



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC PETITION NO. 1 OF 2017
(Formerly Milimani Petition No. 531 of 2016)

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 28, 29, 31, 39,
40, 42, 47, 48, 50, 60, 61, 64, 70, 159, 160, AND 165 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS

UNDER ARTICLES 1(1) & (2) , 2(1) 3(1), 10 (1) & (2), 19, 20(2) & (3) (b), 21(1) & (3),

24(1), (2) & (3), 25, 27, 28, 29 (a) (b) (c) (d) & (f), 31 (b), 35 (1), 40 (1)

(2) & (3), 42, 47, (1) & (2), 48, 50 (1), 57 (c) & (d), 60 (1),

61 and 64 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 4, 144 AND 148 OF THE LAND ACT

AND

IN THE MATTER OF: SECTIONS 24 (a), 25 AND 26(1) OF THE LAND REGISTRATION ACT

AND

**IN THE MATTER OF: SECTIONS 4, 5, 6 AND 7 OF FAIR ADMINISTRATIVE ACTION ACT
NO. 4 OF 2015**

BETWEEN

DAVID RAMOGI.....1ST PETITIONER

GOLDEN LANE LIMITED.....2ND PETITIONER

GRACE NIRASIWA SHABAAN.....3RD PETITIONER

DAVID PELLO NTAYIA.....4TH PETITIONER
SHANTEI PUSHATI MUTAMBERIA &
NAMPEE ENE PUSHATI MUTAMBERIA.....5TH PETITIONERS
AND
THE CABINET SECRECTARY,
MINISTRY OF ENERGY & PETROLEUM.....1ST RESPONDENT
THE CABINET SECTRETARY, MINISTRY OF INTERIOR &
COORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT
KALAPTARU POWER TRANSMISSION LIMITED...3RD RESPONDENT
THE INSPECTOR GENERAL OF
THE NATIONAL POLICE SERVICE.....4TH RESPONDENT
THE COUNTY COMMANDER
KAJIADO COUNTY.....5TH RESPONDENT
THE OFFICER COMMANDING STATION
KAJIADO POLICE STATION.....6TH RESPONDENT
THE ATTORNEY GENERAL.....7TH RESPONDENT
KENYA ELECTRICITY
TRANSMISSION CO. LIMITED.....INTERESTED PARTY

JUDGEMENT

Introduction

The Petitioners' filed a Petition dated 19th December, 2016 which is supported by an Affidavit sworn by one, David Ramogi on the same date. The Petitioners also filed a Notice of Motion application dated the 19th December, 2016 seeking injunctive orders. The 1st, 2nd, 4th and 5th, Respondents on their part filed Replying Affidavit sworn by one, Engineer Julius Mwachani, who is the Secretary - Electrical Power, State Department of Energy, Ministry of Energy and Petroleum. The 3rd Respondent and Interested Party also filed their Replying Affidavit sworn by Johnson K. Muthoka, the Senior Manager, Wayleave Acquisition at the KETRACO.

The Petitioners' filed their submissions on 20th November, 2017. The 1st, 2nd, 4th and 5th Respondents filed written Submissions dated the 31st January, 2018 while the 3rd Respondent including the Interested Party filed their submissions on 29th, January, 2018.

Petitioners' Case

By a Petition dated the 19th December, 2016, the Petitioners prays for the following orders:

