



REPUBLIC OF KENYA



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Kenya Electricity Transmission Co Ltd v Kasina & another (Environment and Land Appeal E023 of 2025) [2025] KEELC 3759 (KLR) (13 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3759 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E023 OF 2025
FM NJOROGE, J
MAY 13, 2025

BETWEEN

KENYA ELECTRICITY TRANSMISSION CO LTD APPELLANT

AND

NELLY K KASINA 1ST RESPONDENT

TIMOTHY THIETH 2ND RESPONDENT

*(Being an Appeal from The Ruling of Honourable EK USUI, CM
Delivered on 17th March, 2025 In Malindi MCELC No. E081 of 2024
– Nelly K. Kasina and Anor Vs Kenya Electricity Transmission Co Ltd)*

RULING

Application

1. The appellant (also referred to as “the applicant” herein) filed a Memorandum of Appeal on 15th of April 2025 appealing against the ruling of Honorable E.K. Usui, CM dated and delivered on 17th March 2025 in Malindi MCELC Number E 081 Of 2024. On 17th April 2025 the appellant filed a Chamber Summons application dated 16th April 2025 seeking that the application Notice of Motion dated 16 April 2025 be admitted for hearing during the court vacation and that the interim conservatory orders be granted in terms of prayer number 2 and 3 of the said Notice of Motion. The matter came up before court on 22nd of April 2025 when the court gave comprehensive directions including the filing of submissions and fixed a date for highlighting those submissions, that is 29th April 2025. On 29th April 2025, the parties counsel appeared before this court and the ruling date was set for 13th May 2025. The Chamber Summons, having been meant to facilitate the urgency of the Notice of Motion, is now spent and the court is left with the task of determination of the Notice of Motion.



2. The Notice of Motion dated 16th April 2025 is seeking a stay of execution of the ruling of the subordinate court delivered on 17th March 2025 in Malindi MCELC Number 081 Of 2024- *Nelly Kasina and Another v KETRACO*. The ruling in that case issued a temporary injunction restraining the applicant herein from entering, doing construction works on, or installing electric lines on the suit land known as Land Reference Number 12888/63. (hereinafter also referred to as “the suit land”).
3. The application also seeks an order that pending the hearing and determination of this appeal this court do grant leave to the appellant to access the land for the purposes of completion of the Rabai-Bamburi-Kilifi 132 KV 67 km transmission line to enable the appellant perform its obligations under the engineering procurement and construction contract (EPC contract) and that the proceedings in Malindi MCELC 081 of 2024 be stayed. It is also sought that this court do grant leave to the appellant to deposit the compensation funds being Kenya shillings 934,020/- in an escrow account as security for the appeal and that the Police Commander or OCS of any adjacent Police Station do ensure there is law an order at the execution of the orders.
4. The grounds upon which the application is being made are as follows:

The appellant is a key state corporation mandated under Sessional Paper Number 4 of 2004 on Energy to plan design construct build operate and maintain high voltage electricity transmission lines and associated substations that form the backbone of Kenya's national transmission grid. The appellant embarked on construction of the Rabai Bamburi Kilifi Transmission Line (herein after referred to as “the line” or the “project”), to achieve which objective the applicant entered into an EPC contract with HOMT Espana (hereinafter also referred to as “Espana”) which project was financed by a loan from the Spanish government with loan which attracts interest payable by the government of Kenya.
5. It happened that the line traversed through the suit land belonging to the respondents. Before the commencement of the project the National Land Commission on behalf of the applicant had given notice to the public vide Kenya Gazette Notice Number 7489 (hereinafter also referred as “the gazette notice”) published on 24th June 2022 stating that the government intended to acquire a wayleave corridor of 30 meters or approximately 1.0378 out of the respondents’ land for the construction of the project and gave notice to assess compensation for the limited use to be so acquired. The appellant offered Kenya Shillings 934,020/- for the limited loss of use of the affected portion.
6. It appears that the applicant commenced the works and completed the foundation and was in the process of erecting a tower when an injunction order was issued in the case before the subordinate court below and which galvanized the appellant to lodge the present appeal.
7. The applicant avers that the matter is urgent because in the contract with Espana, stoppage of works occasioned by actions not attributable to Espana will attract idling claims for manpower and machinery which will be borne by Kenyan taxpayers, which is in the sum of between Kenya Shillings 150,000 to 500,000 on a daily basis, excluding other charges. It is also avert that the project is at such a critical stage of completion and access to the respondents’ land is needed to erect the tower to completion.

