



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

PETITION CASE NO. 16A OF 2019

MORRIS KYENGO MAKOVU (suing on behalf of the estate of

DAVID MAKOVU NDAMBO –DECEASED)PLAINTIFF

=VERSUS=

1. KENYA POWER & LIGHTING COMPANY LTD

2. THE DIRECTOR PUBLIC PROSECUTIONS

3. THE ATTORNEY GENERAL

4. EDWARD WILLY MAKOVU..... RESPONDENT

J U D G M E N T

1. By a Petition dated 1st March 2019, the Petitioner sought for the following orders against the Respondents;

- a) A declaration that the Petitioner's rights under *Article 40* of the Constitution of Kenya 2010 relating to the protection of the right to ownership of property and prompt, full, fair and just compensation in the event of compulsory acquisition for public use have been violated by the Respondent.
- b) A declaration that the Way leaves consent for erection of a 33KV power line to supply Mwala Market on L.R. No. Mwala/Mango/179- Machakos was obtained irregularly is null and void and the 1st Respondent's continued and reliance on it is illegal and in blatant disregard of the Petitioners rights under Article 40 and 47.
- c) A declaration that the 1st and 2nd Respondents compromised and violated the rights to fair administrative action and for legitimate expectation of the time Petitioners under Article 47 of the Constitution.
- d) A declaration that the Petitioner is therefore entitled to special, general and exemplary damages against the 1st Respondents herein, special damages for value of the encumbered freehold interest being a total sum of Kshs. 6,273,250/=.
- e) An order for compensation to the Petitioner for the emotional and psychological torture occasioned upon him and for the loss of time.
- f) An order of compensation for infringement of the Petitioners Constitutional rights,
- g) A declaration that the 2nd Respondent be and is hereby compelled to commence immediate criminal investigations and proceedings with regard to the complaint lodged against an officer of the 1st Respondent by the Petitioner on a forgery of Way leaves consent claiming erection of a 33KV power line to supply Mwala Market on LR No. Mwala/Mango/179- Machakos.
- h) Any other orders that this Honourable court shall deem fit.
- i) Costs and interests be borne by the Respondents.

2. The Petitioner averred that he is the administrator of the estate of David Makovu Ndambo (*deceased*). That land parcel number Mwala/Mango/179 measuring approximately 17 acres is registered in the name of David Makovu Ndambo, who was survived by several heirs, among them the Petitioner. That in the year 2000, Kenya Power & Lighting Company Ltd, (the 1st Respondent) herein erected a high

voltage line across land parcel number Mwala/Mango/179 as Way leave to 33KV power line to supply Mwala Market within Machakos County under their Rural Electrification Programme. That the 1st Respondent did not obtain proper consent and failed to consult, involve and or compensate the beneficiaries of the estate of David Makovu Ndambo. That the 1st Respondent through its Chief Way leaves Officers, forged a consent purported to have allowed the 1st Respondent to erect high voltage lines in the suit property. That the forged consent was purportedly signed by the late Makovu Ndambo on 15th March, 2000, while the said Makovu Ndambo had died in 1986.

3. According to the Petitioner, he has relentlessly reported the irregularities and injustices meted on him and other beneficiaries of the suit land by the 1st Respondent. That the complaints were made to various government offices including the office of the 2nd Respondent, but his quest for justice have led to frustrations intimidation and threats from the 1st and 2nd Respondents. He states that the 2nd Respondent through the DCIO Masii one C.I Muguna, initiated a malicious criminal case against the Petitioner so as to silence him and his family. He also contended that as a result of the 1st Respondent's actions, he has suffered loss and damage. He stated that the valuation conducted on 5/6/19 by Clayton Valuers Ltd showed that the area under the power lines is estimated to be 5 acres which translates to a sum of Kshs. 6,273,250/=, which he ought to be compensated.

The Petitioner therefore stated that his rights under Articles 40 and 47 of the Constitution were violated by the Respondents.