1. A Declaration that the actions by each and every one of the Respondents are in contravention and inconsistent with provisions of Article 1(1) & (2) , 2(1) 3(1), 10 (1) & (2), 19, 20(2) & (3) (b), 21(1) & (3), 24(1), (2) & (3), 25, 27, 28, 29 (a) (b) (c) (d) & (f), 31 (b), 35 (1), 40 (1) (2) & (3), 42, 47, (1) & (2), 48, 50 (1), 57 (c) & (d), 60 (1), 61 and 64 and are therefore unconstitutional.
2. A Declaration that the invasion and unlawful presence of the police on the 2nd to the 5th Petitioners' parcels of land contravenes the Petitioners' rights to possession of property, privacy, residence and movement.
3. A Declaration that the invasion and unlawful presence of the police on the 2nd to the 5th Petitioners' parcels of land contravenes the Petitioners' right to equal application, benefit and protection of the law.
4. A Declaration that the invasion and unlawful presence of the police on the 2nd to the 5th Petitioners' parcels of land contravenes the Petitioners' right to be treated with dignity and respect.
5. A Declaration that the decision to guard or gain forceful and illegal entry and occupation by each and every party of the Respondents over the 2nd, 3rd, 4th and 5th Petitioners' parcels of land contravenes the Petitioners' right to fair administrative action.
6. A Declaration that the invasion and unlawful presence of the police on the 2nd to the 5th Petitioners' parcels of land contravenes the Petitioners' right to freedom and security.
7. A Declaration that the invasion and unlawful presence of the police on the 2nd to the 5th Petitioners' parcels of land contravenes the Petitioners' right to property.
8. A Declaration that the decision to guard or gain forceful and illegal entry and occupation by each and every party of the Respondents over the 2nd, 3rd, 4th and 5th Petitioners' parcels of land is an abuse and arbitrary use of power, punitive in nature, excessive, disproportionate, irrational, unreasonable, illegal and therefore unconstitutional.
9. A Declaration that the State and the 1st, 2nd, 4th, 5th, 6th and 7th Respondents who are State Officers failed in their duty to ensure that the 3rd, 4th and 5th Petitioners, who fall under the category of older members of the society, live in dignity and respect which is free from abuse.
10. An order of injunction be and is hereby issued that each and every of the Respondents do vacates from the 2nd, 3rd, 4th and 5th Petitioners' private parcels of land Number, Kajiado/ Kitengela / 6686; Kajiado/ Kisaju / 5402; Kajiado/ Kaputiei Central/ 66; and Kajiado/ Kitengela / 33.
11. An order of compensation for the losses incurred/damages by the Petitioners.
12. The Respondents be and are hereby directed to pay the costs of this Petition.

Evidence of 1st 2nd, 4th and 5th Respondents

The 1st, 2nd, 4th and 5th Respondents opposed the Petition and filed a replying affidavit sworn by Engineer Julius Mwathani who is the Secretary – Electrical Power, State Department of Energy, Ministry of Energy and Petroleum where he deposes that the Government of Kenya through his Ministry is mandated to improving the quality and reliability of electricity supply through the country; connected of areas currently not connected to the national grid, evacuation of power from planned generations plans, providing a link with neighbouring countries in order to facilitate power exchange and develop electricity

trade in the region, reducing transmission losses and reducing cost of electricity to the consumer. He explains that for the said Ministry to achieve this mandate pursuant to vision 2030 Blueprint, it established KETRACO to undertake the aforementioned exercise. He claims the Mombasa – Nairobi Transmission Line (MNTL) started in Mombasa there about 2009 towards Nairobi. Further, that the Ministry is fully aware that KETRACO instituted proceedings vide ELC 78 of 2016 (KETRACO Vs Agnes Ntoye & 560 others) against the Petitioners herein due to the fact that regardless of the Petitioners' granting right of way to the Interested Party, they had tried and/or attempted to scuttle the agreements as well as physically stopping the ongoing works. He contends that the MNTL is a public utility project being developed for public interest as well as for public benefit of the nation. Further, the construction and operationalization of the MNTL seeks to promote the economic and social status of the people of Kenya, which is inclusive of the Petitioners. He reiterates that the public interest outweigh the Petitioners' interest, in any case, the Petitioners willfully and lawfully gave easement rights to KETRACO. He avers that the Police, 5th and 6th Respondents' role was to maintain peace and order and they were contacted to enforce KETRACO's easement rights following resistance by the Petitioners' pursuant to a Court Order. He reiterates that the status of the project is that the Transmission line has already been completed given that there were no orders by the court stopping the project from going on, with the line currently evacuating power from Suswa to Mombasa. He insists the Respondents have not in any way infringed on the rights of the Petitioners and the rights they are claiming are limited to Article 24 of the Constitution, with the justification being for the greater good of the majority of Kenyans. He contends that the Petition is made in bad faith, has no merit and is only calculated to deprive other Kenyans a legitimate expectation of pocket friendly electricity, which is a right of every Kenyan as well as a pledge by the Government.

