



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC PETITION No. E004 OF 2020

BETWEEN

SOUTHLAKE PANORAMA LIMITED.....PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL..... 2ND RESPONDENT

KALPATARU POWER TRANSMISSION LTD.....3RD RESPONDENT

ELEMEC ENGINEERING (KENYA) LIMITED.....4TH RESPONDENT

JUDGMENT

1. The petitioner herein moved the court through petition dated 24th November 2020 which was later replaced with amended petition dated 29th January 2021. The petitioner described itself as a limited liability company incorporated in the Republic of Kenya. It brought the proceedings against the 1st respondent which it described as a state corporation regulated under the **State Corporations Act**, Chapter 446 Laws of Kenya; against the 2nd respondent in his representative capacity on behalf of the Government of Kenya under **Article 156** of the **Constitution** and against the 3rd and 4th respondents which it described as the contractor and the sub-contractor respectively who won the tender to construct the Olkaria – Lessos – Kisumu 400/220/132KV transmission line on behalf of the 1st respondent.

2. It was averred in the amended petition that the petitioner is the registered owner of the parcels of land known as Land Reference Number Maraigushu Block 10/4697, Block 10/4698 and Block 10/4699 Kedong. That the 1st respondent created a wayleave on the petitioner's land and begun to erect a transmission line which is Lessos – Kisumu 400/220/132 KV Transmission Line Project. That on 4th November 2020, the 1st respondent wrote a letter to the petitioner offering compensation for loss of use of land. That the petitioner replied indicating that the offer was not sufficient and that the affected area was not as estimated by the 1st respondent. That there were several correspondences between the petitioner's director one Daniel Karuru Mwaura and the representative of the 1st respondent with a view to reaching an agreement on the compensation before construction could proceed.

3. The petitioner further averred that negotiations broke down and the petitioner demanded that the 1st respondent ceases all activities on the suit properties until negotiations are concluded but the 1st respondent disregarded those instructions and started construction of the line without the petitioner's authority on 19th November 2020, thereby infringing on its right to property as guaranteed by **Articles 40** and **64** of the **Constitution of Kenya** and rendering untenable the petitioner's intended construction of high-end holiday homes on the land. That the 1st respondent undervalued both the properties and the petitioner's loss.

4. The petitioner therefore prayed for judgement as follows:

a) A declaration that 1st respondent's actions of seeking to curtail, undermine and deprive the petitioner of its property without just compensation is unfair, unlawful and unconstitutional.

b) A declaration that the intended acquisition of the petitioner's land by the 1st respondent without adhering to the strict and mandatory provisions of the constitution and the Land Act No. 6 of 2012 violates the petitioner's constitutional rights of ownership of property as guaranteed under Article 40 (3) (a) & (b) of the constitution.

bAa). A declaration that the 1st, 3rd and 4th respondents entry into the petitioner's without its consent, permission and authority was trespass and infringed on the petitioner's rights to property.

bAb). That the 1st respondent to pay damages for trespass.

bAc). That a declaration that the 1st respondent's actions are in violation of statutory provisions particularly section 144 of the Land Act, No. 6 of 2012

c) A declaration that failure by the 1st respondent to comply with the mandatory provisions of the Land Act violates the petitioner's constitutional right to administrative action that is lawful, reasonable and procedurally fair as guaranteed under Article 47 of the constitution.

d) A declaration that the petitioner's title to the suit property can only be extinguished as provided under the Land Registration Act, Cap 300 no. 3 of 2012 and Constitution of Kenya.

e) A declaration that the unilateral offer made by the 1st respondent is far below of the market value of the petitioner's land and the developments thereon.

f) A declaration that the amount offered by the 1st respondent should be deposited to the petitioner's account to partially cater for the destroyed fence, houses and trees.

fAa). A declaration that the petitioner's property has been entirely untenable for the intended purpose of construction of high end holiday homes in the feasibility studies conducted thereon by the 1st respondent's transmission lines traversing its property.

