



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC PETITION NO 4 OF 2021**

**PRIGAL LIMITED.....1<sup>ST</sup> PETITIONER**

**MICHAEL MWANGI MUTURI .....2<sup>ND</sup> PETITIONER**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION COMPANY LTD.....RESPONDENT**

**RULING**

1. The petitioners filed the petition dated 17<sup>th</sup> February 2021 in court on 18<sup>th</sup> February 2021. The petitioners aver that the 1<sup>st</sup> petitioner is the registered proprietor of land parcels LR No.5212/16, 5212/17 and 5212/19 while the 2<sup>nd</sup> petitioner is the registered proprietor of land parcel LR No.5212/18 all situated within Naivasha Sub-County, Nakuru County. The petitioners further aver that the respondent sought to have a way leave corridor through the petitioners said land parcels for the construction of its 400/220/132 KV Olkaria- Lessos-Kisumu Transmission line and as per the constitutional requirement the Respondent was obligated to compensate the petitioners for use of the petitioners land. The petitioners negotiated with the Respondents and agreed compensation for the four parcels in aggregate at **Kshs.65,797,788/=**. The respondent has however refused.

2. However before the respondent could effect payment of the compensation, Respondent gave notice to the petitioners that it had been brought to its attention that the National Land Commission had vide Gazette Notice No.1716 of 22<sup>nd</sup> February 2019 revoked title LR.No.5212 which was the mother title in regard to the subtitles which were the subject of the compensation. On that account the Respondent gave notice to the petitioners that they would suspend payment of the compensation indefinitely, presumably until the issue of ownership of the affected properties was verified.

3. The petitioners protested the respondent's action of suspending the payment averring that they were the owners of the affected properties by virtue of being the registered proprietors and holders of certificates of title in respect of the properties. The petitioners averred that Gazette Notice No.1716 of 22<sup>nd</sup> February 2019 was the subject of litigation vide **ELC Petition No. 8 of 2019 (consolidated with ELC Petition No. 24 of 2019) Prigal Ltd & Prosperity Ltd -vs- National Land Commission & 2 others** where the court ordered stay of implementation of the Gazette Notice as pertains to LR No.5212 pending the determination of the petitions. The petitioners asserted that under Article 40 (3) of the Constitution they were entitled to prompt compensation for their land that was compulsorily acquired for public purpose. The petitioners instituted the present constitutional petition alleging breach of their constitutional rights. The petitioners in the petition pray for:-

1. A declaration that the Petitioner's rights enshrined in the Bill of Rights have been grossly violated and/or infringed by the respondents in the manner set out herein.

2. An order directing the respondents to forthwith promptly pay in full just way leave compensation in the sum KES.65,797,788.00 to the petitioners for way leave through properties known as Lr. 5212/16,5212/17,5212/18 and LR No.5212/19 situate in Naivasha Sub-County in Nakuru County in terms of the letters of offer dated 18<sup>th</sup> December 2020 by the respondent to each of the petitioners herein as set out at paragraph 15 of the petition hereof.

3. Interest on (3) above at commercial rates from 24<sup>th</sup> December 2020 until payment in full.

4. In default to (2) and (3) above, an order of permanent injunction and or prohibition to restrain the respondent herein either by themselves, through their servants and or officers acting on their instructions from trespassing into, constructing the 400/220/132KV Olkaria- Lessos- Kisumu transmission line through and or within the petitioners properties known as Lr. No.5212/16,5212/17,5212/18 and LR No.5212/19 situate in Naivasha Sub-County in Nakuru- County and/or in any way interfering with the Petitioners lawful use. Possession and development on the suit property in contravention of Statute and the Constitution of

Kenya.

5. Costs of the petition.

4. The petitioners simultaneously with the petition filed a Notice of Motion application seeking various prayers. Prayers 5 and 6 are the ones relevant in regard to this ruling and are as hereunder:-

5. That pending hearing and determination of this petition, an order of temporary injunction to restrain the respondent herein either by themselves, through their servants and or officers acting on their instructions from trespassing line though and or within the petitioners properties known as Lr.no.5212/16,5212/17,5212/18 and LR No.5212/19 situate in Naivasha Sub-county in Nakuru County and/or in any way interfering with the petitioners lawful use, possession and developments on the suit property in contravention of Energy Act, Land Act, 2012 and the Constitution of Kenya.

6. That in the alternative to prayer 5 above and pending hearing of this petition, an order do hereby issue directing the sum of KES.65,797,788.00 being the amount offered and agreed by the respondent as just compensation to the petitioners for ay leave through properties known as LR No.5212/16,5212/17,5212/18 and LR. No. 5212/19 situate in Naivasha Sub-County be deposited in fixed and joint interest earning account in the names of parties counsels herein or as may be directed by the Court.