Respondents’ Replying Affidavit

8. The application is opposed. The first respondent swore a 55 paragraph affidavit dated 27th April 2025 on behalf of both respondents. The highlights of that affidavit are as follows: that the appellant is required to comply with relevant laws on ownership of land and on the acquisition of wayleaves just like any other private citizen; that the power line currently being established runs parallel to another



one that has been existing since the 1980s, and is being constructed along the same route and it serves the same purpose; that the old power line is about 150 m away from the suit land and it has a clear and extensive wayleave corridor; however some few meters before the new line arrives at a parallel position with the respondents' parcel of land, it is suddenly detours towards that parcel of land and cuts right across the middle of its flat area, which is the most prime area of the land as the rest is hilly; that the respondent consider this detour as unwarranted and irregular for the reason that upon exit from their land the said new line rejoins the path followed by the older line after just a few hundred meters and both of them continue to run side by side thereafter towards the same direction. The respondents have been in possession of the sweet land for 16 years. They found out that the appellant has committed out of waste and degradation on their land, hence the suit. They also aver that they are not privy to the EPC contract with Espana and that the act of construction of the line over their land is illegal. They object to the introduction of a map showing the way leaves corridor, which they state is not part of the lower court record.

9. The respondents state that the Gazette Notice is not the notice contemplated by regulation 52(1) of the [Land Regulations 2017](#) and Regulations 71(4) of the [Land Regulations 2017](#). They also state that the applicant has failed to demonstrate the following:
 - a. That the respondents were served with a personal notice of the proposed creation of a way leave over LR Number 12889/63 South Of Kilifi in accordance with the law. That any notice of the proposed wayleave was posted visibly or otherwise along the route over LR Number 12889/63 as per regulation 52 2A of the [land regulations 2017](#);
 - b. That the Gazette Notice Number 7489 lacks legal basis under the provisions of the [Land Act 2022](#) all the land regulations since it is not one of the forms set out under the land regulations or made in conformity with any prescribed form;
 - c. That any announcement was made of the notice in radio stations with nationwide coverage as stipulated by regulation 52 (2) (b) of the [Land Regulations 2017](#);
 - d. That any inspection of LR 12889/63 was made where the way leave was proposed to be created as stipulated by regulation 52 (2)(c);
 - e. That the Kenya Gazette Notice Number 7489 published on 24th June 2022 does not at all contain or list personal number 12889/63 South of Kilifi but refers to LR1289/3 Kilifi which pass of land strange and unknown to the respondents.
10. For those reasons the appellant has no authority or permission to interfere with the suit land for any purpose. It is also averred by the respondents that the appellant failed to involve the respondents in determining the measurement and acreage or the way leaves corridor and the manner in which the line has traversed the suit land leaves the entire parcel useless since the remaining hilly areas are not useful. The respondents aver that their suit against appellant is premised on trespass, illegal encroachment, environmental destruction and degradation occasion by the appellant and not acquisition of wayleaves and compensation. The Respondents further aver that the appellant has failed to comply with Sections 144 To 146 of the [Land Act 2012](#) by failing to make an application to the National Land Commission and by failing to provide all the information to support such an application for a way leave to the National Land Commission under the regulation 70 of the [Land Regulations](#). It is also alleged that the appellant has failed to demonstrate compliance with the land policy principles under chapter 5 Article 60(1) of the [Constitution](#) of Kenya 2010 in failing to secure consent of the owners and inferring to ensure sustainable and productive management of the land and protection and conservation the ecological aspects of the land.