fAb). A declaration that the petitioner is entitled to compensation for 100% loss of user of its property due to the construction of the 400KV/220KV/132KV Olkaria – Lessos – Kisumu.

fAc). That a declaration that just and fair compensation be promptly paid to the petitioner in the following terms:

- i. Loss of land use for Naivasha Maraigushu/Block 10/4697: 48.042 Acres *Kshs. 10,000,000 – Kshs. 484,820,000/=
- ii. Loss of land use for Naivasha Maraigushu/Block 10/4699: 48.042 Acres* Kshs. 10,000,000 – Kshs. 484, 820,000/=
- iii. Damage to 700 mature desert Acacia Xanthopholea trees: 700* Kshs. 5000 – Kshs. 3,500,000/=.
- iv. Damage to 1000 mature sisal plants: 1000 * Kshs 400 – Kshs. 400,000/=.
- v. Damage to two houses flattened: 2 *Kshs. 2,500,000 – Kshs. 5,000,000/=
- vi. Damage for 2 pit latrines: 2 *Kshs. 300,000/= - Kshs. 300,000/=.
- vii. Damage for two Roto 10,000 litres water tanks: 2* Kshs. 74,500 – Kshs. 149,000/=

Net Total Kshs. 978,989,000/=

g) An order of prohibition be issued against the 1st, 3rd and 4th respondents by themselves, their agents, servants and/or employees from trespassing, excavating, erecting and/or interfering with the petitioner's quiet and peaceful occupation of the petitioner in Land Reference Number Maraigushu/Block 10/4697 and Block 10/4699 Kedong.

gAa). In the alternative without prejudice to the foregoing the 1st respondent be ordered to relocate its 400KV/220KV/132KV Olkaria – Lessos – Kisumu line.

h) General, aggravated and punitive damages.

hAa). Special damages as particularized in paragraph 25Ac. of kshs. 13,829,180/=

i) Costs; and

j) Any other or further relief as the court may deem fit and just to grant.

5. The amended petition is supported by an affidavit sworn by Daniel Karuru Mwaura who deposed that he is a director of the petitioner authorized to represent it in this matter. That the petitioner had a plan to develop the suit property and has paid land rates to the county government for the period ending in the year 2028. That it caused the boundaries of the suit property to be marked at a cost of KShs 30,000/=, fenced it and that at the time it bought the suit property, it had a 220KV transmission line and a 66KV transmission line and that later another 33KV distribution line was constructed on it.

6. That it spent money on guards, a borehole, hydrological, land rates and that the suit property was sub divided into four parcels of land known as Naivasha/Maraigushu Block 10/4697, 10/4698, 10/4699, 10/4700 at a cost of KShs 470,500/=. That the 1st respondent intruded on the suit property without the petitioner's consent. He added that the petitioner's advocates on record advised it that the Land Act stipulates the process to be followed in acquiring private land for public use and that responsibility is vested on the National Land Commission and not the 1st respondent. That the petitioner's directors and workers have been chased away from the suit property by the police and that the land is unusable for the kind of developments the petitioner had intended.

7. The 1st, 3rd and 4th respondents opposed the amended petition through a replying affidavit sworn by Johnson Muthoka, a senior manager wayleave acquisition of the 1st respondent who deposed that the ownership of the suit properties is not contested but it is subject to the overriding interests as set out under Section 26(1) as read with section 28(i) of the Land Registration Act and Section 143 of the Land Act. That the 1st respondent does not undertake compulsory acquisition of land but it acquires public right of way as per the Land Act 2012. That the construction of the Olkaria-Lessos-Kisumu transmission line project was initially being implemented by the Kenya Power and Lighting Company Limited who had been issued with an Environmental Impact Assessment Licence No. 0006709 on 9th June 2010 which was later transferred to the 1st respondent.