4. The Petition is opposed. The 1st Respondent filed response to petition dated 18th October 2019 and through their legal officer one Justus Ododa, swore an affidavit on 18th October, 2019 and filed in court on 24th October, 2019 where he stated that the Petitioner had not made full, frank and candid disclosure of material facts and that he had made false and misleading statements as to obtain favourable orders. That the 1st Respondent visited the area in respect of the suit property and mapped the area for construction of a power-line to enable area residents and Mwala Market get electricity connection under the Rural Electrification Programme the year 2000.

5. According to the 1st Respondent, the 1st Respondent conducted investigations through the assistance of the area chief, where it was established that the suit land was ancestral land with various households occupying the same and that the land was registered in the name of Makovu Ndambo (*deceased*) and through the local administration the 1st Respondent officers talked to the children of the deceased together with the heirs who were in active occupation and use of the land todate. That the 1st Respondent having explained to the occupants of the suit land why they needed to erect power lines thereon and educating them as to their rights as landowners, the purpose of the Way leave and the importance of supplying electricity to the community, the heirs and children of the late Makovu Ndambo did not resist the request but were happy that their area would be connected to electricity, thereby agreeing to cooperate with the 1st Respondent.

6. The 1st Respondent averred that they sought for consent to erect the power lines and after consulting with the Petitioner's family members, they agreed that Edward Willy Makovu, the eldest son of Makovu Ndambo was the custodian of the estate of the deceased and he was the one in possession of the deceased's property's documents. That the Way leaves consent was signed by Edward Willy Makovu who informed the 1st Respondent that he was in the process of obtaining letters of administration for the estate of his father. That when the wayleaves officer of the 1st defendant visited the suit property; he found the said Edward Willy Makovu in active occupation of the suit property and the power lines would pass where he had constructed his house. The 1st Respondent emphasized that way leave Consent was granted voluntarily and the agreement was witnessed by the local area wayleaves officer, Mr. David Waiganjo Ndotoni (*deceased*). That it is upon procuring the wayleave consent, that the electricity line was erected and assessment for damages done where crops and properties damaged during the erection of the power line were duly recorded and fair and adequate compensation for affected persons made. That thereafter, Edward Willy Makovu filed a complaint with the 1st Respondent in regard to his temporary houses under the power line, which necessitated a further damage assessment and damages paid in full. That there were no complaints or objections received from any of the family members.

7. That the 1st Respondent was surprised in 2005 when the Petitioner complained that he needs to be compensated. That the 1st Respondent informed the Petitioner that the beneficiaries were compensated. That the Petitioner's suit is meant to revive a matter legitimately adjudicated upon within the bounds of the law.

8. The 1st Respondent insisted that there was never any recommendation to prosecute the 1st Respondent's Wayleave officer for the offence of forgery and that the Petitioner never filed a complaint with the police. That the Petitioner was lawfully and regularly charged in court through a valid and proper legal process and the same was not related to this matter. That this Petition was filed 19 years although the Petitioner has always been aware of the power lines in issue, hence the Petition is aimed at circumventing the provisions of Sections 7 and 8 of the Limitation of Actions Act. That no explanation has been offered for the 19 years delay and that the Petitioner was at liberty to obtain a limited grant to enable him file suit to protect and preserve the deceased's estate and this notwithstanding, the fact that even after obtaining letters of administration on 23rd November, 2012 he still failed to file suit against the 1st Respondent, that hence the delay is inordinate and unreasonable and the petition is an afterthought and made in bad faith.

9. The 1st Respondent faulted the valuation report and stated that the power line was constructed in 2000 and that it is impractical that the same is on 5 acres. Further, that the petition does not demonstrate any breach of fundamental human rights and does not meet the requirements of a constitutional petition.