Evidence of the 3rd Respondent and Interested Party

The 3rd Respondent and Interested Party opposed the Petition and filed a Replying Affidavit sworn by JOHNSON K. MUTHOKA the Senior Manager, Wayleave Acquisition of KETRACO which is the Interested Party herein, who denied the Petitioners' allegations on the unlawful use of force by the Respondents. He deposes that the 1st Petitioner should not be a party to these proceedings as the Mombasa Nairobi Transmission Line (MNTL) does not traverse his property and hence he does not have a *locus standi* in this instant suit. He explained that the Government of Kenya, through the 1st Respondent and the Interested Party, is mandated with improving the quality and reliability of electricity supply throughout the country, connection of areas that are currently not connected to the National Grid, evacuation of power from the planned generation plants, providing a link with neighbouring countries in order to facilitate power exchange and develop electricity trade in the region, reducing transmission losses that currently cost the country heavily every year and reducing the cost of electricity to the consumer by absorbing the capital cost of constructing electricity transmission lines. He avers that the Interested Party that it is mandated to build electricity transmission lines and negotiates with land owners to grant it a right of way over their land to enable construction of the said lines. Further, in return the Land Owner is compensated on the value of their land and thereafter the right of way so granted is registered as an Easement under the Land Registration Act. He confirms that MNTL began in the year 2008 with feasibility studies and the transmission line funded by the European Investment Bank (EIB) as well as African Development Bank (ADB). Further, that the construction of the MNTL commenced in 2010 from Mombasa towards Nairobi as the Interested Party continued negotiating with land owners affected by the project. He contends that a number of Kajiado County Residents granted right of way and executed easement agreements in exchange for valuable consideration in the year 2010, 2011, 2012 and 2013 respectively. Further, that when the 3rd Respondent reached the area in 2013, land owners started demanding for more compensation which demands could not be acceded to, by the Interested Party as the same was not in line with the valuation nor the budgets provided by the National Treasury. He insists majority of the landowners who were demanding extra payment had already executed agreements granting the Interested Party right of way and accepted millions of shillings in compensation. Further, that various negotiations were held and construction work stalled in the area sometime in late 2015 when the landowners led by the 5th Respondent's son stopped the construction progress around the Kitengela, Emarti and Ntashart areas. He states that the stoppage of works led to the Interested Party instituting a suit in the Environment and Land Court vide ELC 78 of 2016 seeking a right of way from court, for the construction of the MTNL, with the 2nd to 5th Petitioners being parties to the said suit. He affirms that the

5th Petitioner led several members of the community to stop the construction of the MN^TL and on several occasions violently chased the 3rd Respondent from their land leading to the 3rd Respondent incurring losses on their equipment as well as injuries to the employees. It is as a result of the hostility on the ground towards the 3rd Respondent that led to the Interested Party requesting for security from the 5th and 6th Respondents respectively, which was provided. He reiterates that despite the presence of the Police in the area, the number of members of the community collected by the 5th Respondent's son increased, which culminated in the Police suggesting that the Interested Party, 3rd Respondent as well as the landowners negotiate and reach a consensus. He further insists the Police never engaged in any violent engagements. He states that during the pendency of the project, the Head of State summoned the political leaders including the landowners to State House where the President acceded to a request by the said landowners of an additional twenty percent (20%) compensation, which was to be paid on condition the landowners allowed the 3rd Respondent to proceed with construction of the MN^TL. He claims that before the Consent could be recorded in court, the Petitioners' through their advocates in ELC No. 78 of 2016 filed an application for injunction to stop the Interested Party and the 3rd Respondent from constructing the power lines, but this injunction was never issued, instead the Court granted an order of Status Quo which at that time meant that the construction was to proceed as the 3rd Respondent was already doing so on the suit lands. He further deposes that the 2nd to 5th Respondents again raised the issue of the value of their lands traversed by the MN^TL after agreeing to the additional 20% compensation in an attempt to obtain more money from the Interested Party, which became a fresh issue for determination in the ELC 78 of 2016, where the Court directed the parties to negotiate, which has been ongoing, with the latest meeting held on 11th January, 2017. He further contends that the 2nd and 5th Respondents have signed easements in favour of the Interested Party and has been paid the consideration thereof in the sum of Kshs. 24, 960, 000 and Kshs. 23, 086, 800 respectively. He reaffirms that the 3rd and 4th Petitioners' have never executed an easement in favour of the Interested Party as they have rejected the compensation amount due to them, citing an issue with the valuation of their lands, which issue is pending determination before court vide ELC No. 78 of 2016. He further claims that the Petitioners have since filed the instant Petition in an attempt to hoodwink this Honourable Court into granting them injunctive orders and failed to indicate that the dispute between them is a matter being handled by another Court of competent jurisdiction with their actions being akin to forum shopping. Further that the dispute between the Petitioners and the Interested Party is specifically the value appended to their properties which value can be agreed upon through negotiations between the parties or determination through ELC No. 78 of 2016. He further deposes that the Respondents have in no way unlawfully derogated the Petitioners' rights and that MN^TL project is very important as it will result in lowering the cost of power once it is commissioned. Further, that stoppage of works for three years in Kajiado County, has a prejudicial effect on Kenyans who have been paying dearly for the credit facility advanced to the GOK by EIB as well as ADB. He further avers that the Constitution of Kenya clearly stipulates that the rights of a few individuals cannot be allowed to trample upon the rights of many Kenyans depending on their Government to provide them with cheap and reliable electricity to their homes including businesses. He further reiterates that it is in the interest of justice and the public good that the injunction issued herein be vacated as the issue for determination between the parties is for compensation to the landowners for loss of land use once the issue of valuation is determined vide ELC 78 of 2016 or as negotiated by the parties.

