



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA**

**AT MACHAKOS**

**CONSTITUTIONAL PETITION NO 4 OF 2019**

**MORRIS KYENGO MAKOVU.....PETITIONER**

**(Suing on behalf of the estate of DAVID MAKOVU NDAMBO-DECEASED)**

**VERSUS**

**KENYA POWER & LIGHTING CO LTD.....1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**EDWARD WILLY MAKOVU.....PROPOSED 4<sup>TH</sup> RESPONDENT**

**RULING ON DIRECTIONS**

1. This Ruling is in relation to the pleadings dated **16.7.2019**. The matter was pending ruling but however in light of my findings below, it is prudent not to handle the same. A perusal of the pleadings indicates that the suit relates to a cause of action in relation to wayleaves and compulsory land acquisition and hence there is need for a determination on the issue of jurisdiction. The issues to be determined are whether this court has jurisdiction and what orders may the court make.

2. In law no court or person assumes jurisdiction. Jurisdiction is a creature of statute. In Kenya, all courts derive their power from the Constitution under Article 159. The Constitution provides for the establishment of the Superior Courts under Article 162 and subordinate courts under Article 169. Judicial power is exercised by the courts which consist of;

- a. The Supreme Court**
- b. The Court of Appeal.**
- c. The High Court.**
- d. Subordinate courts including Magistrates courts, Kadhis Courts, Courts Martial. (See Article 169 of the Constitution).**

3. In selecting a court with power over the type of litigation, regard must be made to the enabling law which empowers such court to hear such a case. I say so because the dispute relates to land and Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

**13 Jurisdiction of the Court**

- 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 protection, climate issues, land use planning, title, tenure, 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 interest in land; and

e) any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.

4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court

5) Deleted by Act No. 12 of 2012

6) Deleted by Act No. 12 of 2012

7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-

a) interim or permanent preservation orders including injunctions;

b) prerogative orders;

c) award of damages;

d) compensation;

e) specific performance;

f) restitution; or

g) declaration; or

h) costs

4. The court clothed with jurisdiction to address the concerns of the applicant is the environment and land court.

5. The petitioner claims to have been charged vide Machakos Chief Magistrate's court criminal case number 1395 of 2014 and was later acquitted of the charges and now seeks for redress. If that is the position, then the appropriate way is to file suit against the state for damages owing to the malicious prosecution but not to lodge a petition. It is clear from the pleadings herein that the petitioner is seeking compensation from the 1<sup>st</sup> respondent with respect to the wayleave claim which is wholly within the jurisdiction of the ELC.

6. The overriding objective of the Civil Procedure Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and or affordable resolution of civil disputes governed by the Act. In the furtherance of this overriding objective, the courts are mandated to ensure the just determination of proceedings, efficient disposal of business of the court, the efficient use of available judicial and administrative resources and the timely disposal of proceedings at a cost affordable by the respective parties. I find it would be efficient to allow the case now pending before this court to be determined by the Environment and Land Court. A transfer of the suit would be in the best interest of both parties, and there is no prejudice that shall be occasioned because the suit property is within Machakos County.

7. To this end I order this matter be and is hereby transferred to the Environment and Land Court at Machakos for hearing and final determination.

It is so ordered.

Dated and delivered at Machakos this 8<sup>th</sup> day of May, 2020.

**D. K. Kemei**

**Judge**