10. The Petitioner filed a supplementary affidavit sworn on 8th November, 2019 and filed in court on 11th November, 2019 and averred that the 1st Respondent did not acquire a wayleaves consent before the construction of the High voltage power lines and that Edward Willy Makovu has never been appointed/nominated as the administrator of the estate of David Makovu Ndambo. That the 1st Respondent's wayleaves officer did not perform due diligence as required under the Wayleaves Act Cap 292 Laws of Kenya as they compensated Edward Willy Makovu who was not the administrator of the deceased's estate, and therefore their acts amounted to intermeddling with the estate of the deceased person. The Petitioner also stated that in any event, the 1st Respondent had not demonstrated how they compensated the alleged Edward Willy Makovu and if so, how much was paid to him or to the estate as no documentation has been provided. He stated that the

officers of the 1st Respondent conspired with the offices of the 2nd Respondent to have him maliciously prosecuted in Criminal Case No. 1397/2014 so as to silence him from pursuing his rights. On the question of Limitation, the Petitioner averred that the 1st Respondent had not filed a formal preliminary objection in respect to the same. That in any event, the Petition involves continued contravention of Constitutional rights from the year 2000 up to date, hence the Limitations of actions Act does not apply. The Petitioner contended that the 1st Respondent had not addressed the issue of forgery of the wayleaves consent by its officers.

11. The 3rd Respondent was disjoined from these proceedings. The 2nd and 4th Respondents did not enter appearance or file a response. It's only the 1st Respondent who entered appearance and filed a response as well as a replying affidavit. The petition proceeded by way of written submissions. The Petitioner filed his submissions dated 24th May, 2021 on 26th May, 2021, while the 1st Respondent filed their submissions on 25th November, 2021.

PETITIONER'S SUBMISSIONS:

12. The Petitioner submitted that Article 22(1) of the Constitution allows the petitioner to institute proceedings now before court as his rights had been violated. He contended that his right to property under Article 40 of the Constitution was violated as he is entitled to fair and just compensation if his rights are interfered with for purposes of public utilities. He maintained that the 1st Respondent entered his land without his consent or consent of the members of the family of Makovu Ndambo, who were present on the land and that the 1st Respondent failed to compensate all the occupants and affected persons whose houses, crops and trees were destroyed during erection of the power line.

13. It was submitted for the Petitioner that the 1st Respondent infringed in the petitioner's right to a fair administrative action under Article 47 of the Constitution and that the procedures set forth in sections 45 and 46 of the Electric Power Act number 11 of 1997 were not followed by the 1st Respondent. That the 1st Respondent failed to investigate the forgery of the wayleave consent.

14. The Petitioner also complained that his legitimate expectation under Article 47 of the Constitution was infringed by the 2nd Respondent. The Petitioner stated that he had made several reports to the 2nd Respondent that criminal acts were done by the 1st Respondent's officers in obtaining the alleged Wayleave consent but the 2nd Respondent failed to investigate the complaint. That the Independent Policing Oversight and Kituo Cha Sheria forwarded letters to the 2nd Respondent asking them to address the injustice in vain.

15. The Petitioner complained that the acts of the Respondents were in breach of Section 46 of the Electric Power Act No. 11 of 1997. Section 4 of the Wayleaves Act Cap 292 (now repealed) the energy Act, 2019 in Sections 83, 142, 5C, 171 and 173 and Sections 98 of the Land Registration Act. (repealed)

16. The Petitioner submitted further that the consent dated 19th March, 2000 marked as MKM3 was fraudulent and a forgery as the signature of the later Makovu Ndambo was forged because as at the time of the signing of the consent Mr. Makovu Ndambo was dead. He contended further that the purported agreement relied upon by the 1st Respondent dated 26th August, 2003 does not amount to a consent as it was made one year after the power lines were erected and it involved only one person who was not the only affected occupant. The Petitioner also faults the fact that no notices were issued contrary to Section 46 of the Electric Power Act.

17. On the issue as to whether the petition is time barred, the Petitioner stated that the power line is still on the suit land since the year 2000. He relied on the case of Peter Mwangi Kabue vs Rural Electrification Authority [2018] eKLR where the court held that according to the definition of continuing trespass by Clerk on Law of torts, 16th edition, as long as a trespasser continues to occupy another's land unlawfully, such occupation remains a continuing trespass which is actionable from day to day so long as the trespasser remains on the land. The Petitioner further stated that he had expressed his intention to sue and his dissatisfaction with the 1st Respondents' actions since the year 2000, as demonstrated by a bundle of his documents from pages 4-35, indicating correspondences between the petitioner and various government institutions as he sought justice. That his vigilance led to his arrest and prosecution in Machakos Criminal Case No. 1498 of 2015. The Petitioner relied on the case of *Joan Akinyi Kabasella & 2 Others vs Attorney General, Petition No. 41 of 2014*, to argue that courts have consistently held that there is no limitation with respect to constitutional petitions alleging violation of fundamental rights.