All the parties filed their submissions that I have considered

Analysis and determination

Upon perusal of the Petition including the supporting and replying affidavits as well as the submissions herein, the main issues for consideration are:

- Whether the 1st Petitioner has locus standi to institute the Petition.
- Whether the Petitioners' Constitutional rights have been violated by the Respondents.
- Whether the Petition is merited.
- Who should bear the costs of the Petition

As to whether the 1st Petitioner has locus standi to institute the instant Petition, I note that it is not disputed that he is an activist and a friend of the 2nd to 5th Petitioners. It is further not disputed that the 1st Petitioner does not own any of the suit lands. The 3rd Respondent and Interested Party however contend that the 1st Petitioner does not have locus standi to institute the suit herein. Article 22(2) (a) and (b) of the Constitution provides that:’ **In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –**

(a) A person acting on behalf of another person who cannot act in their own name;

(b) A person acting as a member of, or in the interest of, a group or class of persons;

Article 258 of the Constitution further provides as follows: ‘**(1) Every person has the right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention. (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –**

(a) A person acting on behalf of another person who cannot act in their own name;

(b) A person acting as a member of, or in the interest of, or a group or class of persons;

(c) A person acting in the public interest;’

The above mentioned provisions from the Supreme Law of the Land are explicit as to allow a party to institute a suit on behalf of another person. In relying on the above Constitutional provisions, and the facts as presented, I find that the 1st Petitioner indeed has locus standi to institute the instant suit on behalf of the other Petitioners.

As to whether the Petitioners’ Constitutional rights have been violated by the Respondents, it is their contention that the invasion and unlawful presence of the Police on their land has culminated in their rights being violated. They have enumerated their rights which were violated to include rights to possession of property, privacy, residence and movement; right to equal application, benefit and protection of the law; right to be treated with dignity and respect; right to fair administrative action; right to freedom and security; and right to property. They contend that the police presence on the land is an abuse and arbitrary use of power, punitive in nature, excessive, disproportionate, irrational, unreasonable, illegal and therefore unconstitutional. Further, that the respondents who are State Officers have failed in their duty to ensure that the 3rd, 4th and 5th Petitioners, who fall under the category of older members of the society, live in dignity and respect which is free from abuse. The Petitioners were hence seeking injunctive orders against the Respondents to vacate the 2nd, 3rd, 4th and 5th Petitioners’ private parcels of land Number, Kajiado/ Kitengela / 6686; Kajiado/ Kisaju / 5402; Kajiado/ Kaputiei Central/ 66; and Kajiado/ Kitengela / 33 as well as an order of compensation for the losses as well as damages they have incurred.

I note the issues in the instant Petition are linked with the dispute in ELC 78 of 2016 where other parties including the 2nd to 5th Petitioners are seeking compensation for the construction of the MNTL through the 2nd, 3rd and 4th 5th Petitioners parcels of land. It is not in dispute that the 2nd to 5th Petitioners are actually Defendants in the said suit. The Petitioners contend that the subject matter herein concerns the violation of their Constitutional Rights but I opine that this cannot be determined unless the Court considers the issues concerning the issue of the construction of the MNTL that led to the Police alleged presence in the suit land. In response, the Respondents insist the dispute herein specifically concerns the disagreement over the value appended to the Petitioners’ properties which value can be agreed upon through negotiations between the parties or determination through ELC No. 78 of 2016. The Respondents deny derogating on the Petitioners’ rights and contend that the MNTL project is one of National importance as it concerns provision of cheap and reliable electricity to the citizenry. They aver that the construction works stalled sometime in late 2015, despite ongoing negotiations because the landowners led by the 5th Respondent’s son who interfered with the project around the Kitengela, Emarti and Ntashart

areas. This culminated in the Interested Party instituting a suit in the Environment and Land Court vide ELC 78 of 2016 seeking a right of way, for the construction of the MTNL, with the 2nd to 5th Petitioners being parties to the said suit. They insist it is the 5th Petitioner who led several members of the community to stop the construction of the MNTL and severally violently chased the 3rd Respondent from their land leading to the 3rd Respondent incurring losses on their equipment as well as injuries to the employees. This is what led to the Interested Party requesting for security from the 5th and 6th Respondents respectively, which was provided. He explains that the 5th Respondent's son incited more community members despite the presence of the Police in the area. They contended that the stoppage of works for three years in Kajiado County, has had a prejudicial effect on Kenyans who have been paying dearly for the credit facility advanced to the government of Kenya through EIB as well as ADB. As per the annexures in the Respondents replying affidavit, it is evident that the construction of the MNTL from Mombasa to Suswa, is a public project of National importance which cuts across several counties.