11. The respondents aver that only the Cabinet Secretary and not the National Land Commission can create way leaves over their land. The respondents state that they learned about the encroachment and interference with the land on 22nd September 2023 and immediately raised objections to the acts of the appellant including by writing a letter dated 2nd October 2023 through an advocate.
12. They state that they received the respondent letter of 17th July 2023 on 3rd of October 2023. They also aver that no independent valuation of the land in support of the offer of Kenya Shillings 934,020 was provided by the appellant.
13. Their subsequent inquiries as to why the entry and usage of the land was in progress were not responded to and the appellant is not honest in claiming that it's offer was rejected. They maintain that in order for issues of compensation to arise the appellant ought to have complied with the law and obtained consent of the owners. They aver that Article 40 of the *Constitution* is only applicable in cases of compulsory acquisition yet according to them this matter does not arise out of and is not related to any compulsory acquisition. They aver that the suit in the lower court is in respect of trespass to land. They accuse the appellant of wanting to defeat the provisions of the *Energy Act*, especially Section 170, 171(1)(a) and (b) 173(1) and 174. To the respondents the ruling of the learned trial magistrate was impeccable since the appellant had failed to respect the respondents' property rights. The respondents state that there is no proof that the applicant is undergoing losses of between Kenya Shillings 150,000 to 500,000 on a daily basis being penalties for delay in the project execution, to Espana. They aver that in any case, it is the applicants' relevant officers who should be made personally responsible for in the losses rather than the same being shouldered by the Kenyan taxpayer as they are the ones to be blamed for negligence and broadened district guard of the provisions of the statute and the rule of law.

Submissions

Applicant's Submissions

14. The appellant identified 3 issues for determination as follows
 - a. Whether a Preliminary Objection on pecuniary jurisdiction can be raised on appeal;
 - b. Whether the Gazette Notice has been set aside and if not the implication of such gazette notice on acquisition of a way if corridor;
 - c. Principles in *Giella Versus Cassman Brown* (in instances) where compensation can be quantified.
15. Citing *Kenya Port Authority Versus Modern Holdings East African Limited* 2017 eKLR the appellant submitted that on a first appeal, the court has power to assess reverse and analyze pleadings against the evidence on record and reach its own findings. It was submitted that the trial court did not have pecuniary jurisdiction to entertain the application and the case before it because the respondents' own valuation dated 16th October 2023 which value the entire sort property at Kenya Shillings 22, 500,000 which is way above the jurisdiction of the Chief Magistrates' court; that the suit ought not to have been filed before the Magistrates' Court; that the issue of jurisdiction was not raised before the Magistrates' Court is not relevant because parties cannot by consent or acquiescence vest a court with jurisdiction; that the issue of jurisdiction can be raised at any time. The appellant cited *Kenya Ports Authority Versus Modern Holdings East African Limited* where the Court of Appeal confirmed this position.
16. *Central Kenya Coffee Meals Limited Versus Commissioner of Domestic Taxes* 2017 eKLR is also cited in that regard. The appellant also avers that Section 7(1)(a) of the *Magistrates' Courts Act* is also applicable and that is called can hear the new challenge on pecuniary jurisdiction in this appeal.



17. It was submitted that Gazette Notice 7489 was issued and the appellant embarked on the construction of the project.
18. It was stated that under Section 60 (o) and (p) of the *Evidence Act*, judicial officers should take judicial notice of matters of general and local notoriety and other matters which it is directed by law to take judicial notice of. The appellant states that the Gazette Notice is one such document. It is submitted that under Sections 143 to 149 of the *Land Act* the National Land Commission can create public rights of way for the benefit of the government, a public authority or a corporate body. Because the Gazette Notice Number 7489 of 24th of June 2022 has neither been set aside nor quashed by an order of court, it still stands.
19. The appellant has also argued in the alternative that in any event, the challenge to the procedure under Sections 143, 144 and 146 of the *Land Act* in the subsequent gazette ought to be raised by way of a Constitutional Petition or an application for Judicial Review by way of certiorari to quash the procedure. Citing *IEBC Versus Stephen Mutinda Mule & 3 Others* 2014 E KLR, the appellant adds that in their suit, the respondents never called upon the appellant to establish that it had complied with Sections 143-146 of the *Land Act*.
20. As to whether an injunction can issue where compensation can be measurable in pecuniary terms, the appellant answers that question in the negative, quoting *Esso Kenya Limited Versus Mark Makwata Okiya* Civil Appeal Number 69 of 1991 and reiterating the position that the title will remain with the respondents as the land is not being compulsorily acquired but only a wayleave. It is submitted, citing *Kenya And Corruption Commission Versus Deepak Chamanlal Kamani And 4 Ors* 2014 eKLR, *National Environment Management & Another Versus Gerick Kenya Limited* 2016 eKLR and *Dupoto Farms Limited Versus Kenya Electricity Transmission Company Limited & 121 Others* 2021 eKLR that the matter of construction of the project is a matter of public interest that outweighs the respondent's private interest and thus ought to be allowed to continue pending the hearing and determination of the appeal.

