



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L PETITION NO. 6 OF 2018

JAMII TELECOMMUNICATION LTD.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF UASIN GISHU.....RESPONDENT

JUDGMENT

1. **Jamii Telecommunications Limited**, the Petitioner, filed the Petition dated the 28th March, 2018 against the County Government of Uasin Gishu, Respondent, seeking for the following prayers;

“(a) A permanent injunction restraining the Respondent, its servants and/or agents acting on the Respondent’s instructions from destroying, interfering, with pulling out cables, damaging the optic cables, pulling down the poles and/or in any other manner interfering with the Petitioner’s optic cables and/or infrastructure and utilities installed by the Petitioner and in existence within Uasin Gishu county and in the estates aforementioned herein above and in particular Eldoret-Kisumu road, roads within Elgon View Estate, West Indies, Kapsoya, Langas, Huruma but just to name a few.

(b) A declaration that the acts committed on 27.3.2018 by the Respondent, its servants and/or agent were unconstitutional, illegal, unprocedural and in blatant disregard of the Petitioner’s legitimate and/or lawfully granted public rights of way.

(c) An order for restoration and/or reinstatement of all the destroyed optic cables and/or the Petitioner’s infrastructure utilities to the state in which they were in prior to the said destruction by the Respondent at the Respondent’s own costs to the satisfaction of the Petitioner and in default, the Petitioner to restore the same and the Respondent to make good the cost thereof in favour of the Petitioner.

(d) An order for payment of the sum of Kshs.25,000,000 being compensation for the loss suffered as a result of the Respondent’s illegal acts.

(e) Damages for infringement of the Petitioner’s constitutional rights.

(f) Costs of the suit.

(g) Any other relief that this Honourable Court may deem fit just to grant in the circumstances.”

The Petitioner described itself as a data network operator, licensed to provide communication and information network solutions to a large number of clients in Uasin Gishu County, its environs and Republic of Kenya. That its clients include Safaricom data network, insurance agencies, hospitals, banks, government offices, mobile cash services among others. That the Petitioner applied for and was **“granted public rights or way form of wayleaves”** by the Respondent for its activities including laying of underground optic cables along various public roads, fixing poles for its optic fibre along for example Eldoret-Kisumu road and roads within Estates like Elgon View, West Indies, Kapsoya, Langas, Huruma. That the Petitioner laid out a network of terrestrial fibre optic infrastructure cables along a number of roads in the aforesaid areas costing colossal sums. That the infrastructure was elaborate, extensive and served a large number of its clients. That as it had obtained the requisite approvals, it expected protection against destruction, interference, damages and to be subjected to due regard of the law, procedure and administrative process that is open, transparent, fair and reasonable upon reasonable notice. That on or about the 27th March, 2018 at about 9.00 a.m., the Respondent, its servants and or agents without any notice and or regard of the Petitioner’s rights of way by wayleaves, embarked on a massive destruction of the Petitioner’s optic cables existing within Elgon View next to Testimony School by excavation in the ground, cutting them into pieces using pangas, axes, hacksaws, pliers, and pulled down the standing poles thereby totally disconnecting and all interfering with the Petitioner’s and its clients’ businesses. That the Respondent’s acts were reckless and uncalled for and led to the Petitioner and its clients incurring massive losses. That the Petitioner’s effort to stop the destructions was not heeded as the Respondent’s servants and or agents were extremely hostile and unco-operative rendering this Petition necessary. That the Petitioner issued demand notice and notice of intention to sue but in vain. The Petition is supported by the affidavit sworn by **Wilson Kipruto Setim**, the Petitioner’s Regional Manager, sworn on the 28th March, 2018 to which he annexed the Petitioner’s single business permit for the year 2018

issued by the Respondent, the Petitioner's Certificate of Incorporation, Company resolutions, bundle of letters between the parties from 2015 to 2017, bundle of receipts, receipt from Sixty-Four Arcade Ltd, and bundle of photographs.

2. The Petition is opposed by the Respondent through the Response to the Petition dated the 29th May, 2019 the affidavits sworn by **Jacktone Kiprop**, the Director of Planning and Urban Development sworn on 21st November, 2018 and 29th May, 2019 and that of Barnabas K. Too, the Chief Officer for Roads, Energy and Public Works sworn on the 19th May, 2020. The Response to the Petition and deposition in the said affidavits are summarized as follows;

(a) That the Respondent's functions are set out in the Fourth Schedule to the Constitution and includes the environment, road, planning, public works among others. That **Article 209(4) of the Constitution** and the **County Government Act** mandates the Respondent to devise ways of raising revenue through the **Finance Act** and **Physical Planning Act** to fund its functions.

