



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MALINDI ELC CASE NO. 63 OF 2015**

**TENNYSON NYINGE CHILYALYA & 60 OTHERS.....PLAINTIFFS**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION COMPANY LTD.....DEFENDANT**

**JUDGMENT**

**Background**

1. By a Plaint dated 23<sup>rd</sup> February 2015 as filed herein on 24<sup>th</sup> April 2015, the 61 Plaintiffs pray for Judgment against the Kenya Electricity Transmission Company Ltd (the Defendant) for: -

- a) Loss of user in the sum of Kshs 15,616,317/10*
- b) Value of trees cut in the sum of Kshs 4,862,987/-*
- c) Loss of user on account of electricity pylons or towers*
- d) Costs of this suit*
- e) Interest at Court rates*
- f) Any other relief that this Honourable Court may deem just to grant.*

2. These prayers arise from the Plaintiffs' contention that they each own various parcels of land along which the Defendant has since constructed an electricity transmission line known as Rabai Malindi-Garsen-Lamu 220 kV Transmission Line Project. On diverse dates between the year 2010 and 2015, the Defendant constructed the said line and proceeded to acquire from each one of them a Wayleave Corridor/Trace of 40 metres width.

3. The Plaintiffs maintain that the Defendant valued their said parcels of land at Kshs 120,000/- per acre and offered to compensate each of them for the loss of user thereof but has to-date failed to pay the compensation due. The Plaintiffs further maintain that the Defendant cut down a number of trees from their respective parcels of land but has refused to compensate them therefor.

4. Accordingly, the 1<sup>st</sup> to 47<sup>th</sup> Plaintiffs demand a sum of Kshs 13,064,532/- as compensation while the 48<sup>th</sup> to 61<sup>st</sup> Plaintiffs who admit to have been paid some Kshs 1,106,225/36 as compensation demand the balance of the said payment which they put at Kshs 2,551,785/10.

5. But in its Statement of Defence dated 22<sup>nd</sup> June 2015 the Defendant while admitting the construction of the Rabai-Malindi-Garsen Lamu 200 kV electricity transmission line denies that the Plaintiffs are owed the alleged or any sums at all. The Defendant avers in this respect that the Plaintiffs did grant it wayleave for the construction of the line and asserts that they were compensated therefor save for their claim for further compensation for trees allegedly cut and power pylons which were denied.

6. It is the Defendant's case that the Plaintiffs were only entitled to compensation at the rate of 30% as loss and not 100% compensation as demanded. The Defendant further denies that it cut the Plaintiffs trees as alleged and asserts that the amount paid in compensation for the wayleave corridor was inclusive of the loss of use in respect of the portion of land on which the power pylons were constructed.

