land and not the 2017 rates.
 - c. An order that the respondent do forthwith pay fair and just compensation for the loss of use of land on Title No. LR 1556/341/11 at current market rates.
 - d. General damages for violation of the petitioner's constitutional rights.
 - e. Cost of the suit.
2. The petitioner averred that she bought plot number 11 of LR 1556/341 Naivasha on 28th April 2018 for Kshs.1, 300,000/= . The petitioner also averred that she took possession of the property constructed a permanent house, pit latrine, chicken pen, tank support steel framework, a perimeter fence and a gate. The petitioner further averred that she also connected electricity to her premises. That the respondent vide the Kenya Gazette of 22nd February 2019 Vol CXX1-No. 23 notified the petitioner of its intention to use her land for the purposes of Olkaria-Lessos-Kisumu 400/220 KV Trans Mission Line Project. That the petitioner allowed the respondent to use the property subject



- to prompt payment of just compensation so that she could purchase another plot and relocate her residence. That the respondent valued the property at Kshs. 5,442,950/= on 21st August 2017 and paid 3,810,065/=. That the respondent demolished the petitioner's developments and paid the balance of kshs. 1, 632,885/=.
3. The petitioner averred that on 5th December 2017, the Respondent offered to pay the petitioner Kshs. 700,000/= for limited loss of use of her land which amount it has never paid. That the value of the land had appreciated and by 16th January 2021 it was valued at Kshs. 1,500,000/=. That the respondent took possession of the petitioner's land and caused high voltage transmission lines to pass over it and she cannot use it for her residence.
 4. The petition was supported by the supporting affidavit of the petitioner sworn on 6th August 2021 where she reiterated the contents of her petition and deposed that she issued the respondent with a Notice of Intention to sue for violation of her constitutional rights vide the letters dated 22nd February 2021 and 12th May 2021. That the Respondent only responded to the petitioner's letter dated 22nd February 2021 vide the letter dated 7th April 2021.
 5. In response to the petition, the respondent filed a Notice of Preliminary Objection and a replying affidavit sworn on 15th September 2021 by Samuel Kirera on 16th September 2021.
 6. The preliminary objection is as follows;

“Take notice that the respondent shall at the earliest opportune time raise a preliminary objection that this honourable court lacks jurisdiction to hear and determine this dispute and suit against the respondent, consequently, should be struck out with costs as the same offends the provisions of Sections 148(5) of the Land Act 2012 as well as Land (Assessment of just compensation) Rules 2017 (LN 283 of 2017).
 7. In the replying affidavit, Samuel Kirera deposed that he is an assistant Land Economist employed by the respondent herein. That he has been assigned to the Olkaria-Lessos-Kisumu Transmission Line Project. That the petition is premature because the respondent has not refused to compensate the petitioner. That through an offer letter dated 5th December 2017, the respondent offered compensation for land parcel 1556/341/11 which had been computed using the respondent's compensation policies. That the petitioner accepted but did not furnish the respondent with all the requisite documents to enable registration of an easement. That the compensation offered was based on the valuation of the subject property in the valuation report by Icon valuers which set out the open market value of the land. That the respondent does not undertake compulsory acquisition of land but only acquires a public right of way as per the Land Act and the ownership remains with the owner. He then set out the mandate of the respondent and stated that the respondent set out to construct the 400/220kv DC Olkaria-Lessos-Kisumu transmission line to evacuate electricity from the geothermal generation plants of Olkaria. That the National Land Commission advertised in the People Daily Newspaper of 27th May 2015 of the said project. That the respondent negotiated with the owners of various parcels of land to grant rights of way over their land to enable construction of the electricity transmission lines and in return the owners were 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 the transmission line on the property. That for land compensation, the landowners would furnish the respondent with title deeds or certificate of titles to enable effective registration of easement in favour of the respondent. That in instances of purchaser's interest, the title holder is engaged with the purchaser to execute grant of easement agreement in favour of the respondent and the purchaser following submission of original title deed to the respondent. That the compensation for limited loss of land use is arrived at by multiplying the impact by the value



of land per acre (VA) by the affected acreage (AA). The impact is the affected acreage divided by the total acreage of the land multiplied by 100%.