· That indeed the Petitioner applied and paid for the permission to lay the fibre optics as per their annexure marked "WKS 2". That the Petitioner proceeded with the works without waiting for the process prescribed under **Section 33 of the Physical Planning Act** that entailed a site visit by the Liaison Committee, scrutiny of the application, approvals by other agencies including NEMA, KURA, KENHA and ELDOWAS, confirmation of existing infrastructure by other entities like Safaricom, ZUKU, and Telekom and Petitioner's interview being completed. That those procedural approvals would have provided a data base to be used by Geo Maps experts, surveyors, KPLC among others to avoid risks to citizens.

· That upon realizing that the Petitioner was laying down the optic cables without the necessary approval, the Roads and Public Works and Urban Development Officers proceeded to the site to stop it. That the said officers noted the optic cables were being installed overhead instead of underground contrary to the Planning Regulations and were a risk to residents and road users due to their closeness to the power lines.

· That the Respondent's efforts to have the works stopped pending approvals was met by the Petitioner with defiance, force and extreme hostility. That no cables, tools, equipment of any nature belonging to the Petitioner was vandalized, destroyed or interfered with as all the Respondent did was to stop further defiance of the law and due process.

· That the Respondent's action was within the law as the Petitioner's act of unprocedurally and irregularly laying the infrastructure in disregard of the law infringed on the rights of others and safe and secure environment.

· That the Governor Uasin Gishu County, called a meeting on 29th March, 2018 that was attended by the Petitioner's representative among others and it was resolved that no approvals had been issued to the Petitioner and they should stop the works among others.

· That no demand notice and intention to sue had been served and the copies exhibited had no receipt acknowledgment from the Respondent. That the Petitioner has failed to comply with the procedure set out at **Sections 5, 7, and 8 of Fair Administrative Actions Act No. 4 of 2015** and **Section 33 of Physical Planning Act** and the petition is therefore an abuse of the court process.

· That the Petitioner has not specified the constitutional right that has been violated.

· That the permit issued to the Petitioner on 12th June, 2019 was for purposes of wayleaves and excavation and is not a Planning Development approval that is issued by a Liaison Committee under **Section 33 of the Physical Planning Act**. That the permit of 12th June, 2019 had no retrospective application, but was effective from that date upon the laid down conditions being met.

· That the Court should therefore declare that the Petitioner contravened the provisions of the Constitution, **Sections 5, 7, and 8 of the Fair Administrative Act No. 4 of 2015** and **Section 33 of the Physical Planning Act**.

· That the petition is therefore premature, an abuse of the law and court process and should be dismissed with costs.

3. The learned Counsel for the Petitioner filed their written submissions dated the 6th August, 2018 and further submissions dated the 24th July, 2019 summarized as follows;

· That the Petitioner had applied for and was granted public rights of way in the form of wayleave by the Respondent for the activities which include laying of underground optic cable and fixing poles for its optic cables within the province of **Section 27 (1) of the Road Act Chapter 2 of 2007**.

· That by virtue of the grant of the wayleave, its right over the part it lay its fibre was protected under **Article 40 of the Constitution**, and in view of **Section 27(2) of the Road Act**, the Respondent was obligated to issue them with a 60 days' notice to remove the infrastructural utilities but did not do so before removing and damaging them.

· That the Respondent's action amounted to a contravention of **Article 47 of the Constitution** and **Section 6 of the Fair Administrative Act, 2015**.

· That the Petitioner was entitled under **Article 22 and 258 of the Constitution** to move to court to protect its rights over the property. The learned Counsel relied on the decision in the case of **Kiluwa Ltd & Another Vs Commissioner of Lands & 3 Others [2015] eKLR**.

