



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**ELC CIVIL CASE NO. 1289 OF 2015**

**IN THE MATTER OF THE INFRINGEMENT, VIOLATION AND DENIAL OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 19, 20,  
21, 22, 23 AND 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS  
AND FREEDOMS UNDER ARTICLES 23 OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**PRINSAL ENTERPRISES LIMITED.....PETITIONER/RESPONDENT**

**=VERSUS=**

**KENYA ELECTRICITY**

**TRANSMISSION COMPANY LIMITED.....RESPONDENT/APPLICANT**

**RULING**

1. This is the notice of motion dated 23<sup>rd</sup> May 2018 brought under Article 159 of the Constitution of Kenya, 2010, Section 80 of the Civil Procedure Act, Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010.

2. It seeks orders:-

1. *Spent*

2. *Spent*

3. *That this honourable court be pleased to review its judgment delivered on 19<sup>th</sup> April 2018 by retracting the sum awarded of Kshs.13,475,000/- and substitute it with the sum of Kshs.3,208,275/-.*

4. *That this court be pleased to direct the Land Registrar to register an easement against the Title Number Juja/Komo Block 2/1670 in consideration of the aforesaid compensation.*

5. *That the applicant be at liberty to apply for further order/and/or directions as the Honourable Court may deem just to grant.*

6. *That the costs of this application be provided for.*

3. The grounds are on the face of the application and are set out in paragraphs (a) to (L).

4. The application is supported by the affidavit of Lydia Wanja, Manager Legal Services of the applicant sworn on the 23<sup>rd</sup> May 2018.
5. The petition is supported by the affidavit of Godfrey Githinji Kamiri the petitioner herein sworn on the 6<sup>th</sup> March 2018.
6. The application is opposed. There is a replying affidavit sworn by Faraaz Tejanja director of the Petitioner/Respondent sworn on the 10<sup>th</sup> January 2019.
7. On the 23<sup>rd</sup> January 2019 the court directed that the application be canvassed by way of written submissions.

#### **The Respondent's/Applicant's Submissions**

8. Through an accidental slip, omission and/or arithmetic mistake, the learned judge's final award of Kshs.13,475,000/- does not correspond with her analysis and findings in the judgment. The court noted that the petitioner/respondent was claiming 100% compensation while only 23.21% of the land had been traversed by the power lines (an equivalent of 2.619 acres of the total 11.24 acres). The Honourable court further agreed and adopted the applicant's open market value of Kshs.3,500,000/- per acre and its compensation rate of 35% for limited loss of user of the petitioners land. The final award flies in the with face of the analysis and findings, since the award of Kshs.13,475,000 as compensation payable to the respondent would imply that the entire 11.24 acres was affected by the easement which is erroneous.
9. There was an omission on the need to have the easement registered against the certificate of title and noted in the register as an encumbrance in exchange for compensation award.
10. The amount of Kshs.13,475,000/- that was ordered in the judgment of 19<sup>th</sup> April 2018 translates to an inference that the entire parcel of land being 11.24 acres of land was affected by the power line which is factually wrong and is not disputed. This is an apparent arithmetic error. That is easily decipherable to a reasonable person and the court should review its judgment to rid it of this abnormally. It has put forward the cases of **Zablon Mokuva vs Solomon M Choti & 3 others [2016] eKLR** cited with approval the case of **Chandrakhant Joshipai Patel vs R [2004] TLR 218** where it was held that an error stated to be apparent on the face of the record would be corrected, (further reiterated in the case of **Wanjiru Gikonyo & 2 Others vs National Assembly of Kenya & 4 Others [2016] Eklr**).
11. It is clear that the court by an inadvertent miscalculation, made an arithmetic mistake in computing the award payable to the petitioner. Having found in its analysis of the facts that only 2.619 acres out of the total being 11.24 acres was affected by the power lines, the court inexplicably awarded the petitioner compensation for the entire 11 acres. There is no ambiguity in what the court intended to do. It made the right findings but an erroneous conclusion and the applicant has ably demonstrated so and invited the court to cure this anomaly through reviewing the said award. It has also put forward the case of James **Githuku Gichuki & Another vs Makueni County Sand Conservation & Utilisation Authority [2018] eKLR** where the court cited with approval the case of **Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550**.
12. It is an error occasioned by accidental slip of the pen in arithmetic calculations. Further more the same is not a question of judicial discretion but rather an anomaly that ought to be corrected by this court. It has also put forward the case of **Vailabhadas Karsandas Raniga vs Mansukhal Jivraj and Others [1965] EA 780**.
13. The court ought to correct the anomaly and grant in clear terms an easement to the applicant to be registered by the Land Registrar and the petitioner be compensated to the tune of Kshs.3,208,275/-. The court made a finding that there was public interest involved in the action of the applicant and therefore it was justified and that the petitioner is to be compensated for the use of the land. It has put forward the case of **Great Lakes transport Co (U) Ltd vs Kenya Revenue Authority [2009] eKLR**. The Court should correct its judgment in order to bring out the true intention of the court when it delivered the judgment. That is the applicant be granted an easement over the suit property and that the petitioner be compensated for the grant of such easement to the tune of Kshs.3,208,275. It prays that the application be allowed with costs.