Respondents' Submissions

29. The submissions of the respondents identified 4 issues for determination
 - a. Whether the Chamber Summons application is merited;
 - b. Whether the applicant has satisfied the principles for grant of orders of mandatory injunction pending appeal;
 - c. Whether the court should stay proceedings in ELC Number E081 of 2024;
 - d. Whether this court should allow the appellant to deposit the compensation funds of Kshs 934 020/- as security for the appeal.
30. On the first issue it was submitted that the Chamber Summons has been overtaken by events and this is the correct position.
31. On the 2nd issue it was pointed out that the appellant has not filed a counterclaim in the lower court and therefore has no basis for it to obtain a mandatory injunction order or relief. *David Sironka or The Tukai Versus Francis Muge and 2 Ors* 2014 KECA 155 KLR (CA) was cited in this regard; that parties are bound by their pleadings and that the court can only decide a matter of the basis of those pleadings filed. *John Kubai Meringa Versus Patrick Ntongai Meringa* 2009 KEHC 3132 KLR was also relied on for this point.



32. Citing Volume 24 *Halsbury's Laws of England* 4th Edition Paragraph 948 the respondents aver that there are no special circumstances that warrant the grant of a mandatory injunction in the present case.
33. On the strength of the decision in *Patricia Njeri & 3 Others Vs National Museums Of Kenya* 2004 eKLR and *Madhupaper International Limited Versus Kerr* 1985 K E C A 116 KLR, it was submitted on the respondents behalf that the application before court does not satisfy the requirements of the principles applicable in an application for injunction. *Macharia's Obaga Anunda Versus Kenya Electricity Transmission Company Limited* 2015 eKLR as well as *Ajit Bhogal Versus Kenya Power And Lighting Companies Limited* 2020 KEELC 449 eKLR, the respondents aver that the appeal is not merited since the proper procedure for the acquisition of a wayleave was not followed. It was also urged that granting the relief sought would summarily determine the dispute pending before the Magistrate's Court which is yet to be determined on its merits, which would be a gross infringement of the respondents' right to fair hearing under Article 50 of the *Constitution*, and their right to fair administrative action. *Stanley Kangethe Kinyanjui Versus Tony Keter & 5 Others* 2013 KECA 378 KLR it was also submitted that the construction of power lines over the land would impair the respondents' ability to develop it, yet refusal to grant the injunction sought would not render the appeal nugatory, and that construction to completion of the steel tower on the suit land could be virtually irreversible, and that trespass cannot be compensated for by way of damages.

Citing

34. Citing numerous provisions of the law as enumerated in their replying affidavit and the case of
35. It was also submitted, citing *Pius K. Kogo Versus Frank Kimeli Tenai* 2018 eKLR and *Paul Gitonga Wanjao Versus Gathuthi Tea Factory Limited & 2 Others* 2016 eKLR that the appellant has not pleaded nor satisfied this court that it stands to suffer irreparable harm if the orders sought are not granted, and that the balance of convenience in this matter lies in favor of not permitting any further development by the applicant on the suit property.
36. Citing the case of *Lucy Waitbera Kimanga & 2 Ors Versus John Waiganjo Gichuri* 2015 eKLR, it was argued that stay of the proceedings before the trial court pending the determination of the appeal hearing should not be granted and that the case should be resolved at the earliest opportunity.
37. On the issue of deposit of Kenya Shillings 934,020/- as security for the appeal the respondents submitted that there is no basis for the court to accept that deposit yet there is no claim by the applicant for the same or at all before this court or before the Magistrate's Court.

Analysis And Determination

38. In the preparation of this ruling I have carefully considered the Notice of Motion application the Replying Affidavit filed by the 1st and 2nd respondents and the Submissions of the parties.
39. I note that parties have gone to very great lengths to argue their case with all kinds of material some of which may be only fit for the substantive hearing of either the suit before the trial court below or the appeal before this court. However, in the consideration of this court, the issues that present themselves for determination in the application, and which attract a far less extensive analysis than presented by the parties, are narrowed down as follows:
 - a. Whether pending the hearing and determination of the appeal the appellant should be granted leave to enter and access the suit property Land Reference No 12889/63 for completion of the project to enable the appellant perform its obligations under the EPC contract;



- b. Whether the proceedings in Malindi MCELC No E081 of 2024 *Nelly Kasina & Anor V KETRACO* ought to be stayed pending the hearing and determination of the present appeal;
- c. Whether this court should grant leave to the appellant to deposit the compensation funds being Kenya shillings 934,020/- in an escrow account as security for the appeal;
- d. Who ought to meet the costs of the present application.