- That the Petitioner's properties destroyed by the Respondent is estimated at Kshs.25,000,000, and due to the data lost, and the customer confidence suffered, the Petitioner is entitled to the prayers sought due to the loss suffered.
- That the justification tendered by the Respondent has no basis as no enforcement notice had been served upon the Petitioner before their action as provided for under **Section 38 of the Physical Planning Act**.
- The learned Counsel referred to the case of **Miguna Miguna Vs Dr. Fred Okeng'o Matiangi, Cabinet Secretary, Ministry of Interior and Co-ordination of National Government and 6 Others – Nairobi High Court Constitutional Petition No. 51 of 2019**. In that case, the court awarded Kshs.7 million for violation of the Petitioner's constitutional rights and Kshs.250,000 for damage to the Petitioner's house.
- The learned Counsel also referred to the case of **Edward Akong'o Oyugi & 2 Others Vs Attorney General [2019] eKLR**, on the position that an award of compensation against the state is settled as an appropriate and effective remedy for redress of established infringement of a fundamental right under the Constitution.

4. The learned Counsel for the Respondent filed their written submissions dated the 29th May, 2019 summarized as follows;

- That Fourth Schedule to the Constitution, 2010 sets out the County Government's functions and the 8th function relates to County Planning and Development. That all the letters by the Respondent, and attached to the Petitioner's supporting affidavit and marked "WKS 2" are advisory in nature and not approval in themselves as confirmed by the following statement appearing on them; **"Take note that your approval shall be subject to..."**
- That the receipts issued in acknowledgment of fees paid do not amount to approvals. That after an application for approval and fees required are received, the next process is assessment before an approval is issued. That the process is provided in **Section 33 of the Physical Planning Act**. That **Sections 29 and 30 of the Physical Planning Act**, as read with **Section 7 of the Sixth Schedule of the Constitution (Transitional and Consequential)** are irrelevant.
- The learned Counsel referred to the case of **Re Hardial Singh & Others [1979] KLR 18; [1976-80] 1 KLR 1090, Republic Vs Institute of Certified Public Accountants of Kenya Ex-parte Vipichandra Bhatt T/A J. V. Bhatt & Company Nairobi HCMA No. 285 of 2006**, in which the case of **Republic Vs Chuka University Exparte Kennedy Omondi Waringa & 16 Others [2018] eKLR**, was cited. The cases show that courts have recognized that authorities can exercise the power bestowed upon them so long as they act within the law.
- That the Respondent exercised its authority to stop the Petitioner from carrying out development without a licence, and from setting up its fibre optics overhead instead of underground as required by the Liaison Committee in exercise of their powers under the **Physical Planning Act**.
- That after the Respondent's action, the Petitioner should have complied with **Sections 5(1) (a) to (d), (i) to (iii) and Sections 7 and 8 of Fair Administrative Action Act** before coming to court. The learned Counsel referred to the case of **Bernard Murage Vs Fine Serve Africa Ltd & 3 Others [2015] eKLR**, and the Court of Appeal of Trinidad & Tobago case of **Damian Delfante Vs The Attorney General of Trinidad and Tobago C.A. 84 of 2004**, which were cited in the case of **Godfrey Paul Okutoyi & Others Vs Habil Olaka & Another [2018] eKLR**.
- That the provisions of the **Fair Administrative Actions Act** was aimed at curing the mischief of administrative bodies going against the constitution under the guise of acting administratively, and stopping litigants from running to courts at the slightest whim, crying foul and claiming huge remedies that are disproportionate to the action. That **Section 9 of the Fair Administrative Actions Act** provides for the remedy of judicial review that is only available after the internal mechanisms for appeal and review under any other law are first exhausted, unless the court has first granted an exemption. That in this instant, the Petitioner has not exhausted the internal mechanisms for redress, and had not obtained leave before filing this case. The learned Counsel referred to the case of **Peter Ochara Anam & 3 Others Vs Constituencies Development Fund Board & 4 Others [2011] eKLR**.
- That the Petitioner's case is motivated by profit and malice. That is why the Petitioner did not serve any demand notice before coming to court.
- That the Petitioner should have challenged the Respondent's action through the Chief Officer, County Secretary or County Attorney. That the Petitioner could also have made use of **Section 11 and 13 of the Physical Planning Act** if they felt aggrieved by being denied overhead laying of cables by appealing instead of coming to court.
- That the Petitioner has not tendered material evidence to determine if the Petitioner was occasioned any damage. That the photos provided by the Petitioner are strange and do not provide details of what was damaged. That the case of **Romauld James Vs AGT [2010] UKPC**, which was relied upon by the Court of Appeal in **Moi Education Centre Co. Ltd Vs William Musembi & 16 Others [2017] eKLR**, held that it is only after some damage has been shown that the Court can exercise its discretion whether or not to award compensatory damages.
- That the Supreme Court Advisory opinion in **Speaker of The Senate & Another Vs Hon. Attorney General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013], eKLR**, and High Court Case of **Republic Vs Attorney General & Another Ex-parte Stephen Wanyee Roki [2016] eKLR**, demonstrates the Court's duty to protect devolution. That in the case of **Institute of Social Accountability & Another Vs National Assembly & 4 Others High Court Petition No. 71 of 2014 [2015] eKLR**, the Court held that it is enjoined under **Article 259 of the Constitution** to interpret it in a manner that promotes its purposes, values, fundamental freedoms in the Bill of Rights and that contributes to good governance. That the Court in exercising its judicial