**The Plaintiffs Case**

7. At the trial herein, the Plaintiffs called a total of seven (7) witnesses in support of their case.
8. PW1-Paul Charo Mkoka is the 25<sup>th</sup> Plaintiff and a farmer at Pumwani village in Kilifi. He told the Court that he knows the other Plaintiffs and that they had given him a written authority dated 23<sup>rd</sup> February 2015 to testify on their behalf.
9. PW1 told the Court that the Defendant's employees went to their land between 2011 and 2015 and proceeded to destroy the same. Some of those whose parcels of land were affected were paid only 30% compensation and are now praying for the balance. Others were not paid anything despite their land having been taken.
10. PW1 testified that when the Defendant first appeared in their area around 2010, they told them they would be compensated at Kshs 120,000 per acre. In addition, they were to pay 30% of the value of the land. PW1 was among those who were never paid a coin. Later on in 2014, when the Defendants were working in the Bura-Magarini Section, they came up with a second agreement which did not now make reference to the 30%.
11. PW1 told the Court that they were demanding 100% percent compensation as the Defendant had put up masts on the land and it was unusable. In certain places, the Defendant had built permanent towers.
12. On cross-examination, PW1 told the Court the land in question stretched from Bura Magarini, Bomani upto Marereni. He knew all the co-Plaintiffs although he could not state the measurements of their parcels of land. PW1 told the Court they called meetings in the villages where they met. While his parcel measured 5.22 Ha and had title, PW1 told the Court that some of his colleagues had no title deed for their portions.
13. PW1 testified that those who were compensated were picking their letters from Kiarie Kariuki & Company Advocates who are on record for the Defendants herein. It was his case that no one was paid at the Chief's Office. While admitting that none of them transferred their parcels to the Defendant, PW1 told the Court that it was like the Defendant was buying the land as they were taking upto a width of 40 metres of the land and it was no longer possible to be used other than to plant crops.
14. PW2-Elijah Kalume Shapa is the 35<sup>th</sup> Plaintiff and the owner of Plot No. 282 in Pumwani. He told the Court the Defendant took 3.83 acres of his land after telling him he would be paid the sum of Kshs 120,000/- per acre. He testified that he has never been paid a coin and urged the Court to award him a sum of Kshs 456,000/-. His plot has a pylon tower for which he was not compensated.
15. On cross examination, he told the Court the Defendant went to the ground first and talked to People. When they cut his 67 trees and erected a pylon on his land, PW2 went to the Area Chief but was told to let the Project go on. He however conceded that he had nothing to show that his trees were cut. He further told the Court that while the entire portion of his land taken was 40 metres wide, the pylon tower only occupied about 5 metres.
16. PW3-Harrison Kazungu is the 47<sup>th</sup> Plaintiff. He told the Court the Defendant has never paid him a coin and that they owe him Kshs 273,147.40/- in compensation. He further told the Court he was only paid 30% of his dues and that what he is demanding is the 70% balance.
17. On cross-examination, PW3 admitted that he was paid Kshs 116,800/- by the Defendant. He told the Court he had attended a meeting where they were given a document to sign and were told the payments would be made. He told the Court he cannot build on the power line although the land still belongs to him. He can only use it to plant crops. He told the Court the Defendant has never paid for his trees which were cleared from the land. He urged the Court to award him Kshs 112,000/- for the trees which he told the Court were all hardwood.
18. PW4-Katana Kombo Wanje is the 61<sup>st</sup> Plaintiff and a resident of Kibao. He told the Court he was asking for the 70% balance of compensation as he was only paid Kshs 74,000/-.
19. On cross-examination, PW4 conceded he was paid at the Defendant's office, in Mombasa after he had attended a meeting earlier in the village. He conceded he signed a document showing he was paid 30%.
20. PW5-Mathias Kahindi Dzombo was formerly an employee of the Defendant. He told the Court he was engaged between 2011 and 2012 to cut the trees in Pumwani Phase One. He was being paid Kshs 300/- per day.
21. On cross-examination, PW5 conceded he had not been to any of the Defendant's offices to be employed. He further admitted the Defendant was not the one paying him and stated he was a casual employee who was not on the payslip. He told the Court it was one Joash Mogambi who used to pay the workers.
22. PW6- James Kayuyu Mwakubo also told the Court he was engaged by the Defendant to cut trees between 2011 and 2012.
23. On cross-examination, he told the Court he took up the job as the Defendant's employees were passing through his village. The Project Manager Joash Mogambi was the one responsible for their payments. Mogambi would however not pay them directly but would deal with their supervisor. He conceded he did not sign any contract with the Defendant.
24. PW7-Yohana Kadhengi Mtama is the 16<sup>th</sup> Plaintiff and a resident of Kadzuhoni. He told the Court the lines passed through his parcel of land No. 1191 Gongoni. More than 2 ½ acres of his land were taken and he was only paid Kshs 91,668/- while he was expecting Kshs 305,000/-. He was therefore only paid 1/3 of his dues and was not compensated for his 35 trees.

25. On cross-examination, PW7 conceded he had not stated the acreage of his land in his Statement filed in Court. He told the Court no one had stopped him from cultivating his land.

### **The Defence Case**

26. On its part, the Defendant called a single witness in support of its case.

27. DW1-Johnson Itema is a Senior Manager Wayleaves Acquisition Department at the Defendant Corporation and a Registered Valuer by profession. He told the Court that the electricity transmission line in issue runs from Rabai, Malindi, Garsen to Lamu and is a 220kV line with a 40 metre corridor.

28. DW1 testified that the line was constructed between 2011 and 2015. The procedures involved required identification of the route, carrying out public awareness and an environmental impact assessment. The Defendant did all that before carrying out independent valuations of the parcels of land falling within the 40 metres corridor. It was then agreed that the value would be Kshs 120,000/- per acre and those affected were asked to give permission for the towers to be built and the lines to pass.

29. DW1 told the Court that countrywide, the Defendant had agreed to compensate those affected at 30% of the value of the land because the lines pass 50 metres above and the Defendant does not take over the parcels of land. For safety reasons however, houses and tall trees are not allowed under the lines. In this respect, DW1 testified that the Plaintiffs had agreed to their terms and they put up the lines peacefully and gave the owners of the land letters reflecting the payments offered for the affected areas. A majority of the Plaintiffs have since been paid their dues.

