



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC. CASE NO. 1289 OF 2015**

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

**AND**

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 23 OF THE  
CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**PRINSAL ENTERPRISES LIMITED.....PETITIONER**

**VERSUS**

**KENYA ELECTRICITY TRANSMISSION CO. LTD.....RESPONDENT**

**JUDGMENT**

**The Pleadings**

This case was commenced by way of a petition dated 10<sup>th</sup> July 2014 and filed on 11<sup>th</sup> July 2014 in which the petitioner seeks for orders as follows:

1. a declaration that the petitioner's fundamental rights to property has been violated, transgressed on and trampled upon by the respondent.
2. a declaration that the respondent has illegally and unlawfully invaded the petitioner's land.
3. An order to issue that the respondent do pay the petitioner general damages for contravention of his fundamental rights to own property.
4. That this Honourable Court be pleased to grant the costs of this petition to the petitioner.

The petition is supported by the supporting affidavit of Amjad Rahim sworn on 10<sup>th</sup> July 2014 in which he averred that he is the director of the petitioner. He further averred that the petitioner is the duly registered owner of all that parcel of land known as Juja/Komo Block 2/1670 (hereinafter referred to as "suit property"). He stated further that sometimes in the year 2011, the respondent unlawfully and illegally invaded the suit property and began constructing electricity transmission power lines. He added that in the time of the invasion by the respondent, the petitioner was preparing to start the business of quarrying on the suit property and it had actually invested heavily in acquiring the required machines to commence our quietly for cutting stones on the suit property. He further averred that upon realising the invasion by the respondent on the suit property, the petitioner wrote to the respondent enquiring about the trespass. This was the letter dated 26 February 2014 in which the petitioner informed the respondent of the trespass and ordered the respondent to vacate the land and to remove the electricity transmission power lines. It was his evidence that the respondent wrote back to the petitioner the letter dated 27 February 2014 seeking for copies of the petitioner's title documents. He averred further that the respondent made an offer to the petitioner to purchase an easement over the suit property which the petitioner declined to grant as it was an attempt to regularise a breach of the constitutional right to property.

In response to the petition and the supporting affidavit thereto, the respondent filed the replying affidavit of Johnson Muthoka, a land economist working with the respondent, sworn on 11 December 2014 and filed on 16 December 2014. In the replying affidavit, Mr Muthoka

stated that construction works on the 132 KV electricity transmission power line referred to in the petition started sometime in May 2010. He further averred that the suit property was initially captured as land reference number 10080/1 in 2010 but ownership details could not be obtained at the relevant land registry in Nairobi. He added that all other parcels in the neighbourhood of the suit property were duly captured and payments done after due diligence was conducted. He added that a compensation rate for right of use of the said parcels of land was assessed at between 35% in 37% of the value of the parcels of land. He added further that the compensation rate was based on the fact that in reality the respondent only acquired a minor interest in the land where the owners of the affected parcels of land were only prohibited from planting trees whose height would be over 3.5m at maturity and secondly from putting up building structures within the space mainly for safety reasons. He stated further that the power line was completed and energized sometime in November 2013. He added that with respect to the suit property the respondent could not immediately establish ownership or trace their land owners in this case the petitioner. He added that it is only later in 2014 that the respondent came to realise that the suit property details were faulty in that land reference number 10080/1 was actually the suit property and belonged to the petitioner. It was upon this realization that the respondent proceeded to compute the total acreage of the suit property and offered to compensate the petitioner vide its letter of offer dated 5<sup>th</sup> June 2014 at the sum of Kshs. 3,196,555/-. It was his view that this offer was adequate and just compensation for the grant of easement in acquisition of the right of way and for the loss of use of part of the suit property. He added that to date the respondent is yet to receive an acceptance from the petitioner to the offer letter. He reiterated that the respondent does not claim ownership of the entire parcel of land in question nor does it dispute traversing over it for purposes of laying the electricity power line aforementioned. He concluded by stating that the respondent's actions were necessitated by extenuating circumstances hereinbefore described and maintained that their willingness to compensate the petitioner for what use of their land to lay the power line.