authority is obliged under **Article 159 (2) (e) of the Constitution** to protect and promote the purpose and principles of the Constitution.

5. The following are the issues for the Court's determinations;

(a) Whether the Petitioner has shown that the Respondent's action was unlawful and infringed or breached their rights under Article 40 and 47 of the Constitution.

(b) Whether the Petitioner is entitled to any of the relief sought.

(c) Who pays the costs?

6. The Court has carefully considered the grounds on the petition, the response to the petition, the affidavit evidence filed by both parties, the learned Counsel's submissions set out above and come to the following determinations;

(a) That it has not been disputed that the Petitioner applied for and obtained a single Business Permit for 2018 upon paying Kshs.25,500 to operate an Internet Backbone Services as evidenced by the copy marked **"WKS 1(a)"** attached to the supporting affidavit. It is also not disputed that the Petitioner was incorporated on the 29th April, 2004 as per Certificate of Incorporation attached to the said affidavit and marked **"WKS 1(b)"** and that during its Board of Directors' Meeting of 29th March, 2018, it was resolved among others that it would pursue legal action against the Respondent for unearthing and or destruction of optic cyber cables, poles and fittings. The Minutes of the said meeting has been annexed to the supporting affidavit and marked **"MKS(1)(c)"**.

(b) That the 25 copies of the documents issued by the Respondent, and addressed to the Petitioner annexed to the supporting affidavit and marked **"WKS 2"** are all except three headed or referenced **"APPLICATION FOR WAY LEAVE TO LAY FIBRE CABLE"**. They also communicate the charges to be paid and further state as follows in the last paragraph;

"Take note that your approval shall be given subject to the following conditions, that –

(i) All road cuttings shall be micro tunneled.

(ii) Upon approval by the County, you shall seek the concurrence of Kenya Urban Roads of County (KURA).

(iii) Fill areas damaged shall be reinstated at your costs to the satisfaction of Chief Officer, Transport and Infrastructure, Uasin Gishu County.

We shall process the letter of authority after we receive your payment. The detailed conditions shall be stated in the said letter."

(c) That the three exemptions referred to in (b) above are the documents dated 16th June, 2016 under reference **UG/C/RDS/38/121**, 3rd October, 2016 reference **UG/C/RDS/38/137** and 23rd December, 2016 reference **UGC/RDS/FIBRE/VOL.11/09**. The three are headed **"PERMIT TO LAY FIBRE OPTIC CABLE – ELDORET"**. That the permits contain the following other distinct details at paragraph 2.

· **PERMIT DATED 16TH JUNE, 2015**

"Your application to lay a fibre cable within Eldoret town from Kisumu road to CMC, Eldoret having paid the requisite fee for the way leave is hereby approved by the County. We therefore acknowledge your payment of Kshs.54,450 vide receipt 22784#253783".

· **PERMIT DATED 3RD OCTOBER, 2016**

"Your application to lay a fibre cable within Eldoret town along Kitondo Street to Vomoron House and from Sixty Four Street to NTSA Offices having paid the requisite fee for the way leave is hereby approved by the County. We therefore acknowledge your payment of Kshs.15,048.00 vide Receipt 438,933#462072."

· **PERMIT DATED 23RD DECEMBER, 2016**

"Your application to lay a fibre cable within Eldoret Town along Elgon View and West Indies having paid the requisite fee for the way leave is hereby approved by the County. We therefore acknowledge your payment of Kshs.324,803.00 vide Receipt No. 71403."