5. The application was supported on the grounds set out on the body of the application and on the supporting affidavit annexed to the petition sworn on 17<sup>th</sup> February 2021 by Igal Elferzouaty.

6. The Respondent filed a replying affidavit in response to the petition and application sworn on 4<sup>th</sup> March 2021 by Johnson Muthoka a Senior Manager Wayleave Acquisition of the Respondent. The Respondent admitted that it had negotiated and offered adequate compensation as tabulated by the National Land Commission which the petitioners had accepted. The Respondent averred that it had not refused to pay the compensation to the petitioners except that a dispute as to the ownership of land parcels LR Nos. 5212/16 5212/17,5212/18 and 5212/19 (originally LR No.5212 before subdivision had arisen with the National Land commission revoking title Number LR 5212. The Respondent argued that until the issue of ownership was clarified with the National Land Commission it would be acting imprudently if it processed the compensation to the petitioners. The respondent averred that it was accountable to the public in the usage of funds entrusted to it as a fully owned State Corporation. The respondent averred that it would be ready and able to pay the compensation once the issue of the ownership of the suit properties was settled.

7. There is no dispute that the petitioners and the Respondent had reached agreement on the amount of compensation payable for the Wayleave that the Respondent wished to have established on LR No.5212/16, 5212/17 5212/18 and 5212/19 deemed to have been owned by the petitioners. It is also not disputed that the National Land Commission vide Gazette Notice No.1716 of 22<sup>nd</sup> February, 2019 recommended to the Chief Land Registrar: **To revoke the titles for LR No.5211 and LR No.5212 respectively held by Karati Farm and Top Farm and vest the property to Livestock Research Organization (KALRO)**. It is further not disputed that indeed the petitioners have held titles to land parcels LR Nos.5212/16, 5212/17, 5212/18 and 5212/19 since September 2012 when the parcels were transferred and registered in their names. The petitioners have petitioned to have the National Land Commission's decision vide the Gazette Notice to have their titles revoked quashed. It cannot be ruled out that the court could very well quash the National Land Commission's decision or uphold the same. Until the Court makes the determination on the validity or otherwise of the National Land Commission decision recommending the revocation of the titles held by the petitioners, the petitioners continue to have an interest in the suit properties. The decision of the National Land Commission has been challenged by the petitioners and the court has ordered a stay of the implementation of the same pending the determination of the petitions where the decision has been challenged.

8. Article 40 (3) of the constitution provides as follows:-

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

9. Pursuant to the above constitutional provisions in the event the petitioners titles are upheld, the respondent would mandatorily be required to compensate the petitioners. The Respondents were prepared to make the compensation to the petitioners and in that regard negotiated and agreed the quantum of the compensation. The Respondent has entered onto the land and has constructed the high voltage transmission line traversing the parcels of land claimed/owned by the petitioners. In the event the petitioners are decreed the owners of the suit properties they will be entitled to be paid adequate and prompt compensation by the Respondent for the use of portions of their land. The compensation ought to be made at the point the land is acquired.

10. In the present matter it is apparent the respondent identified the land it required, compensation was assessed and agreed and all that remained was payment. Should the ownership dispute be resolved in favour of the petitioners at the conclusion of the pending petitions, the

petitioners stand to be prejudiced if they would be paid the same amount of compensation that was assessed and accepted in December 2020. The respondent has pursuant to the agreement in the compensation taken possession of the land they required out of the petitioners parcels of land and have executed their works of constructing the transmission line. The Respondent has thus taken the full benefit flowing from the negotiations and agreement they reached with the petitioners.

11. It is my considered view that both the interest of the petitioners and the Respondent can be served if the respondent is required to pay the compensation into an interest earning bank account operated jointly by the representatives of the petitioners and the Respondent pending the determination of the ownership dispute respecting the suit parcels of Land. Under such an arrangement the petitioners will be entitled to have the money released to them together with the accrued interest if the properties are decreed to them. The compensation amount will not diminish but will grow owing to application of interest. On the other hand if the properties are decreed to be government property, the Respondent will recoup the money together with the accrued interest and will thereby have safeguarded public funds.

12. In the premises, I make an order directing the respondent to have the agreed compensation amount in the sum of **Kshs.65,797,788.00** for Wayleave through properties known as LR Nos. 5212/16, 5212/17, 5212/18 and 5212/19 situate in Naivasha Sub-Country, Nakuru County, deposited in a joint fixed interest earning account at **Kenya Commercial Bank Ltd** and/or **Co-operative Bank of Kenya Ltd** to be opened and operated in the names of the parties' counsel firms herein. The deposit shall be made within a period of 45 days from the date of this ruling. The account shall remain in force pending the determination of the petition herein and/or until further orders of the Court. Any party shall be at liberty to apply.

13. The costs of the application shall be in the cause.

14. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28<sup>TH</sup> DAY OF OCTOBER, 2021**

**J M MUTUNGI**

**JUDGE**