30. Dw1 further testified that they were also compensating for structures and trees. The Plaintiffs were required to fill-in particular forms where their structures were being re-located. So far, no one had complained about non-payment for the structures involved. For crops and trees, DW1 told the Court that they would get Valuation from the Ministry of Agriculture and the Kenya Forest Service. There were Crop-Damage Reports to be filled-in and witnessed by the Area Chiefs before the parties could be compensated.

31. On cross-examination, DW1 conceded that the team leader during the process was Joash Oindo Mogambi who had 200 assistants working under him. He further conceded that they engaged private valuers and that the Plaintiffs did not do the valuation themselves. He denied that they had cut any trees during the process and told the Court they were offering compensation in a uniform manner whether someone's land had a tower erected thereon or not.

### **Analysis and Determination**

32. I have carefully perused and considered the pleadings filed by the parties herein, the testimonies of the witnesses and the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the Parties-Mr. Shujaa Wara for the Plaintiff and Mr. Kiarie Kariuki for the Defendant.

33. The 61 Plaintiffs herein are individual landowners owning separate and distinct parcels of land located on a stretch running from Rabai to Malindi and onwards to Garsen and terminating in Lamu. The Defendant Kenya Electricity Transmission Company Ltd (KETRACO) is a State Corporation established and regulated under the State Corporations Act, Cap 446 with the core mandate to plan, design, build and maintain electricity transmission lines and associated substations.

34. It is the Plaintiffs' case that on diverse dates between the year 2011 and 2015, the Defendant commenced the construction of an electricity transmission power line which traversed their parcels of land. In order to do so, the Defendant acquired from each of the Plaintiffs a wayleave corridor measuring 40 metres in width across the stretch of land and offered to pay each and everyone of them compensation for the loss of use of the land to the extent that the Defendant's transmission line traversed their land. It is further the Plaintiffs case that the Defendant was to similarly compensate them for the trees and crops that were cleared to pave way for the construction of the line.

35. The Plaintiffs told the Court that for the said purpose, the Defendant valued each of the parcels to be affected to receive compensation at Kshs 120,000/- per acre but after taking into consideration the acreage of land affected by the wayleave corridor, the Defendant unilaterally decided to pay the Plaintiffs compensation for the loss at the rate of 30% rather than at 100% of the value of the land.

36. In addition, the Plaintiffs accuse the Defendant of constructing towers and pylons on some of the parcels of land but failing to compensate the concerned individuals for the loss of use of those portions of land. Accordingly, the Plaintiffs demand payment of a sum of Kshs 20,479,304.10/- as compensation for the loss of user and the value of the destroyed trees.

37. As it were, the Defendant does not deny constructing the electricity line on the Plaintiffs parcels of land. It was instead their case that in line with the Government's commitment to increase access to electricity in the rural areas from 4% to 20%, they are presently in the process of putting up power lines that will traverse various parts of the Country. That undertaking includes the erection of a 220kV electricity transmission line that will link the counties of Kilifi, Tana River and Lamu which line traverses, inter alia, the land parcels owned by the Plaintiffs herein.

38. In this respect, the Defendant told the Court that they obtained wayleave consents from the Plaintiffs for the construction of the transmission line and that each one of the Plaintiffs signed the individual letters of offer consenting to the wayleave. According to the Defendant, each parcel of land was valued at Kshs 120,000/- per acre and they used that figure to compute the compensation due to every affected person.

39. It was further the Defendants case that the said Letters of Offer covered the grant of wayleave which mandated the Defendant to lay

electricity pylons or towers and transmission lines and therefore the compensation for the same was fully paid as set out therein. To-date, the Defendant told the Court that 20 of the 61 Plaintiffs had been paid their dues by cheque. These were the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup>, 36<sup>th</sup>, 53<sup>rd</sup>, 54<sup>th</sup>, 56<sup>th</sup>, and the 60<sup>th</sup> Plaintiffs. Interestingly, according to the Plaintiffs, it would appear the Defendant's figures have not been updated. From their list, a total of 43 Plaintiffs have been compensated at 30% and only 18 are yet to receive any compensation at all.