Article 244(c), (d) and (e) of the Constitution provides the Objects and functions of the National Police Service and state that the service shall:

(c) comply with constitutional standards of human rights and fundamental freedoms;

(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and

(e) foster and promote relationships with the broader society.

Further, the National Police Service Act at section 24 provides some of the functions of the Kenya Police Service to include:

(a) provision of assistance to the public when in need;

(b) maintenance of law and order;

(c) preservation of peace;

(d) protection of life and property;

(e) investigation of crimes;

(f) collection of criminal intelligence;

(g) prevention and detection of crime;

The Petitioners submitted that the heavy presence of the Police on the suit lands which are private lands amounted to a violation of their Constitutional rights as they were intimidated and threatened with arrest. Further, that the Police presence was there to aid the Respondents in interfering with the suit lands. The Respondents contend that the construction of the transmission lines are already completed and that the 2nd and 5th Petitioners have been compensated for the easement in the amount of Kshs. 24, 960, 000 and Kshs. 23, 086, 800 respectively. From the evidence presented, I note that it is the actions of the 2nd to 5th Petitioners that led to the presence of the police on their respective parcels of land. Further, despite the Police presence, the Petitioners' have not clearly demonstrated how each of them was violated by the Police and whether they reported the said allegations to any law enforcement agencies nor written in protest to the Inspector General of Police to intervene. I find that in accordance with Article 244 of the Constitution as well as section 24 of the National Police Service Act whose provisions, the Police were in the suit lands legally to restore law and order as well as protect the Respondents who were constructing the power grids. Further, according to the above cited legislation, it can be inferred that the Police are allowed to enter private property whenever there is a violation and a member of the Public or an entity can seek its services for the preservation of peace as well as protection of life including property.

I find that the Petitioners' were disgruntled about the amount of compensation in respect of their parcels of land and were interfering with the construction of the MNTL to ventilate their frustration. Further, the matter of compensation was already being adjudicated upon in a court of competent jurisdiction, with two of the Petitioners' already compensated. In the case of **ANARITA KARIMI NJERI Vs R (1976 – 1980) KLR 1272** the Court held that the Petitioner must state and identify the rights with precision and how the same have been infringed upon.

It is against the foregoing that I find that despite the Petitioners' alleging the Police presence on the suit land is infringing on their rights, they have failed to precisely demonstrate, how their rights have been infringed upon.

On the issue of compensation for damages as well as losses incurred, I wish to refer to section 148 of the Land Act, which provides as follows:

'(1) 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 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.

(2) Compensation relating to a wayleave or communal right of way shall not be paid to a public body unless there is a demonstrable interference of the use of the land by that public body.

(3) Damage caused as a result of the creation of a wayleave shall include any preliminary work undertaken in connection with surveying or determining the route of that wayleave, and whether the trees, crops or buildings so damaged were included in the route of the wayleave as delineated in the order of the Cabinet Secretary.

(4) The duty to pay compensation payable under this section shall lie with the State Department, county government, public authority or corporate body that applied for the public right of way and that duty shall be complied with promptly.

(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.

(6) The Commission shall make Regulations prescribing the criteria to be applied in the payment of compensation under this section and to give effect to this section.'

The provisions cited above are very clear in terms of the process to be adhered to, for purposes of compensation of private land owners for the provision of wayleaves. There is already an existing suit which subject matter revolves around compensation of the landowners and at this juncture, I find that it would be pertinent if the Petitioners awaited the outcome of the ELC case No. case number 78 of 2016 where the Court will make a final determination on the amount of compensation to be paid to 3rd and 4th Petitioners' respectively. I note that the 2nd Petitioner and 5th Petitioners have already been compensated and Easement Agreements even filed in the Kajiado Land Registry. Since the Petitioners were already aware of the ongoing negotiations over their suit lands concerning the MNTL project, I find that their

claim herein is simply geared towards negotiating for a higher amount of compensation. It is on the basis of the evidence before me that I find that the Petitioners' Constitutional Rights were not violated by the presence of the Police on the suit lands, as alleged.

From my findings above, I find that the Petition dated the 19th December, 2016 is not merited and dismiss it. Each party to bear their costs.

Dated signed and delivered in open court at Ngong this 3rd October, 2018

CHRISTINE OCHIENG

JUDGE