The respondent further filed a supplementary affidavit sworn by Mr Johnson Muthoka on 17<sup>th</sup> June 2015 and filed on 18<sup>th</sup> June 2015 in which he averred that on or about 1<sup>st</sup> June 2010, his colleague Eliud Moki, being a registered and licensed land surveyor and he, conducted a survey and valuation exercise on the suit property with a view to determining the area affected by the 132 KV electricity transmission power line. He further averred that they both determined that the affected area was 1.06 ha out of the total area being 4.55 ha so the impact was 23.21%. He further stated that they both determined the open market valuation for 1 acre undeveloped land in the area of the suit property at as Kshs 3.5 million as per the current open market value at the time. He then further stated that they recommended a just and adequate compensation to the petitioner for the loss limited loss of use of the suit property at the rate of 35% of the value of the affected area being a total of Kshs. 3, 197, 250/-. He noted that it is a generally accepted and standard practice that compensation for way leave acquisition is normally limited to loss of use of one's land without changing any transfer of the land as opposed to outright purchase which would involve a transfer of the land in question which was not the case in this particular instance.

In response, the petitioner filed the supplementary affidavit of Faraaz Tejani sworn on 8<sup>th</sup> September 2015 and filed on 9<sup>th</sup> September 2015 in which he averred that he is a director of the petitioner and well versed with the facts of this suit. He added that the petitioner instructed a reputable company to conduct a valuation exercise on the suit property with the following instructions:

1. to ascertain the user of the property
2. to ascertain a market value of the property
3. two asserting the rental income that can be obtained from the property

He annexed the valuation report dated 15<sup>th</sup> April 2015 which was prepared and that according to that report the market value of the suit property is Kshs. 6 million per acre or Kshs. 66 million for the entire parcel. According to the report which he annexed the rental value of the suit property was Kshs. 300,000 per acre per month. He invited the court to base the compensation for the suit property on these figures.

### **The Issues for Determination**

There is no dispute on the question of ownership of the suit property. Both the petitioner and the respondent confirmed that the suit property belongs to the petitioner. There is also no dispute that the respondent entered into the suit property and lay electricity power lines on a portion thereof. The only issue arising in the suit for determination is the question on compensation in respect of the space taken by those electricity power lines that the respondent lay on the suit property. The petitioner is of the opinion that it is entitled to compensation for the entire parcel of land being the suit property on the premise that the electricity lines that have been laid on this suit property render the entire parcel useless to it. The petitioner's case is that it had invested heavily in quarry equipment in preparation for commencement of quarrying business on the suit property. The petitioner urges the court to find that the activity that the respondent has undertaken of laying electricity lines on the suit property is tantamount to a compulsory acquisition requiring compensation for the entire parcel. According to a valuation report filed by the petitioner, the compensation rate should be at the rate of Kshs 6 million acre for the 11 acres coming to a compensation amount of Kshs 66 million. The petitioner also claims for rental income at the rate of Kshs 300,000 per acre per month.

On its part, the respondent confirms that it has indeed entered into the suit property and laid out electricity power lines at a portion amounting to 23.21% of the suit property. The respondent is prepared to compensate the petitioner at a higher rate of 35%. The respondent is of the view that the open market value of the suit property at the time of laying the electricity lines was Kshs. 3.5 million per acre. On this basis, the respondent has offered to pay the petitioner the sum of Kshs 3,197, 250/-.

### **The Determination**

The respondent has demonstrated the reason why it was not able to contact the petitioner in the year 2010 when it commenced works on the suit property. It was not able to contact the petitioner due to an awareness of the proper parcel identity. This explains the reason why the respondent proceeded to set up the electricity lines on the suit property without involving the petitioner at the beginning. In the circumstances I would find that this is not a case of trespass.

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 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 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 at Kshs. 3.5 million to arrive at Kshs. 13,475,000/-. I will not want 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 judgment.

**SIGNED AND DATED BY HON. LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL 2018.**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED BY HON. MR. JUSTICE SAMSON OKONGO THIS 19<sup>TH</sup> DAY OF APRIL 2018.**

**SAMSON OKONGO**

**PRESIDING JUDGE**

**In the presence of:-**

Advocate for the Plaintiff

Advocate for the Defendant

Court clerk