



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

CONSTITUTIONAL PETITION NO. 5 OF 2016

IN THE MATTER OF ARTICLES 2, 3 (1), 10, 19, 20, 21, 22, 23, 40, 47, 48, 64, 162 (2), 165 (3) & (6), 258 AND 259 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 13 (1), 2, 3, 5 AND 7, 14, 17, 20 AND 29 OF THE ENVIRONMENT AND LAND COURT ACT 2011

AND

IN THE MATTER OF ALLEGED CONTRAVENTION AND/OR APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010; THE RELEVANT SECTIONS OF THE LAND ACT AND THE ENERGY ACT

AND

IN THE MATTER OF LAND REFERENCE KABARE/NYANGATI/6123 SITUATED AT KUTUS, KIRINYAGA COUNTY

AND

IN THE MATTER OF UNLAWFUL ENTRY, ACQUISITION, INTERFERENCE AND/OR UNLAWFUL ENCROACHMENT OF LAND REFERENCE KABARE/NYANGATI/6123 SITUATED AT KUTUS, KIRINYAGA COUNTY

BETWEEN

AYADEM COMPANY LIMITED.....PETITIONER

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

This cause was commenced by way of a petition dated 1st November 2016 and filed the same date in which the Petitioner seeks the following orders:

(a) That there be a declaration that the Petitioners fundamental rights and freedoms as enshrined under Article 40 of the Constitution of Kenya have been contravened and infringed upon by the Respondent.

(b) That there be a declaration that the Petitioner's fundamental rights and freedoms as enshrined under Article 47 of the Constitution of Kenya have been contravened and infringed upon by Respondents.

(c) In the alternative:

(i) A mandatory injunction does issue to compel the respondent to reinstate the suit property to its original form by removal of the electric poles and wires over the suit property.

(ii) That the Petitioner be given leave to remove the electric poles and wires at the respondent's costs.

(iii) A permanent injunction be issued to restrain the respondent by themselves, their agents, servants and/or employees from trespassing, alienating or interfering with the petitioner's quiet and peaceful possession of the property KABARE/NYANGATI/6123.

(d) That there be a declaration that the Petitioner is entitled to compensation for the actions of the Respondent of erecting power lines on the Petitioner's portions of land KABARE/NYANGATI/6123 at the current market value plus interest and not the Respondent's proposed value.

(e) General damages extemporary damages and aggravated damages under Article 23(3) of the Constitution of Kenya be awarded, for the violation of the Petitioner's rights by the Respondent.

(f) Costs of the petition and interest thereon.

The petition is supported by the affidavit of the Petitioner filed on 27th February 2017.

The Respondent opposed the petition through a replying affidavit sworn by one JOHN MURIUKI who works as a Way-leave officer at Kenya Power & Lighting Company Limited.

PETITIONER'S CASE

The petitioner filed this petition stating that he was the registered proprietor of L.R. KABARE/NYANGATI/6123.

- He further alleged that in September 2014, the respondent started erecting transmission pylon on his adjacent land. He inquired severally from the respondent but his inquiries elicited no response. Later in August 2015, the respondent responded by stating that the petitioner is aware of the proposed transmission power line Sagana – Kutus Project.
- That the power line traverse the petitioner's land and that he would be compensated an amount of Ksh. 286,200/=.
- Thereafter, on 15th August 2015, the respondent without any colour of right caused the power line to traverse his land thereby violating his Constitutional right to property. That the proposed compensation did not put into consideration the value of the property and without him submitting a copy of title deed and National Identity Card as was required.
- The petitioner further averred that on 2nd September 2015, he wrote to the Chief Way-leave officer opposing the actions of the respondent.
- On 24th February 2016, he engaged the services of a registered land valuer who valued the whole of KABARE/NYANGATI/6123 at Ksh. 8 million and the portion used by the power line to be Ksh. 2,880,000/=.

RESPONDENT'S CASE

The respondent on the other hand stated that before they constructed the power line, they approached the land owners on the line route. Among them was one Wangui Munyi who is the widow of one Munyi Kabare who is also the registered proprietor of L.R No. KABARE/NYANGATI/115, the original parcel of land.

- Negotiations were undertaken and the property owners executed way leaves agreements in 2011.
- L.R No. KABARE/NYANGATI/115 was subsequently sub-divided and sold to various owners including the petitioner herein.
- That despite the new owners being successors of the right and obligations created by the way leave agreement already signed, the respondent formed a negotiating team to engage with them for peaceful co-existence.
- The negotiating team valued the affected parcels and in its report dated 30th June 2015 established that the value of the land per acre was Ksh. 1,200,000/=.
- The petitioner's land affected by the power line was tabulated at Ksh. 572,400/= and that since their standard compensation is 50% of the value, the petitioner was offered Ksh. 286,200/= as compensation.