That the next paragraph at the front page of the three permits goes on to provide as follows;

"The works shall be undertaken as per the sketch map and distance as applied for subject to the following conditions;

- (1) *That, the Cable shall be laid to a depth of not less than 600 m from the road surface and 2000 mm away from the carriage way.*
- (2) *That, you shall not cut any road surface but shall all undertake micro tunneling thereon.*
- (3) *That, at your cost you shall acquaint yourselves of any other services and not interfere with them without authority from the providers and reinstatement thereof to their original state.*
- (4) *That, all surfaces that may be interfered with shall be reinstated to the satisfaction of the undersigned.”*

That the back pages of the permits dated 16th June, 2016 and 3rd October, 2016 are blank while that of the permit dated 3rd December, 2016 contains a continuation as follows;

- “(5) That you shall also liaise with KURA Regional Manager for his information and consent before commencement.*
- (6) That vide this letter, you indemnify the County of any liability that may arise out of your laying of the cable and activities thereto.*
- (7) Inform the undersigned officer before the start of the works for supervision.*
- (8) That you shall provide a detailed drawing/line map of where the trench excavation will be carried out and also work programme.*
- (9) That you shall generate a tabular checking system for all the location.*
- (10) That you shall provide detailed information on how to carry out reinstatement.*
- (11) That you shall give exact measurement and respective payment and that any extra measurement shall only be allowed for excavation after its payment.*
- (12) All service providers must seek clearance from the County before they make payment to sub-contractors.*
- (13) Upon satisfactory completion, the contractor to request the County for inspection and clearance certificate should be issued.*
- (14) All sub-contractors to provide photos of all asphalt roads before and after trenching.*
- (15) Completion Certificates to be issued when the project is complete.”*

(d) That the photographs annexed to the supporting affidavit and marked “WKS 5” are mostly of a tractor pushing poles to which cables are dangling and others of poles and wires. There is one photo of a person holding onto a wire with the left hand and a hammer with the right. That having considered the affidavit evidence by both parties and the learned Counsel’s submissions, the Court comes to the conclusion that the photograph captures the action or exercise of bringing down of cables hosted overhead on poles and not digging up of underground or underneath cables. That the poles and cables’ infrastructure are claimed by the Petitioner and the Respondent has not disputed that claim of ownership.

(e) That the Petitioner claims that it had applied for and obtained from the Respondent the wayleave approval and the Respondent was not justified when it embarked on the massive destruction of their optic cables “*existing within Elgon View Estate near to Testimony School by excavation of...the optic cables in the ground to cut them into pieces...*” That there is no evidence of optic cables buried in the ground being excavated and exposed to the surface. That the more probable version of events is that of the Respondent that when they went to the site, they found “*fibres optics were being put overhead and not underground as per the Planning Regulations*”. That a consideration of the condition 1, 2, 4, 8, 10 and 11 on the copy of the permit dated 3rd December, 2016 leads the Court to only one conclusion that the activities envisaged therein involved trenching or cutting the ground, laying the cable infrastructure, and thereafter closing or reinstating the ground, and not planting of poles. That in the absence of any such permit allowing the Petitioner to have an overhead optic cable infrastructure, then the court finds the Petitioner has failed to tender evidence that their activity was done in accordance with the permit or licence issued by the Respondent.

(f) That as can be seen from the documents issued by the Respondent to the Petitioner referred to at paragraphs (b) and (c) above, that are annexed to the supporting affidavit and marked “WKS 2”, and as further submitted by the Respondent, the Petitioner was upon obtaining the Respondent’s approval expected to liaise and or seek the concurrence of Kenya Urban Roads (KURA) Regional Manager before commencement of works and to provide a detailed/line map of where the trench excavation will be carried out and also work programme. That the Petitioner has not provided evidence that the foregoing conditions that were required to be complied with before commencement of the works had been adhered to. That as the Respondent’s authority under the Constitution and Statutes to Manage and Control Planning, and Infrastructural Developments in its area of jurisdiction has not been challenged by the Petitioner, then the court finds that the Respondent had a duty not only to supervise and ensure that the Petitioner’s activities are carried out in accordance with the approved permits granted, but also to ensure unapproved activities are stopped.

(g) That the statute guiding physical development plans in 2018 when the activities subject matter of this petition occurred was the

Physical Planning Act No. 6 of 1996.

That the Act having been a pre-2010 Constitution, the legislation was required by **Section 7 of the Sixth Schedule of the Constitution** to be “*construed with the alterations, adaptations, qualifications and exception necessary to bring it into conformity with the Constitution*”. That **Section 30 of the Act** provided for development permissions as follows;

“30. Development Permission

(1) No person shall carry out development within the area of a local authority without a development permission granted by the local authority under Section 33.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding one hundred thousands shillings or to an imprisonment not exceeding five years or both to both.