8. Mr Muthoka further deposed that the petitioner's director was a member of the first board of directors of the 1st respondent from 16th January 2009 and that he was therefore aware of the project. That the project was earmarked for completion by the end of February 2021 and that the 1st respondent contracted the 3rd respondent for the construction of the project at a cost of 10 billion Kenya Shillings. That the project was advertised in the People Daily Newspaper of 27th May 2015 by the National Land Commission in compliance with the Land Act 2012 on acquisition of power wayleaves and that the said date was the project cut-off date for valuations of land so as to avoid land owners coming up with new valuations later. That the 1st respondent negotiates with land owners to allow for right of way over their land for construction of the electricity transmission line and in return they are compensated for the loss of land based on the value of land per acre at the project cut-off date and the impact of the transmission line on the property.

9. He also deposed that the suit property was among the properties identified for acquisition of wayleave and was advertised as Kedong/995 through advertisement dated 27th May 2015 and was also gazetted in the Kenya Gazette dated 22nd February 2019. That later the 1st respondent found out that the petitioner had subdivided the suit property and that they then established that the transmission line would only affect two parcels of land which are Naivasha Maraigushu Block 10/4697 and 4699 whose titles were issued to the petitioner on 26th May 2017 after the project cut-off date of 27th May 2015. That when the petitioner acquired the suit properties, they already had three other transmission lines which had been constructed by Kenya Power & Lighting Co. Ltd. That the project traverses 0.818 acres and 5.184 acres out of the total acreage of 48.037 acres and 48.037 acres of Naivasha Maraigushu Block 10/4697 and 4699 respectively.

10. Mr Muthoka deposed that although the 1st respondent does not recognize subdivisions undertaken after the project cut-off date, in this case the 1st respondent agreed to compensate the petitioner on the basis of the subdivisions in good faith and with a view to concluding negotiations. That the 1st respondent initiated valuation of the suit properties through the National Land Commission who returned a valuation of KShs 7,500,000 per acre and that through letters dated 4th November 2020 it offered the petitioner compensation in the sum of KShs 1,840,227.25 and KShs 11,664,355.50 for parcel numbers 4697 and 4699 respectively which the petitioner rejected without making any counter offer. That in an effort to resolve the dispute, it enhanced its offers to KShs 3,067,128.75 and KShs 19,440,592.50 for parcel numbers 4697 and 4699 respectively, which amounts the petitioner again rejected. That ultimately, it paid the sums of KShs 3,067,128.75 and KShs 19,440,592.50 to the petitioner pursuant to a consent order made in this matter on 14th December 2020.

11. The petitioner responded through a replying affidavit sworn by Daniel Karuru Mwaura, its director who deposed that the National Land Commission had not initiated the process of acquiring a public right of way on the petitioner's land in accordance with section 143 of the Land Act. That the 1st respondent did not follow the laid down procedure to get the wayleave. That the allegation that the National Land Commission advertised the suit property in the People Daily Newspaper was mischievous as the said newspaper has limited circulation. That the 1st respondent and the petitioner's director had a meeting on 8th December 2020 where they agreed on various issues that included compensation but the 1st respondent did not follow through with the agreement. That the 1st respondent has not implemented the recommendations contained in the joint valuation and impact assessment reports.

12. Pursuant to a consent order made in the matter on 14th December 2020, a Joint Due Diligence Environmental and Social Impact Assessment Report dated 18th December 2020, a Joint Valuation Report dated 17th December 2020 and a separate Valuation Report dated 18th December 2020 were filed.

13. The petition was canvassed through written submissions. The petitioner in its submissions gave a background to the dispute and reiterated the contents of the further affidavit in support of the petition and the petitioner's response to the replying affidavit sworn on 19th February 2021. The petitioner submitted that the 1st, 2nd and 3rd respondents violated Article 40, 60 (1) (b) and 64 of the Constitution. It argued that the process of wayleave acquisition is contained in the Land Act and that the 1st respondent did not follow it. It placed reliance on the case of **Machareus Obaga Anunda vs. Kenya Electricity Transmission Co. Ltd [2015] eKLR**. It argued further that the 1st, 2nd, and 4th respondents trespassed onto the petitioner's property and stopped the petitioner's agents from accessing it and urged the court to find that the entry to the petitioner's land was illegal and unconstitutional. It relied on the case of **Kenya Transmission Company Limited vs. Lpeton Lengidi & 3 others [2018] eKLR**.