ISSUES FOR DETERMINATION

- (1) Whether the way leave agreement executed by one Wangui Munyi on 10th June 2011 is binding on the petitioner.
- (2) If the answer to paragraph (1) above is negative, whether the petitioner is entitled to compensation.
- (3) Who will bear the costs of this petition?

ANALYSIS AND DETERMINATION

I have carefully considered the pleadings and the submissions by counsels for the parties. The main issue for determination in this petition is whether the respondent obtained consent from the original owner Wangui Munyi the widow of Munyi Kabare before the land was succeeded by the petitioner.

- According to the official search dated 3rd May 2011, Munyi Kabare was registered as the proprietor of the suit property L.R. No. KABARE/NYANGATI/115 and the way leave agreement executed by his wife on 10th June 2011.
- There is no proof that the said Wangui Munyi (widow) had taken out letters of Administration of the Estate of her deceased husband Kabare Munyi.
- The issue of letters of Administration is relevant as was held in the case **of PHYLLIS N. MBALUTO VS KENYA POWER AND LIGHTING CO. LIMITED (2012) e K.L.R** where it was held:

“It is trite law that any dealing over the estate of a deceased person, can only be by a person holding letters of administration over the estate. However, this was not the case here. The defendant’s Way-leave officer, however, testified and added another dimension to the aforesaid position in law. It was his testimony that in cases where the owner of the plot is deceased, the defendant’s Way-leaves officers look for the person with letters of administration or in the absence of such a person, the person in occupation and/or possession and use of the land The evidence of the defendant on the issue of the deceased’s son executing the consent without a grant of letters of administration but as a person in actual possession of the suit premises was not seriously challenged by the plaintiff/. I am therefore prepared to accept the evidence of the defendant that if it is seeking way leave consent with regard to the estate of the deceased, they will first approach the person with a grant failing which they will look for a person in actual use and possession of the land in which the way leave is sought. This makes practical sense, since what is sought is not a transaction inimical to the title of the owner of the land but a mere consent for a way leave. This was a mere right of way to enable the defendant erect power line. The circumstances of this case indeed justify the above observation”.

- However, after the way leave agreements had been executed, L.R. No. KABARE/NYANGATI/115 was subsequently sub-divided and sold to various owners including the Petitioner herein.
- Based on the illusion that they had signed a way leave agreement with the widow of the original owner, the Respondent proceeded with the construction without issuing notice to the Petitioner who was in actual possession and occupation of the suit property.
- My finding in this case is that this petition is governed by the provisions of the ***Electric Power Act No. 11 of 1997*** and the ***Way Leave Act Chapter 292*** of the Laws of Kenya (since repealed).
- It is also my finding that the claim by Petitioner is founded in ***Section 45 of the Electric Power Act, No. 11 of 1997*** and ***Section 4 and 5 of the Way Leave Act***.
- ***Section 46 (1) – (3) of the Electric Power Act No. 11 of 1997*** provides for the procedures to be followed for payment of compensation in such circumstances.

“(1) An owner shall be deemed to have assented to a proposal to lay an electric supply line on his land if he fails to notify the person desiring to lay an electric supply line in writing of his dissent therefrom within sixty days after the service of him of the notice required by the section; and in the event of dissent, the Court, on the application of the licensee, shall decide:

(a) What injury if any, the proposed electric supply line will cause to the owner, or to the occupier or that person interested in the land; and

(b) Whether any injury that will be caused is capable of being fully compensated for by money, unless the owner requires those questions to be decided by arbitration.

(2) The result of a decision under Sub-section (1) shall be as follows:

(a) If the decision is that injury shall be caused to the owner, occupier or other party interested in the land, but that the injury is of a nature capable of being fully compensated by money, the Court or arbitrator shall proceed to assess the compensation and to apportion it amongst the owner, occupier and other parties in his or their judgment entitled thereto, and on payment of the sum so assessed, the licensee may proceed to lay the proposed electric supply line.

(b) If the decision is that injury will be caused to the owner, occupier or other party interested in the land, and that the injury is not of a nature to admit of being fully compensated by money, the licensee shall not be entitled to lay the proposed electric supply line.