18. On the question as to whether the petitioner is entitled to compensation the petitioner argued that articles 2, 10, 26, 28, 31, 40, 42, 47, and 232 obligated the Respondents to uphold basic rights and fundamental freedoms and therefore in the event of violation of such rights, there should be compensation. The Petitioner relied on Section 148 of the Land Act to argue that he is entitled to compensation. He placed reliance on the case of Kenya Power & Lighting Company Ltd vs Josphat P. Kingara [2013] eKLR where the court held that the value of the land is the determinant factor for compensation under the *Land Act No. 6 of 2012* and land cannot be reinstated to its previous position where electric power lines are in place. The Petitioner sought for compensation of Kshs. 7,000,000/= and stated that the same was sufficient.

19. Counsel submitted that the petitioner was entitled to special, general and exemplary damages on ground that the Petitioner will no longer exploit the full potential of the land in issue. He stated that Kshs. 6,273,250/= was for special damages being the value of the land under the power lines in accordance to the valuation report presented. He relied on the Assessment of Just Compensation Rules 2017, legal Notice No. 283 and the *Land Act No. 6 of 2012*. He also relied on *Article 23* of the Constitution and the cases of *Titus Gatitu Njau vs Municipal Council of Eldoret* (2015 eKLR) and *Obondo & Another vs Municipal Counsel of Kisumu*, both of which this court has considered. He also relied on the case of *John Peter Mangi Kagira vs National Land Commission & Another* [2019] eKLR, to seek for declaratory orders.

1ST RESPONDENT'S SUBMISSIONS:

20. The 1ST Respondent submitted that they visited the suit land, conducted due diligence and obtained consent from Edward Willy Makovu. They maintained that there was no forgery or harassment of the Petitioner. They relied on the case of *Phyllis N. Mbahito vs Kenya Power & Lighting Co. Ltd.* [2012] eKLR where the Court of Appeal held that where Kenya Power and Lighting Company cannot get a person with a grant of letters of administration, it makes practical sense to look for a person in actual use and possession of the land for a

Wayleave consent, as this was a mere right of way, because, if the company insists on dealing with persons in possession of a grant and forget the people in actual possession, it could result in tremendous losses and suffering especially when those entitled to grant are not about to do so in the near future.

The 1st Respondent further cited the case of Boaz Rueben Kisagi Shume vs Kenya Power & Lighting Co. Ltd & 71 Others [2019] eKLR and relied on Article 40 of the Constitution that provides that provisions may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not have title to the land.

The 1st Respondent submitted further that it was not in contention that the 4th Respondent Edward Willy Makovu was in occupation and possession in particularly where the power lines passed and the Petitioner never raised any issues until 2006, when he started writing letters.

21. It was the Respondent's contention that though the Petitioner alleges forgery on the part of the 1st Respondent, no one has ever been charged. That wayleave consent was properly obtained and therefore the issue of trespass does not arise, as the petitioner is only interested in unjustly enriching himself.

22. On the question of limitation of time, the 1st Respondent submitted that the Petitioner was trying to circumvent the Limitations of Actions Act. It was submitted that the issue is whether there was forgery of consent of Way leave. Counsel relied on the case of James Kanyiita Nderitu vs Attorney General & Another [2019] eKLR where the Court of Appeal stated that a Constitutional Petition or Judicial Review Proceedings is not meant to circumvent the law on Limitation of Actions. Consequently, Constitutional Petitions filed in delay alleging violation of the Bill of Rights are to be considered on a case by case basis taking into account the explanation and merits of the delay. The 1st Respondent also relied on the case of Wellington Nzioka Kioko vs Attorney General [2018] eKLR, which the court has considered. The 1st Respondent argued that by filing the claim after 19 years, the Petitioner was merely taking advantage of the size of the 1st Respondent knowing well that the file had been closed and making it hard for the 1st Respondent to trace all relevant documentation.