The issues are discussed as herein below.

a. Whether pending the hearing and determination of the appeal the appellant should be granted leave to enter and access the suit property Land Reference No 12889/63 for completion of the project to enable the appellant perform its obligations under the EPC contract;

40. Regarding issue no (a), besides facing the usual complexities involved in the issuance of a mandatory injunction order by a court, the appellant faces the uphill task of establishing that the suit land was listed in the Gazette Notice that was issued by the NLC on its behalf, that is gazette notice Gazette Notice Number 7489. There are two pertinent issues that are the determinants as to whether the order can be issued as follows:
- i. Whether the applicant has satisfied the requirements for the grant of a mandatory injunction at an interlocutory stage;
 - ii. Whether the suit land was named in Gazette Notice Number 7489.
41. On the sub-issue (i) above this court commences this analysis by noting that the order sought is a mandatory injunction meant to compel the respondents to allow the appellant into their land for the purpose of pursuing of further construction of the project while the present appeal is still pending. The principle courts follow is that mandatory injunctions should be sparingly allowed at an interlocutory stage, and should be allowed only in specific cases, for example where the respondent to the application has sought to steal a march on the applicant in the course of the litigation. *Kenya Breweries Limited & another v Washington O. Okeyo* [2002] KECA 284 (KLR) elaborated on circumstances which attract the grant of an interlocutory mandatory injunction as follows:

“The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 *Halsbury’s Laws of England* 4th Edn. para 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff a mandatory injunction will be granted on an interlocutory application”.

Also in *Locabail International Finance Ltd. V. Agroexport and others* [1986] 1 ALL ER 901 at pg. 901 it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of



assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

The principles of law enunciated by these decisions have received full approval by the courts within our jurisdiction. See the cases of *Belle Maison Limited vs. Yaya Towers Limited* H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) and *The Ripples Limited vs. Kamau Mucuba* H.C.C.C. No. 4522 1992 per Mwera, J.”

42. The questions that the court must ask itself in the present application are (a) whether the applicant herein has adduced evidence by affidavit of special circumstances to warrant such an injunction; (b) whether the case is clear and one which the court thinks it ought to be decided at once; (c) the act done is a simple and summary one which can be easily remedied; (d) the defendant attempted to steal a march on the plaintiff; and (e) court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted.
43. Regarding question (a), what are the special circumstances according to the applicant? The applicant’s plea is that the appellant is a key state corporation mandated under Sessional Paper Number 4 of 2004 on Energy to plan design construct build operate and maintain high voltage electricity transmission lines and associated substations that form the backbone of Kenya’s national transmission grid. It is thus not a private entity but a public body, and aligned to this assertion is the averment that the matter of construction of the project is a matter of public interest that it outweighs the respondent’s private interest and thus a mandatory injunction ought to be granted and project construction ought to continue pending the hearing and determination of the appeal. It is the averment of the respondents which lacks any rebuttal from the appellant that there is already an old power line that follows the same trajectory that the new project has followed. The court surmises that the purpose of the new line is therefore not to establish a first time connection but to supplement an existing line and this mitigates the urgency of the appellant’s situation.
44. The second aspect raised by the appellant is that the taxpayer stands to lose colossal amounts of money to be paid to the project contractor for delays in construction. The respondents of course refute that allegation for want of any evidence. The implied argument here is that this court should intervene to stop the possible waste of public funds through payment of penalties to the contractor for project delay. This court notes that the mere allegation without proof that colossal amounts of money have been mentioned in the application as being likely to be lost cannot be termed as a special circumstance solely determinant and sufficient to persuade this court to lean towards issuance of a mandatory injunction at an interlocutory stage. In any event the respondents have clearly indicated that they were not privy to the agreement between the appellant and the contractor; to add to that, this court is also of the view that a time has come in the management of public affairs when the management of public bodies needs to align itself with the necessity of saving public funds by insisting on equitable clauses in contracts with other entities, so as to safeguard themselves from unjust and unwarranted penalties not borne of their own wrongdoing.
45. Regarding question (b) this court does not consider the case as clear and one which the court thinks it ought to be decided at once. There is the question of whether the respondents’ land was included in the Gazette Notice at all, and whether, if there was a mistake in the land reference or parcel number that was included in the notice and which was meant to refer to their land, the process that commenced thereafter pursuant to that notice can in law be deemed as a wayleave acquisition process or mere trespass. this court ought to refrain from further remarks on the same so as not to prejudice both the hearing of the appeal and the trial of the suit in the Magistrate’s Court below.