(c) If the decision is that no injury will be caused to the owner, occupier or other party interested in the land, the

licensee, may forthwith proceed to lay the electric supply line.

(3) If any difficulty or question arises as to the person entitled to the compensation payable under this Act, the Court shall order the compensation to be paid into Court pending the making of an application under Section 4”.

Section 6 (1) of the Way Leave Act (since repealed) also provide for compensation to be paid to land owners as follows:

“(1) The Government shall make good all damage done, and shall pay compensation to the owner of any tree or crops destroyed or damaged, in the execution of any power conferred by this Act”

The provision for compensation with respect to Way-leaves are now provided under **Section 148 of the Land Act No. 6 of 2012** which provides as follows:

(1) 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 way leave, in addition to any compensation for the use of land for any damage suffered in respect of trees, crops and buildings as shall, in cases of private land, be based on the value of the land as determined by a qualified valuer.

(2) Compensation relating to a way-leave or communal right of way shall not be paid to a public body unless there is a demonstrable interference for the use of the land by that public body.

(3) Damage caused as a result of the creation of a way-leave shall include any preliminary work undertaken in connection with surveying or determining the route of that way-leave, and whether the trees, crops or buildings so damaged are included in the route of the way-leave as delineated 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 or compensation and the Court in making any award, may, make any additional costs and inconvenience incurred by the person entitled to compensation.

(6) The Commission shall make regulations prescribing the criteria to be applied in the payment of compensation under this section and to give effect to this section”.

The provisions cited above are very elaborate in terms of the process to be adhered to, for purposes of compensation of private land owners for the provision of way leaves.

In the case of ***Prinsal Enterprises Limited Vs Kenya Electricity Transmission Co. Ltd (2018) e K.L.R.***, the Court held:

“The only question to determine is what is adequate compensation to pay the petitioner for use of the suit property. The petitioner claims hundred percent compensation. However, as demonstrated by the respondent only a portion of 23.21% has been actually used to live the lines. The respondent is prepared to offer a higher figure of 35%. The open market value of the suit property was arrived at Ksh. 3.5 million per acre by the respondent. The petitioner arrived at open market value of Ksh. 6 million per acre. I will go with the value accorded by the respondent in to calculate their compensation value to be given to the petitioner by the respondent as 35% of 11 acres multiplied by the open market value of Ksh. 3.5 million to arrive at Ksh. 13,475,000/=.

Again in the case of ***Kenya Power & Lighting Company Limited Vs Josphat P. Kingara (2013) e K.L.R.***, the Court held:

“The normal measure of damages for purposes of compensation in the case of trespass to land is the cost of reinstatement, and where this is not practical or sensible, then the amount of the diminution in value of the land is considered (see MCGregor on damages, Eighteenth Edition, paragraphs 34 – 003 to 34 – 022). The value of land is also now the determinant factor for compensation under the Land Act, Act No. 6 of 2012. In the present case, the land cannot be reinstated to its previous position as the electric power supply lines are already in place, and the parties herein have consented to their remaining on the defendant’s land. The applicable principle in the present case is therefore that of diminution in the value of land, and the question that this Court needs to answer is the nature and extent of the said diminution in value”

A perusal of the valuation reports presented by the parties show that the plaintiffs valuers valuation of this portion of land as at December 2003 was Ksh. 400,000/=. The defendants’ valuers valuation of the same portion of land in January 2004 was Ksh. 700,000. It would therefore appear to me that an average value of Ksh. 550,000/= would be a reasonable value of the said portion of land as at January 2004”.

Applying the same principle as in the above case, it would appear to me that an average value of the petitioner’s valuer’s valuation report and the respondent’s valuers valuation report would be an adequate compensation. The petitioner valuers valuation of the affected portion of land was 2,880,000. The respondent’s valuer’s valuation of the same portion of land was Ksh. 572,400/=. It would therefore appear to me

that an average value of Ksh, 1,726,200 (one million, seven hundred twenty six thousand two hundred) would be a reasonable value for compensation of the affected portion of land.

In the final analysis, I hereby do enter judgment for the petitioner against the respondent in the sum of one million, seven hundred twenty six thousand two hundred (Ksh. 1,726,200/=) plus interest from today. The respondent shall also bear the costs of this petition.

It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 4th day of October, 2019.

E.C. CHERONO

JUDGE

4TH OCTOBER, 2019

In the presence of:

- 1. Mr. Ndirangu holding brief for Mwangela for Respondent*
- 2. Mr. Asimwe holding brief for Magee for Petitioner*