23. On the issue of compensation, counsel submitted that special damages must not just be specifically pleaded but must also be proved. It was submitted for the 1st Respondent that the Petitioner failed to specifically plead with particularity for the special damages and instead gave a general figure for Kshs. 6,273,250/= and a valuation report. Reliance was placed on the case of Chyna Oversees Engineering Company Limited vs Isaaq Kichwen Kijo [2019] eKLR where the court held that special damages must be specifically proved.

24. The 1st Respondent concluded that the petition was a conspiracy between the petitioner and the 4th Respondent to gain double compensation. Further, that the 1st Respondent acted diligently and within the law to make electricity available to the residents of Mwala Market. They sought for dismissal of the petition with costs.

ANALYSIS AND DETERMINATION:

25. I have considered the Petition, the response thereto and the party's submissions as well as authorities relied upon. In 2019 the Petitioner filed this Petition in the High Court alleging contravention of several Articles of the Constitution including Articles 22, 23, 40, and 47 of the Constitution of Kenya 2010 and Articles 75 (1) of the Constitution of Kenya (repealed). By a decision of the High Court dated 8th May, 2020, the High Court transferred this matter to this court for hearing and determination. The acts complained of were that the 1st Respondent erected power lines in land parcel number Mwala/Mango/179 without obtaining wayleave consent from the title holder. The Petitioner has sought for declaratory and compensation orders. The 1st Respondent, being the only Respondent who took part in the proceedings, has stated that the suit is time barred having been filed after 19 years when the cause of action arose and that the person(s) who were in occupation of the suit land at the time of the erection of the power lines were duly compensated in accordance with the law. Therefore, two issues arise for determination in this matter as follows: -

- a) Whether this petition is time barred; and
- b) If the answer to (a) above is in the negative, whether the Petitioner is entitled to the orders sought in the Petition.

26. The question of time limitation goes to the jurisdiction of this court. As was held in the case of Bosire Ongero vs Royal Media Services [2015] eKLR, the question of limitation touches on the jurisdiction of the court, hence if a matter is statute barred, the court would lack jurisdiction to entertain it. In the case of Mukisa Biscuit Manufacturing Ltd vs West End Distributors [1969] E.A. 696, it was held that a plea of limitation amounts to an objection to the courts' jurisdiction.

27. Jurisdiction is the power of the court or authority that the court has to decide cases brought before it. Halsburgs Laws of England (4th Edi) Vol 9 at page 350, defines jurisdiction in the following terms: -

“The authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision”

28. The Black's Law Dictionary 9th Edition defines jurisdiction as the power of the court to entertain, hear and determine a dispute before it. John Beecroft Saunders in “Words and phrases legally defined” Vol. 3 at page 113 defines jurisdiction as follows;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, Charter or Commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the

particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

29. The *locus classicus* case on the subject of jurisdiction is the case of Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] where it was held as follows: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. When a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

30. In the instant Petition, the Petitioner stated that the 1st Respondent erected power lines on the suit property in the year 2000. That he raised a complaint in 2005. He has annexed several documents in respect of his communication between him and the 1st Respondent. The first communication between the Petitioner and the 1st Respondent is a letter by the Petitioner dated 1st August, 2006. In this letter, the petitioner informed the 1st Respondent’s managing director that his efforts to be compensated were not fruitful as the 1st Respondent’s Principal wayleaves officer was unresponsive. On 22/12/2007, the Petitioner wrote to the 1st Respondent’s Central Office and gave 14 days’ notice of intention to sue should they fail to respond to his letter dated 1st August, 2006. There appears to have been no communication between the 1st Respondent and the Petitioner until 5th April, 2012 when the 1st Respondent wrote to the Petitioner seeking for a route sketch to the Petitioner’s plot, together with the latter’s telephone number to enable the 1st Respondent investigate the Petitioner’s allegations. There appears to be no further engagement between the Petitioner and the 1st Respondent after 5th April, 2012. Between 12th November, 2013 and May 2018, there are correspondence on record to show the petitioner’s engagement with the 2nd Respondent, where the Petitioner complained of being harassed by the 2nd Respondent’s officers, while the 2nd Respondent wrote to the petitioner indicating that they were looking into the petitioner’s complaints.