#### **The Petitioner's/Respondent's Submissions**

14. The petitioner/respondent seeks to appeal on the issue of quantum as it is aggrieved by the insufficient damages awarded. The court failed to lay any basis as to why it relied on the respondent's/applicant's valuation report rather than the petitioner/respondent's. This court lacks jurisdiction to make any review orders at the matter is now before the appellate court.
15. There was no arithmetic error made during the calculation of the final award. It has relied on the case of **Skool Enterprises Limited vs Housing Finance Company of Kenya Ltd & 3 Others [2017] eKLR** which relied on the case of **Nyamogo & Nyamogo Advocates vs Kago [2001] 1EA 173**.

The court agreed with the applicant that the only portion of the petitioner's land that was affected by the transmission line is 23.21% (an equivalent of 2.55 acres out of 11 acres). The Respondent/applicant never prayed for the honourable court to register an easement against the certificate of title at the time of filing its response or during the hearing of the main suit. There can be no basis for the court to make such an order at this stage. The procedure for creation of an easement as provided by statute should be followed. The respondent/applicant has not established any grounds for review of the judgment delivered on 19<sup>th</sup> April 2018. It prays that the application be dismissed.

16. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the written submissions of counsel and the authorities cited. The issue for determination are:-

(i) *Whether there is an error apparent in the face of the record.*

(ii) *Whether this honourable court should review its judgment delivered on 19<sup>th</sup> April 2018 by retracting the sum awarded of Kshs.13,475,000 and substituting it with the sum of Kshs.3,208,275/.*

(iii) *Whether this honourable court should direct that the land registrar register an easement against the title number Juja/Komo/Block 2/1670 in consideration of Kshs3,308,275 as compensation for the grant of easement.*

17. I have gone through the judgment by Hon. Lady Justice Mary Gitumbi dated 12<sup>th</sup> April 2018 and delivered on 19<sup>th</sup> April 2018. The Honourable learned Judge stated as follows:-

*“.....The only question to determine is what is adequate compensation to pay the petitioner for use of the suit property. The petitioner claims a hundred percent compensation. However as demonstrated by the respondent only a portion of 23.21% has been actually used to lay the lines. The respondent is prepared to offer a higher figure of 35%. The open market value of the suit property was arrived at Kshs.3.5 Million per acre by the respondent. The petitioner arrived at open market value of Kshs.6 million per acre. I will go with the value accorded by the respondent in order to calculate the compensation value to be given to the petitioner by the respondent as 35% of 11 acres, multiplied by the open market value at Kshs.3.5 million to arrive at Kshs.13,475,000. I will not award anything towards rental income. Accordingly judgment is entered in this suit in favour of the petitioner in the sum of kshs.13,475,000/- to be paid by the respondent within 45 days from the date of delivery of this judgement”.*

18. It is the respondent/applicant’s submission that there is an apparent arithmetic error. It relied on the case of **James Githuku Gichuki & Another vs Makueni County Sand Conservation & Utilisation Authority [2018] eKLR** where the High Court acted with approval the case of **Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550** in which it was held that:-

*“Clerical or arithmetical mistakes in judgment, decree or orders or errors arising therein from accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of the parties”.*

19. Having gone through the judgment delivered on 19<sup>th</sup> April 2018, I find that the Honourable Learned Judge M Gitumbi intended to award Kshs.13,475,000. There is therefore no error apparent on the face of the record. The learned judge gave an explanation as to how she arrived at the said figures. Having found so, this court declines to review the judgment delivered on 19<sup>th</sup> April 2018 by retracting the sum awarded of Kshs.13,475,000 and substituting it with Kshs.3,208,275/-.

20. According to Black’s Law Dictionary an “easement” is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below for a specific limited purpose”. **Section 2** of the Land Act 2012 defines an Easement *“as a non-possessory interest in another’s land that allows the holder to use the land to particular extent to require the proprietor to undertake an act relating to the land or to restrict the proprietor’s use to a particular extent and shall not include a profit.”* It is the petitioner/respondent’s contention that the Respondent/applicant never prayed for the registration of an easement during the hearing of the petition. However I have gone through the respondent’s/applicant’s submissions to the petition dated 5<sup>th</sup> February 2016 and filed in court on 8<sup>th</sup> February 2016. I note that the respondent/applicant addressed the issue at length. It relied in sections 98 and 149 of the Land Act 2012. I rely entirely on these provisions.

21. It is therefore not true as claimed by the petitioner/respondent that the respondent/applicant never sought the registration of an easement. It means that once a land owner is compensated an easement ought to be registered appropriately. In the case of **Great Lakes Transport Co (U) Ltd vs Kenya Revenue Authority [2009] eKLR** the Court of Appeal held that the High Court had the power to award a prayer that had been pleaded in the main body of the plaint or pleadings but not specifically sought in the orders as the court sitting as a court of equity does not allow a wrong to be suffered without a remedy. I am guided by the above authority.

22. In conclusion, I find merit in this application only to the extent that the land registrar is hereby directed to register an easement against title number Juja/Block 2/1670 in consideration of Kshs.13,475,000 as compensation. The respondent/applicant do bear costs of this application.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 5<sup>th</sup> day of December 2019.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Wachira for the Petitioner

Ms Kabiti for Mwangi for the Respondent

Kajuju – Court Assistant