(3)

(4) Notwithstanding, the provisions of subsection 2 –

(a) the local authority shall require the developer to restore the land on which such development has taken place to its original condition within a period of not more than ninety days.

(b) if on the expiry of the ninety days’ notice given to the developer such restoration has not been effected, the concerned local authority shall restore the site to its original condition and recover the costs incurred thereto from the developer.

(5)

(6)

(7)

(8)”

That **Section 31 of the Act** provided for the development application and required details to be submitted by the developer while **Section 33** dealt with the approval or rejection of such applications as follows;

“33. Approval of development application –

(1) Subject to such comments as the Director may make on a development application referred to him under Section 32, a local authority may in respect of such development application –

(a) Grant the applicant a development permission in the form prescribed in the Fifth Schedule, with or without conditions; or

(b) Refuse to grant the applicant such development permission stating the grounds of refusal.

(2)

(3) Any person who is aggrieved by the decision of the local authority refusing this application for development permission may appeal against such decision to the relevant liaison committee under Section 13.

(4) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under Section 15.

(5) An appeal against a decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High court.”

That under **Section 35 of the Act**, the local authority could refer development applications of “*major public policy*” to the relevant Liaison Committee and under **Section 36**, require the applicant to submit an Environment Impact Assessment Report with the application. That **Section 38 of the Act** provided for Enforcement Notice as follows;

“38. Enforcement notice

(1) When it comes to the notice of a local authority that the development of land has been or is being carried out...without the required development permission having been obtained, or that any of the conditions of a development permission granted... has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.

(2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice...such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.

(3) Unless an appeal has been lodged under subsection (4), an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.

(4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice, he may within the period specified in the notice appeal to the relevant liaison committee under Section 13.

(5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under Section 15.

(6) An appeal against the decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.

(7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of the appeal made under subsections (4), (5) or (6).”

That **Section 39** provides for supplementary provisions as to enforcement as follows:

“39. Supplementary provisions as to enforcement.

(1) If, within the period specified in the enforcement notice or within such further period as the local authority may determine any measures required to be taken...have not been taken, the local authority may enter on the land and take those measures....or any other action that may be taken under this Act, recover from the person on whom the enforcement notice is served any expenses reasonably incurred by it in connection with taking of those measures.

(2) If such person has not lodged an appeal under **Section 38**, he shall not be entitled to question the validity of any action taken by the local authority under **subsection (1)** upon any grounds, that could have been raised in such appeal.

(3)

(4)”

That the **Physical Planning Act No. 6 of 1996** has since been replaced by the **Physical and Land Use Planning Act No. 13 of 2019**, which repealed it under **Section 91**. That the new Act has a commencement date of 5th August, 2019. That the **Physical and Land Use Planning Act** has provided for the Physical and Land Use Planning Liaison Committees and the appeal processes at **Part VI, Sections 73 to 89** and for enforcement notices at **Section 72**. That the Act has at **Section 93** provided as follows:

“93. All disputes relating to Physical and Land Use Planning, before establishment of the National and County Physical and Land Use Planning Liaison Committees shall be heard and determined by the Environment and Land Court.”

(h) That as submitted by the Petitioner, the Court finds that the Respondent has not availed any evidence that it had served the Petitioner with an enforcement notice requiring the Petitioner either stop its activities or comply with any of the conditions including for example getting the consent of **KURA** before taking the action it took through its officers. That the fact that the Petitioner had hosted its optic cables overhead on poles, instead of beneath the ground was wrong but did not excuse the Respondent from its legal duty to act in accordance with **Section 38 of the Physical Planning Act** before being entitled to take the action required thereon in case the Petitioner failed to act within the time given. That it has severally been said that two wrongs will never amount to a right. That in any case, the Respondent being a public body, with all the resources both human and materials at its disposal, is duty bound to lead by example in fidelity to the law. That without the Petitioner having been issued with the enforcement notice, the Respondent cannot turn around and demand that the Petitioner should have filed an appeal against its action to the County Liaison Committee, and thereafter to the National Liaison Committee in terms of **Section 13 and 15 of the Physical Planning Act** before coming to court. That had an enforcement notice in terms **of Section 38 of the Act** had been issued by the Respondent and served upon the Petitioner then the Respondent’s submissions that before coming to Court the Petitioner should have moved to the County Liaison Committee and thereafter the National Liaison Committee on appeal pursuant to **Section 38 (4) and (5)** would have received the Court’s backing, and this petition would have been found to be premature.