40. Compensation in respect of the public right of way is provided under Section 148 of the Land Act as follows: -

***“148. Compensation in respect of public right of way.***

***(1) Subject to the provisions of this Section, compensation shall be payable to any person for the use of land, of which the person is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to any compensation for the use of land for any damages suffered in respect of trees, crops and building as shall, in cases of private land, be based on the value of the land as determined by a qualified Valuer.***

***(2) .....***

***(3) Damage caused as a result of the creation of a wayleave shall include any preliminary work undertaken in connection with surveying or determining the route of that wayleave, and whether the trees, crops or buildings so damaged were included in the route of the wayleave in the order of the Cabinet Secretary.***

***(4) The duty to pay compensation payable under this section shall lie with the State Department, County Government, Public Authority or Corporate body that applied for the public right of way and that duty shall be complied with promptly.***

***(5) If the person entitled to compensation under this Section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.”***

41. From the material placed before me, it was clear that Defendant has already constructed the electricity transmission power lines across the Plaintiffs land. However, while the Defendant purports that the Plaintiffs had agreed to the terms of compensation and that they proceeded to put up the lines peacefully, it was clear from the testimonies of the Plaintiffs that they were not agreed to the terms.

42. According to the Defendant, it carried out an independent valuation of the parcels of land falling within the 40 metres corridor and agreed that the value of the land was Kshs 120,000/- per acre. The Defendant did not produce a copy of any Valuation Report herein and it was not clear how that figure was arrived at for the entire spectrum of the land extending hundreds of kilometres.

43. Be that as it may the Plaintiffs themselves did not produce any independent valuation of their properties either. Indeed, while they attacked the proposition by the Defendant to award them 30% instead of 100% of the value of the land as proposed by the Defendant, they appeared content and indeed based their figures claimed herein on the valuation carried out by the Defendant.

44. According to the Defendant, the wayleave corridor does not deprive the Plaintiffs of the ownership of the land and hence the partial compensation of 30% of the value of the land and not 100% as demanded by the Plaintiffs. It was however the Plaintiffs' case that while the Defendant's use of the land may be partial, the loss of use was not partial as the land around the power lines is reserved to give the Defendant access to its installations.

45. As it were, I was unable to fault the Plaintiffs' argument that as a result of the Defendant's actions, their respective parcels of land had lost much of its value. There would be no reason for the Defendants to reserve a corridor of 40 metres around the power lines if indeed the Plaintiffs were able to use their land in the usual manner as stated by the Defendant.

46. From their own caution to the Plaintiffs, the Defendants had by the wayleave acquisition barred the Plaintiffs from erecting houses and planting trees under the lines. That in my view is a major loss of use of the affected parcels of land and, even granted that the Defendant is a public body meant to observe thrift in the use of public resources, I was unable to find the basis for the compensation at 30% especially when it was clear that the Plaintiffs had not had much say in the Valuation of their parcels of land.

47. Indeed while the Defendant purported it has no more use of the land, a perusal of Sections 183 to 185 of the Energy Regulations Act 2019 makes it clear that the Plaintiffs are prohibited from dealing with the land in certain ways except with the approval of the Defendant and that hindering or obstructing the Defendant from repairing, inspecting or removing an energy infrastructure such as the power lines herein amounts to an offence punishable with a fine of upto Kshs 500,000/-.

48. Accordingly, and given the absence of a valuation report and the evidence of any participation of the Plaintiffs in the process that arrived at the values presented by the Defendant, I am prepared to accept that the diminution in value of the Plaintiffs parcels of land was at the rate of 100% and hereby proceed to award them compensation at the said rate of 100%.

49. That being the case, I did not think that the second issue raised by the Plaintiffs in regard to the discrepancy of compensation for those with towers or pylons on their land is of relevance any longer and I decline to make any award in that regard.

50. The third issue raised by the Plaintiff was in regard to compensation for trees that were allegedly cleared by the Defendant during the process of erecting the power transmission lines. In this respect, the Plaintiffs sought compensation in the sum of Kshs 4,862,987/- as tabulated in their Plaint. As it were, the Defendant disputed that its employees cleared any trees in the affected area.

51. In my view, this was a claim for special damages which the concerned parties having pleaded ought to have specifically proved. There was however absolutely nothing placed before me to demonstrate that the alleged trees existed and or that they were cleared by the Defendant as claimed. Indeed, according to the Defendant, they had availed forms to be filled-in by any affected persons. No evidence was placed before me to show that the Plaintiffs filled-in the same, had them certified by the Kenya Forest Services as required and then presented the same for payment by the Defendant.

52. In the premises, Judgment is hereby entered for the Plaintiffs as against the Defendant in the sum of Kshs 16,716,540/- as particularized at paragraph 5 of the Plaint.

53. The Plaintiffs shall also have the costs of this suit.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of September, 2020.**

**J.O. OLOLA**

**JUDGE**