8. He also deposed that the suit property was among the properties earmarked for acquisition of wayleave and was advertised as LR No. 1556/2. That the respondent later established that the suit property had been subdivided and the transmission line later affected LR 1556/341/11 after the project cut-off date of 27th May 2015. That upon engagement with the owners, it was agreed that compensation would be made upon proof of ownership as per the respondent's Resettlement Policy Framework. That the transmission line traverses 0.073 acres of land parcel number LR No. 1556/341/11. That the respondent does not recognise the subdivisions that were undertaken after the project cut of date. That based on goodwill, the respondent issued the petitioner with a letter of offer dated 5th December 2017 that required the petitioner to supply the respondent with all the requisite documents which she had not supplied. That the delay in compensation has been occasioned by the failure to supply the requisite documents. That the petitioner filed the present petition before supplying the respondent with the requisite ownership documents. That the compensation payable is for the inconvenience caused by the wayleave and not for the entire property as envisioned by the petitioner.
9. The petitioner filed a supplementary affidavit on 5th October 2021 that was sworn on 2nd October 2021.
10. She deposed that with regard to the preliminary objection, this court has jurisdiction to hear and determine this matter as provided for by Section 148 (5) of the Land Act. That Section 13 of the Environment and Land Court Act and Article 162 of the Constitution grants the court jurisdiction to hear the petition. That the valuation report by Icon Valuers has never been availed to her and that it indicates that the respondent unlawfully offered her less than the ascertained value. That she can no longer use the land and that the respondent's policy does not state the payment of compensation would be done after she had furnished the respondent's with the documents of title. That the conduct of the respondent is not in accordance with the national values and principles of governance as required under Article 10 of the Constitution.
11. The petitioner also filed a further supplementary affidavit on 14th January 2022 sworn on the same day.
12. She deposed that she furnished the respondent with all the relevant documents to prove ownership and that the respondent vide its letter dated 5th December 2017 indicated that it would compensate her for her land. She reiterated that the respondent caused her to demolish her permanent house and other developments on the land and she complied and they paid her Kshs. 5,442, 950/= . That the respondent would not have paid for her developments if they had any doubt of her ownership of the suit property. That in the advertisement in the People Daily of 27th May 2015, the respondent indicated her as the owner of the suit property and that the respondent cannot lawfully fail to pay her on the ground that it was not sure whether she was the owner of the land or not.

Evidence

13. Penina Njeri Thiong'o testified as PW1. It was her evidence that the dispute is over LR No. 1536. She testified that she subdivided it into five portions and surrendered her title. She also testified that she has not collected the titles because the title of LR 1536/341 was misplaced.
14. Upon cross examination she confirmed that Miriam's title number was 1556/341 and that she was not alone as there were many. She also confirmed that Miriam did not buy the suit property from her. She further confirmed that the petitioner had bought the suit property from Joseph Mwangi Mburia who had bought the property from Joyce Wambui Thiongo. She admitted that she was the administrator of the estate of Joyce Wambui Thiongo. She confirmed that Joseph Mwangi Mburia had bought 1 acre which he subdivided into 40 x 80 plots and sold them to 12 people.