46. On questions (c) and (d), they are not applicable in the present case as there is no wrongful act that the appellant attributes to the respondents; the respondents in fact are vexed that an application for a mandatory injunction order can be lodged in the present appeal regardless of the fact that the appellant lacks a counterclaim in the case before the trial court below.
47. Regarding question (e), owing to the complexity of the matter without needing to make any comment on the merits of either the suit in the Magistrate's Court or the present appeal, it suffices to state that there are no clear indications that the trial of the appeal it would appear that the mandatory injunction had rightly been granted. In the circumstances and to avoid embarrassment in such foggy litigation weather this court is inclined to suffer the appellant await the determination of the appeal rather than risk issuing any mandatory injunction order at the interlocutory stage.
48. As to whether the suit land was listed in Gazette Notice Number 7489 this remains one of the issues live for trial before the Magistrate's Court and it is noteworthy to state that the respondents have raised the issue that the Gazette Notice does not qualify as the proper notice for the commencement of such a process under the law. Also, independent of the respondent's opinion objection to the notice, as this court has stated herein above, around the contents of the Gazette Notice relating to land reference numbers stated are various issues arising, among which is the issue as to whether the process of legal acquisition of wayleave effectively kicked off by the Gazette Notice with regard to the suit land.
49. The conclusion is that this court agrees with the respondents that there are no special circumstances that warrant the grant of a mandatory injunction at an interlocutory stage in the present case.
50. Lastly, it is worthy of comment that for the purpose of balancing the interests of the parties a court may be called upon to issue an injunction or an order of maintenance of status quo midway during proceeding. There was such an application made in the trial court below and which was granted vide the ruling which is the subject of appeal in this court. It must be noted that perchance this court issued a mandatory injunction order in the present application as sought, the same would be in conflict with the order of the Chief Magistrate's court and, in view of the fact that the application before this court does not seek an order setting aside the injunction order, the existence parallel to one another, of the two contradictory orders would be unhealthy for the administration of justice and ought not be allowed.

b. Whether the proceedings in Malindi MCELC No E081 of 2024 Nelly Kasina & Anor V KETRACO ought to be stayed pending the hearing and determination of the present appeal;

51. I have considered *Lucy Waitthera Kimanga & 2 Ors Versus John Waiganjo Gichuri* 2015 eKLR, and the respondent's argument that stay of the proceedings before the trial court pending the determination of the appeal hearing should not be granted and that the case should be resolved at the earliest opportunity. However, the *Constitution* holds all persons as equal before the law. Consequently, just as the respondents have pleaded, and correctly so in my view, that granting the mandatory injunction would summarily determine the dispute pending before the Magistrate's Court which is yet to be determined on its merits and which they opine would be a gross infringement of their right to fair hearing under Article 50 of the *Constitution*, the appellant also deserves to be heard on its appeal substantively before the Magistrate's Court can make a decision on the merits of the case before it. Consequently, this court finds it necessary to grant a stay of the proceedings before the subordinate court pending the disposal of the present appeal.



c. Whether this court should grant leave to the appellant to deposit the compensation funds being Kenya shillings 934,020/- in an escrow account as security for the appeal;

52. The appellant desires to have the monies it considers adequate compensation placed in an escrow account. That would mean beyond the reach of either party where it would be bearing interest. This court has considered this plea and found it not inimical to any of the parties' interest. Depending on the outcome of the case before the Magistrate's Court the monies may ultimately be utilized, or utilized as part of the award of compensation to the respondents. However, this court finds that this not being the trial court, it is pointless for it to issue such an order. That application should, if necessary, be made before the trial court, which will be eventually able to make substantive orders at the execution stage regarding the disposal of such monies. That prayer should be rejected.

d. Who ought to meet the costs of the present application.

53. Regarding who is to meet the costs of the present application, this court finds it necessary to order that the costs do abide the outcome of the substantive appeal.

Conclusion.

54. The upshot of the foregoing analysis is that the application dated 16/4/2025 lacks merit and it is hereby dismissed. Costs thereof to abide the main appeal.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 13TH DAY OF MAY 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