31. The 1st Respondent deponed that their wayleaves officer a Mr. David Waiganjo Ndotono, who had been assigned the task of seeking consents from all persons affected by the power line in issue was deceased. The 1st Respondent further stated that the petition was filed 19 years after the erection of the power line and that the petition was filed with intention to circumvent the Limitation of Actions Act and more particularly Section 7 and 8 of the said Act. The 1st Respondent has argued further that the petitioner obtained grant of letter of administration for the estate of his father on 23rd November, 2012 but still failed to move the court soon thereafter. Therefore the 1st Respondent contended that the petitioner has not presented any justification for the inordinate delay in bringing this action.

32. In rebuttal, the Petitioner stated that over the years he had relentlessly reported the irregularities and injustices meted on the beneficiaries of his father’s estate but his quest for justice had ended up in frustrations, intimidation and threats from officers of the 1st and 2nd Respondents. He also contended that the plea for limitation could not be entertained as the 1st Respondent had not filed a formal preliminary objection on a point of law and therefore that argument was untenable in law. He also averred that the petition involved a continued contravention of constitution rights from the year 2000 up to date and therefore the Limitation of Actions Act n does not apply.

33. The Petitioner argued that the 1st Respondent’s acts amounted to trespass and that there was continued trespass on the part of the 1st Respondent which was actionable from day today.

He further argued that courts have consistently held that there is no limitation with respect to Constitutional Petitions alleging violation of fundamental rights. He also contended that his bundle of documents at pages 4 to 35 demonstrated the constant correspondence between the petitioner and various government institutions, which vigilance saw him get arrested and charged in Machakos Criminal Case No. 1395 of 2014.

34. On the other hand, the 1st Respondent contended in their submissions that the suit before court is that of trespass, yet the petitioner was circumventing the provisions of the Limitation of Actions Act by filing a Constitutional Petition. They argued that a constitutional petition should not be filed with the intention of circumventing the Limitations of Actions Act. They stated that even if there is no time Limitation for Constitutional Petitions, the delay must not be inordinate and where there is a delay, there must be a plausible explanation.

35. I have considered the petition and the documents in support. The Petitioner stopped engaging the 1st Respondent on 22nd January, 2012 upon giving a 14 days’ notice of intention to sue. The Petitioner has not given any plausible reason why he took 19 years to file this suit. Even though constitutional petitions have no time limitations, a party does not have the liberty to file a petition any time they deem fit as that would defeat the intention of the Limitations of Actions Act, with the consequence that the Respondent in such petition may be greatly prejudiced and ultimately suffer injustices.

36. Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya provides as follows: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person.

Section 8 of the Limitation of Actions Act provides that an action may not be brought and distress may not be made to recover rent arrears or damages in respect thereof after the lapse of six years from when the rent became due.

The purposes of the Law of Limitation was expounded in the case of Gathoni vs Kenya Cooperative Creameries Ltd [1982] KLR 104 where the Court of Appeal stated as follows: -

“The law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

In Mehta vs Shah [1965], E.A. 321 the Court held as follows: -

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

In the instant suit, the petitioner came to court after 19 years from the date the power lines were installed on the suit land. The question that this court has to address is whether by entertaining this claim justice will be served to both parties.

37. The 1st Respondent has argued that their wayleaves officer who handled the matters in dispute is now deceased and that other witnesses have retired while others have died and therefore it will be hard for them to trace all the relevant documents. I note that the petitioner’s claim is hinged on allegation of breach of the Wayleaves Act (repealed), the Electric Power Act (repealed) and the Land Act. The Petitioner filed the claim after 19 years, there is no material placed before this court to justify the inordinate delay. This court will not excuse the inordinate delay merely because the claimant has approached the court by way of Constitutional Petition and failed to file an ordinary suit based on the primary statutes. In any event every claim worth its salt may likely have a bearing on the Constitution and therefore not every suit commenced by way of a Constitutional Petition should be exempted from application of the Limitation of Actions Act Cap 22 Laws of Kenya.