14. It argued further that its rights were violated as the 1st, 3rd and 4th respondents entered the suit property without the consent of the petitioner and that they have finalized the construction of the transmission lines without the payment of compensation. That it has suffered damage and loss as particularized in paragraphs 16A, 16Aa, 21Ad, 21Ae, 25Aa, 25Ab and 25Ac of the amended petition and that it rejected compensation because it was not commensurate to the loss occasioned. That as per the Joint Environmental and Social Impact Assessment Report, the petitioner's property has lost its value and its purpose completely and the petitioner then quoted extensively sections of the joint

reports. It argued further that on 18th December 2020, Legit Valuers Limited indicated that the petitioner's property had depreciated by more than 60% and that they should be awarded damages for loss of user and value of land, damages for trees and crops, damages for trespass and special damages. It also argued that it ought to be compensated for the entire portion of land that has been affected by the wayleave as shown in the Environmental and Social Impact Assessment and relied on the case of **Kenya Power and Lighting Company Limited vs. Philip A M Kimondiu [2018] eKLR**.

15. On damages for trees, crops, houses, two latrines and roto tanks, the petitioner invited the court to look at page 5 of the joint valuation report which shows the damaged crops and trees and urged the court to award damages as enumerated at paragraphs 25 Aa and 25Ab of the amended petition. On damages for trespass, it placed reliance on the cases of **Ajit Bhogal vs Kenya Power & Lighting Co. Ltd [2020] eKLR** and **Rhoda S Kiilu vs. Jiangxi Water & Hydropower Construction Kenya Limited [2009] eKLR** among other cases and submitted that there are valuation and environmental & social impact assessment reports which indicate the extent of loss and damage totals to KShs 576,504,000. On special damages, the petitioner argued that it has specifically pleaded and proved through attached evidence and therefore prayed that the court enters judgement in its favour as prayed in the amended petition.

16. The 1st, 3rd and 4th respondents in their submissions reiterated their replying affidavit and argued that they gained entry onto the suit property for the purposes of placing beacons marking the location of the tower foundations. They submitted that the petitioner cannot claim trespass as the National Land Commission had issued a notice of the project and that it followed the procedure under sections 143-149 of the Land Act on acquisition of wayleaves. That under Section 149 of the Land Act, the 1st respondent is obligated to compensate land owners for the wayleave acquired on its behalf by National Land Commission which it did through the payment of KShs 22,507,721.30 after they entered into a consent order dated 15th December 2020 and therefore the petitioner has not proved the claim for trespass and infringement of Article 40 of the Constitution.

17. The respondents relied on the case of **KETRACO vs. Valeria Hellen Wangechi Kigano & Others [2018] eKLR** and submitted that the 1st respondent had come up with a resettlement framework policy to ensure prudent use of public resources in compensation and that the petitioner has been paid KShs 3,067,128.75 and KShs 19,440,592.50 for parcels Naivasha/Maraigushu Block 10/4697 and 4699 respectively as per the consent order dated 15th December 2020 which also provided for the joint valuation of the land and a joint impact assessment of the proposed 400k-V line in the Petitioner's land. They argued that the Joint Impact Assessment Report dated December 2020 does not touch on the loss occasioned by the 400KV line and went on to point out particular sections of the report. On the Joint Valuation Report, they relied on the case of **National Land Commission vs Estate of Sisiwa Arap Malakwen & Another [2017] eKLR** and submitted that the valuation that ought to be applied in this case is that of the National Land Commission dated 6th July 2020.

18. On whether the amount already paid to the petitioner is sufficient, the respondents argued that the petitioner's claim for loss of land use for the suit properties is a claim for compulsory acquisition of the suit properties which the 1st respondent does not undertake. That the various claims for damages were not supported by any evidence as there is no report from a qualified expert on trees or structures that quantifies the damages and prayed that the court dismisses the amended petition and order that the compensation of KShs 22,507,721.25 paid to the petitioner on 21st December 2020 is just and fair compensation.