(i) That in view of the finding that the Petitioner has failed to exhibit an approved licence or permit authorizing it to construct overhead optic cables along Eldoret/Kisumu, Elgon View Estate, Kapsoya, Langas, Huruma roads or any other area within the Uasin Gishu County, the Court finds the declaratory orders sought at prayers **(a)** and **(b)** cannot issue against the Respondent who has a Constitutional and Statutory duty to ensure that development activities and land use in the County are planned in a manner that integrates with the economic, social and environmental needs of the present and future generations. The Respondent cannot live to the said legal expectations if developers who have deviated from the conditions in the permits in carrying out activities, especially on public land, or who carry out activities not envisioned in the permits issued, would readily obtain court orders to stop the Respondent from doing what the constitution and the statute allows it to do. That prayer **(c)** of restoration/reinstatement order is also unavailable to the Petitioner for the same reason that the overhead optic cables had been constructed without a permit being obtained in accordance with the law.

(j) That the Court finds that the action taken by the Respondent in its effort to stop the Petitioner from constructing overhead optic cables without prior permit being applied for, approved and issued resulted to some damage being occasioned to the infrastructure. The Petitioner is seeking for compensation for the loss suffered at Kshs.25,000,000 plus damages for infringement of their constitutional rights. The Respondent has disputed that amount on the basis that it has not been proved and further that no damages are payable due to the Petitioner not having obtained a permit for the works. The court has considered the decisions in the cases of ***Miguna Miguna Vs Dr. Fred Okong'o Matiangi (supra)***, ***Edward Akong'o Oyugi & 2 Others Vs Attorney General (supra)*** and the Court of Appeal case in ***Moi Education Centre Co. Ltd. Vs William Musembi & 16 Others (supra)*** and there is no doubt that where damage is proved to have been suffered as a result of breaches or violation of rights and fundamental freedoms, then the Court would consider awarding compensation, which in its discretion which is judiciously exercised, restores the already violated rights and to act as a deterrent against future violations. That while the Court finds no basis for awarding prayer (d) in view of the earlier finding that the Petitioner had not obtained an approved permit to construct an overhead optic cable infrastructure and to award them a huge sum as damages would amount to a benefit or a profit from the public coffers for acting outside the law, the Court finds that their right under **Article 47 of the Constitution of Fair Administrative Action** was nevertheless infringed by the Respondent through their failure to serve them with an enforcement notice detailing the actionable complaints and timelines for the expected action. That the Respondent's failure to issue and serve the enforcement notice which led to the Petitioner being denied the right to appeal under **Section 38 (4) and (5) of the Physical Planning Act** that would have kicked in an automatic discontinuance of the Petitioner's works, and stay of execution of the Respondent's enforcement notice under **subsection (7)**, denied the Petitioner the opportunity to have a fair administrative action before the County and National Liaison Committees. That having considered the circumstances of this matter, the need to remind the Respondent that it must lead by example in adhering to the Constitution and the statute in carrying out its functions within its area of jurisdiction, and noting that the Petitioner was not itself without some blame for the reasons set out above, the Court considers an award of Kshs.100,000,000 (**One Million**) to be sufficient compensation for infringement of the Petitioner's right under **Article 47 of the Constitution**.

(k) That though costs ordinarily follow the events, the finding above that both the Petitioner and the Respondent acted outside the law, hence leading to this petition, makes this a suitable matter where each side bears its own costs.

6. That flowing from the foregoing, the Court finds and orders as follows;

(a) That the Petitioner is awarded Kshs.1,000,000 [**One Million**] against the Respondent for infringement of its constitutional right under **Article 47 of the Constitution of Fair Administrative Action** as per prayer (e).

(b) That all the other prayers have not been proved and therefore rejected/dismissed for the reasons set out above.

(c) Each party to bear its own costs.

Orders accordingly.

Delivered virtually and dated at Eldoret this 9th day of December, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Petitioner: Absent.

Respondent: Absent.

Counsel: M/s Odwa for the Petitioner.

Court Assistant: Christine

and the judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.