For instance, claims for recovery of land though anchored on Article 40 of the Constitution are subject to sections 7 and 8 of the Limitation of Actions Act.

38. Every Constitutional Petition should therefore be considered on a case by case basis. Indeed, in the case of James Kanyiita Nderitu vs Attorney General & Another [2019] eKLR the Court of Appeal held as follows: -

“A Constitutional Petition, or for that matter Judicial Review Proceedings, is not meant to circumvent the law on Limitation of Actions. Consequently, Constitutional Petitions filed in delay alleging violation by the Bill of Rights is to be considered on a case by case basis taking into account the explanation and merits of the delay. In Josephat Ndirangu vs Henkel Chemicals (E.A.) Ltd [2013] eKLR, the trial court correctly held that litigants should not avoid the provisions of the Act by going behind statute and seeking to rely directly on constitutional provisions. The primary legislation should not be circumvented. In the Peter Lubale Lubullellah vs Teachers Service Commission Petition No. 145 of 2016 on the issue of circumvention of the primary legislation it was aptly stated as follows; -

“To name the matter herein as a petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the Petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings, even where there is no challenge to the claims made by the Respondent. It is obvious, the claim is for gratuity payment for the employment period if the defendant is filed way out of time as required under Section 90 of the employment Act, 2007”.

39. In the case of Ochieng Kenneth K. Ogutu vs Kenyatta University & 2 Others, High Court Petition Number 306 of 2012, the Court stated at paragraph 35 as follows; -

“As I conclude this matter, I will address the issue of delay in filing this petition. The Respondent has argued that the petitioner is guilty of inordinate delay and I am inclined to agree with it. The events complained of took place more than 12 years ago. There is nothing before the court that explains or justifies the delay in coming to court to vindicate his rights. The Petitioner’s counsel submitted that he was so traumatized that he could not come to court before, but I can see no basis for this submission. While the Petitioner alleges that he was arrested and charged and that he served for 15 days before his fine was paid, I cannot see any basis for alleging that he was so traumatized that it has taken him 12 years to recollect that he had a claim against the respondents. While the reason for delay in cases such as those involving the Nyayo House torture cases may be acceptable, at least for a time, that they were not able to file claims because of the politically repressive climate then prevailing, there is no such justification in this case. Even if I found the facts demonstrated a violation of the petitioner’s rights (which I have not) I would have had difficulty in excusing the 12 years delay in this matter”.

In the said case, the court went further to state as follows: -

“... There is a great danger that parties are abusing the Constitutional Protection of right to bring claims before the court whose sole aim is enrichment rather than vindication of rights. A delay of 10 years or more before one comes to court to allege violation of rights is clearly not justifiable. As Nyamu, J observed in Abraham Kaisha Kanzike and Another vs Central Bank of Kenya, (supra); -

“Even where there is no specified period of limitation, it is proper for the court to consider the period of delay since the accrual

of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay. In this case, a delay of 17 years is inordinate and it has not been explained. The prosecution by the claimant took 6 years and although he gives this as the reason for the delay, he has not explained the balance of eleven years”.

40. In the case of Ochieng Kenneth K’Ogutu(supra), the court concluded as follows: -

“In my view failure by a Constitutional Court to recognize general principles of law including limitation expressed in the constitution would lead to a legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some cases ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a “constitutional issue” after the expiry of the prescribed limitation period.”