19. The petitioner filed submissions in response to the 1st, 3rd and 4th respondents' submissions. It reiterated its submissions filed on 7th April 2021 and argued that the petitioner's director was not part of the board that approved the advertisement of the project in the People Daily. That no evidence was placed on record that the 1st respondent complied with Section 144(5) of the Land Act as the notice was placed in a newspaper that does not have nationwide circulation. It also argued that the sum of KShs 22,507,721.25 was received by the petitioner on a without prejudice basis and it therefore cannot extinguish the petitioner's claims. It also argued that the property had been undervalued as confirmed by the Joint report of Valuation done by Legit Valuers Limited and Capital Valuers Limited. They argued further that the court should be guided by the Joint Environment and Social Impact Assessment Report of December 2020 instead of the Environmental and Social Impact Assessment of the proposed Kisumu-Lessos-Olkaria Transmission Line dated 22nd December 2009 as the latter is obsolete to the proceedings as the 1st respondent had ignored the proposals contained therein. It concluded its submissions by submitting that compensation should be commensurate to the loss and therefore the amount of KShs 978,989,000 would be sufficient.

20. The 2nd respondent neither filed a response to the petition nor submissions. Instead, he relied entirely on the pleadings and submissions of the 1st, 3rd and 4th respondents.

21. I have carefully considered the petition, the affidavits filed and the submissions of parties. The issues that arise for determination are whether this court has jurisdiction; if so, whether the petitioner's rights were violated and lastly; whether the reliefs sought are available.

22. From the onset, I note that the question of jurisdiction has not been raised or argued by any of the parties. Nevertheless, jurisdiction is the entry point in any matter that the court is called upon to determine. Jurisdiction is the very lifeblood of any proceedings. Without it, the proceedings come to a certain end and the court cannot take any further step. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**.

23. As the Supreme Court stated in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**:

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...

24. Thus, jurisdiction cannot be conferred even by consent of the parties or by innovation whether in drafting of pleadings or on the part of the court. If the court proceeds in a matter in which it lacks jurisdiction, even if the parties cheer, urge and nudge it on, its determination would amount to a nullity. The Supreme Court reiterated the position in **Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others [2020] eKLR**.

25. Thus, the first duty of the court is to determine if it has jurisdiction, even if the parties maintain loud silence on that issue. It should also be noted that the manner in which the court is moved may determine whether the court has jurisdiction to grant the relief sought. For example, it is plain that a litigant seeking judicial review orders cannot move the court by way of a plaint. The court can only grant judicial review orders when sitting as a judicial review court or a constitutional court and not otherwise. It matters not that the proper claim for judicial review orders would have to be filed before that very court.

26. The Court of Appeal recently restated the position in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** as follows:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ...

20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. ...

27. The import of the position taken by the Court of Appeal is that a suit filed in a court without jurisdiction is stillborn, bereft of life from the onset and incapable of being revived or sustained in any manner. Among others, such a suit cannot be transferred to a court with jurisdiction for purposes of hearing and determination. Parties must withdraw it and file a compliant one in the proper court. If they don't, the court must get it out of the system through striking out.

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.

30. So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court. In that regard, the Supreme Court observed as follows in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**:

[256] The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Krentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.

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. That being the case, I do not need to enquire into the other issues that I framed for determination. In line with **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service** (supra), the petition is for striking out.

33. In the result, I strike out the petition herein. Parties should pursue the dispute resolution mechanism available under statutory provisions, including filing an ordinary suit if needed. It is that process which will validly determine if the petitioner should be paid anything over and above that which it has been paid. Each party to bear own costs.

Dated, signed and delivered at Nakuru this 28th day of June 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Manyara for the petitioner

No appearance for the 1st, 3rd and 4th respondents

Mr Ondieki for the 2nd respondent

Court Assistants: B. Jelimo & J. Lotkomoi