Submissions

15. The petitioner filed her submissions dated 3rd March 2023 on 6th March 2023, the respondent filed its submissions dated 24th March 2023 on the same date and the petitioner filed further submissions dated 14th April 2023 on 17th April 2023.
16. The petitioner in her submissions filed on 6th March 2023 set out the background of her petition, the response thereto and identifies the following issues for determination;
 - a. Whether the petitioner's rights under Article 40 of *the Constitution* has been violated.
 - b. Whether the petitioner is entitled to compensation at current market rates.
 - c. Whether the petitioner is entitled to general damages for violation of her rights under Article 40.
17. On the first issue, the petitioner relied on the case of David Gathu Thuo v Attorney General & another [2021] eKLR and submitted that she has met the standards required of a constitutional petition as she cited in her petition that the respondent had violated her rights under Article 40 of *the Constitution*. The petitioner further submits that she has proved that she was not given just compensation which was contrary to Article 40 (3)(b) of *the Constitution*.
18. On the second issue, the petitioner relied on the case of Kenya Power and Lighting Company Limited vs Philip A M Kimondiu [2013] eKLR and submitted that she is entitled to be compensated for loss of use of LR 1556/341/11 in its entirety since she could not relocate her residential property to the remaining unaffected part of the suit parcel of land in view of the restrictions of use placed by the way leave. The petitioner reiterated the contents of her supplementary affidavits and submitted that the contract between her and the respondent was void and so she was entitled to be compensated for the loss of use of the land 100% at the current market rates as it would enable her purchase alternative land.
19. On the third issue, the petitioner relied on the cases of Peter Ndegwa Kiai t/a Pema Wines & Spirits vs Attorney General & 2 Others [2021] eKLR, Susan Kakai (substituted with Simon Kampala Kakai) vs Ministry of Co-operative Development & 2 others [2020] eKLR and sought that the prayers in her petition be granted.
20. The respondent in its submissions gave a background to its response to the petition and submitted on whether this court has the jurisdiction to hear and determine this matter.
21. The respondent relied on the cases of the owners of Motor Vessel 'Lilian S' vs Caltex Oil Kenya Ltd [1989] KLR 1, Samuel Kamau Macharia and another v Kenya Commercial Bank and 2 Others application No. 2 of 2011 and submitted that the petitioner ought to have approached the authority or the Energy and Petroleum Tribunal before coming to this court.
22. The respondent also submitted that the petitioner lacks locus standi and relied on the case of Alfred Njau and Others vs City Council of Nairobi [1982] KAR 229, Section 24 (a) and 26(1) of the *Land Registration Act*. The respondent further submitted that the petitioner has failed to prove her legal interest in the suit property.
23. The respondent concluded its submissions by seeking that the petitioner's claim be dismissed as she failed to supply her title documents to enable her to be compensated. The respondent relied on the case of Secretary of State for foreign affairs vs Charlesworth Piling & Co. & another [1901] The Law Reports (HL & PC), 373 and sought that the petition be dismissed with costs.



24. The petitioner in her submissions filed on 17th April 2023 submitted on the whether this court has jurisdiction to hear and determine the petition, whether she lacks locus standi and whether she is entitled to the prayers sought.
25. On the first issue, the petitioner submitted that the matters for determination in the present petition are distinct from the disputes that are envisaged by the *Energy Act* No. 1 of 2019 as per Sections 11 and 36 of the *Energy Act* No. 1 of 2019. She reiterated that the issue for determination is whether the entire process of compensation was constitutional and that the Energy and Petroleum Tribunal did not have the jurisdiction to determine violations and infringement of rights and fundamental freedoms. The petitioner relied on the case of Johnson Mbaabu Mburugu & another v Mathiu Nabea & 9 Others [2020] eKLR among other cases in support of her arguments.
26. On the second issue, the petitioner relied on Article 22 of *the Constitution*, the case of Ms Pathologist Lancet Kenya Limited vs Christa Marianne Mission Hospital [2021] eKLR and reiterated that the respondent gazetted her as the owner of the suit property and it cannot therefore now claim that she had not demonstrated that she was the owner of the suit property.

Analysis and determination

27. After considering the petition, the response thereto, supplementary affidavits and the submissions, it is my view that the following issues arise for determination;
 - a. Whether this court has jurisdiction to determine this petition.
 - b. Whether the petitioner is entitled to the reliefs sought in the petition.
 - c. Who should bear costs of the petition.
28. On the first issue, the respondent raised a preliminary objection to the petition on the ground that it offends sections 148(5) of the *Land Act* and Land (Assessment of Just Compensation) Rules 2017.
29. In response, the petitioner argued that the Energy and Petroleum Tribunal does not have the jurisdiction to determine whether rights have been violated.
30. It is important to note that the respondent raised a preliminary objection on the ground that this court lacks jurisdiction to hear and determine this petition and it should be struck out as it offends the provisions of Sections 148(5) of the *Land Act* 2012 and the Land (Assessment of Just Compensation) Rules 2017.
31. However, the respondent in its submissions relied on Section 36(3) and (4) of the *Energy Act* 2019 and submitted that the jurisdiction to determine any matter touching on wayleave should be determined by the Energy and Petroleum Tribunal.
32. The court in the case of Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 held as follows:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided. ...regarding the meaning and import of submissions in matters, I find that submissions are like decorations in a wedding fete where parties therein decorate the props and environment generally to direct the guests’ attention to the fact that there is a wedding cake placed somewhere in readiness for enjoyment by way of eating. They are to attract guests to focus on the real issue partaking of the cake. Where there is no wedding cake, the decorations are meaningless