41. In the past, constitutional courts have excused delays in filing Constitutional Petition in matters involving transitional justice especially in cases of rights violations by oppressive political regimes, which was characterized by hostile environments and parties were unlikely to obtain effective remedies. However, what happened then cannot and should not be expected to be the norm. The prophecy by the court in the case of Charles Gachathi Mboko vs Attorney General, Civil Case No. 833 of 2009 (O.S.), to the effect that there will come a time when constitutional courts will not let parties who have slept on their rights abuse the court’s indulgence by failing to give serious explanation for their delay; has already unfolded. This court, sitting as a constitutional court is also a court of equity. And equity does not come to the aid of the indolent. In the case of Njuguna Gathiru vs Attorney General [2016] eKLR, the court cited with approval the case of Smith vs Clay 1767 Ery R 55, [1767] 3 Bro CC 646 [1767] 29 ER 743 where Lord Camden L.C. stated as follows: -

“A court of Equity has always refused its aid to Stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence; where these are wanting, the court is passive, and does nothing. Equity would not countenance laches beyond the period which a legal remedy had been limited by statue, and where the legal right had been barred, the equitable rights to the same thing was also barred...”

In the case of James Kanyiita Nderitu (supra) the court stated as follows: -

“Although there is no limitation period for filling proceedings to enforce fundamental rights and freedoms, the court in considering whether or not to grant relief under section 84 of the Constitution is entitled to consider whether there has been inordinate delay in lodging the claim. The court is obligated to consider whether justice will be served by permitting a respondent whether an individual or the state in any of its manifestations should be vexed by an otherwise stale claim”.

42. Therefore, the case of Joan Akinyi Kabasellah & 2 Others vs Attorney General [2014] eKLR, cited by the Petitioner should be distinguished from the instant suit since the court found in that case that the delay did not prejudice the Respondent. In addition, that case concerned a claim in respect of rights violation in regard to the Nyati House and Nyayo house torture for a person alleged to have been a member of the then outlawed Mwakenya Movement, which the government of the day then did not tolerate. The instant case has nothing to do with political persecution or transitional justice and therefore unexplained inordinate delay cannot be indulged by this court. In addition, the 1st Respondent will be prejudiced by the stale claim.

43. While I am cognizant of the fact that the repealed Constitution and the Rules made under section 84 for seeking redress for violation of fundamental rights and freedoms does not impose any limitation period, I am clear in my mind that the position is not a gate pass for entertaining every unexplained inordinate delay.

In the instant case, the delay in lodging this suit is inordinate and unjustified. I am not satisfied that the Petitioners delay to seek redress has been explained.

In addition, the petitioner’s claim is for compensation for breach of the Wayleaves Act Cap 292 (repealed) as well as the Electric Power Act Number 11 of 1997, which is subject to the Limitation of Actions Act Cap 22 Laws of Kenya. Therefore, the Petitioner’s claim as against the 1st Respondent is inordinate and therefore time barred and cannot be entertained by this court.

44. The Petitioner has also made a claim against the 2nd and 3rd Respondents. In so far as the petitioner’s claim in respect of the 2nd and 3rd Respondents is concerned, I note that the petitioner seeks for a declaration that the 2nd Respondent be and is hereby compelled to commence immediate criminal investigations and proceedings with regard to the complaint lodged against the 1st Respondent on forgery of Wayleaves consent during the erection of a 33KV power line to supply Mwala Market on LR No. Mwala/Mango /179, Machakos. As indicated earlier, a court’s jurisdiction emanates from the constitution and statute. The jurisdiction of this court is anchored on Article 162 (2) (b) of the Constitution and provided in Section13 of the Environment and Land Court Act No. 19 of 2011. That Section provides as follows: -

“13(1) the court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution, and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2) In exercise of its jurisdiction under Article 162, (2) (b) of the constitution, the court shall have power to hear and determine disputes: -

a) relating to environmental planning and protect, climate issues, land use plenary, title tenue, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) Any other dispute relating to environment and land.

45. From the Statutory and Constitutional provisions above, it is clear that the jurisdiction of this court does not include compelling the Director of Public Prosecutions to commence criminal investigations and proceedings in respect of forgery of Wayleaves consent as sought by the Petitioner.

46. In the end, I struck out the Petition herein with costs.

DATED, SIGNED AND DELIVERED AT MACHAKOS (VIRTUALLY) THIS 9TH DAY OF DECEMBER 2021.

A. NYUKURI

JUDGE