for guests do not eat decorations. And, a wedding cake can be eaten without decorations necessarily being there. In like manner, courts will decide on issues before them even where submissions have not been made thereon”

33. It is my view therefore that the petitioner cannot raise a preliminary objection to the petition under Section 148 (5) of the [Land Act](#) and then go ahead and submit on Section 36(3) and (4) of the [Energy Act](#) 2019.
34. Section 148(5) of the [Land Act](#) provides as follows;
 - (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.”
35. The petitioner in the present matter alleges that she is the owner of LR 1556/341/11. She argues that once she bought the suit property, she took possession and commenced making developments thereon. After the property was gazetted by the respondent for its intended use for the Olkaria-Lessos- Kisumu 400/220 KV Trans Mission Line Project, the respondent demolished the petitioner’s developments. The respondent then compensated her Kshs. 5,442, 950/= which was the value of the developments but failed to compensate her for the limited loss of use of her land.
36. The respondent on the other hand argues that it has not compensated the petitioner for the limited loss of use of her land because she had not supplied her title documents to it. In response, the petitioner argues that the respondent already compensated her for the value of the developments on the suit property and it cannot therefore purport to argue that it cannot compensate her for limited loss of use of the suit property on the ground that she did not supply her title documents.
37. It is my view that the petition is premised on the issue of lack of payment of compensation by the respondent for its failure to pay for the limited loss of use of her land.
38. The court in the case of Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others [2021] eKLR held as follows;
 28. A perusal of the amended petition filed on 26th February 2021 reveals that it was averred at paragraphs 7 to 10 thereof that the 1st respondent offered the petitioner compensation on 4th November 2020, that the petitioner communicated back that the offer was neither sufficient nor just and that the parties then engaged in communication with a view to agreeing on the quantum of compensation. Although the petitioner has claimed that the 1st respondent infringed on its right to property as guaranteed by Article 40 by proceeding with construction of the line without its authority, the dispute between the parties is simply one of compensation. If the petitioner is paid a just compensation, no more issue would arise. I do not see any constitutional angle to the dispute, much the same way that a vendor of land cannot file constitutional petition claiming that a purchaser who has not paid the purchase price has infringed on his right to property as guaranteed by Article 40. That kind of a case would certainly not fit within the constitutional jurisdiction of the court.
 29. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of [the Constitution](#) by filing a



petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3). The “compensation” contemplated by Article 23 is in regard to denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22 and not compensation in respect of wayleave...

31. Determination of quantum of compensation in respect of wayleave is not a matter for the constitutional court. There exist ample statutory options for resolving such a dispute. By way of example, Section 148 (5) of the [Land Act](#), 2012 as well as Land (Assessment of Just Compensation) Rules 2017 (LN 283 of 2017) make ample provision for resolving the kind of dispute that the petitioner has presented to this court without recourse to the constitutional jurisdiction of the court.
32. In view of the foregoing discourse, I find that this court, sitting as a constitutional court, does not have jurisdiction to determine this matter.” (Emphasis Mine)
39. As aforementioned, the only issue that arises for determination in the present petition is that of compensation. Similar to the above quoted case, once the issue of compensation has been determined, no other issue will arise. It is my view that the present petition does not raise any constitutional issue and for that reason, this court sitting as a constitutional court does not have jurisdiction to determine this matter. Consequently, the present petition is hereby struck out with no orders to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH, DAY OF SEPTEMBER 2023.

A O OMBWAYO

JUDGE

