



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 474 OF 2017

KENYA ELECTRICITY TRANSMISSION COMPANY PLAINTIFF

VERSUS

LPETON LENGIDI 1st DEFENDANT

DANIEL LEJOON NLENGIDI 2nd DEFENDANT

WILLIAM LCHADA LENKIDI 3rd DEFENDANT

LESAUTI LENKIDI 4th DEFENDANT

JUDGEMENT

1. The Plaintiff is a state corporation whose core business is to plan, design, construct, own, operate and maintain high voltage electricity transmission grid and regional power interconnectors that will form the backbone of the National Transmission Grid. For purposes of this suit, the Plaintiff will be referred to as KETRACO.

2. The Plaintiff is in the process of constructing the Loiyangalani Suswa 400kV Electricity transmission line which traverses several parcels of land including parcels known as Samburu Poro B/125,274,132 and 142 which parcels of land belong to the Defendants.

3. This suit was first filed in the High Court of Kenya sitting in Meru on the 19th July 2017 before it was subsequently transferred to this court.

4. The Plaintiff in their suit sought for the following orders:

i. An assessment of just compensation payable to the Defendants.

ii. Permanent injunction against the Defendants either by themselves, their agents, employees from interfering with the works of the Plaintiff and attacking the servants and agents of the Plaintiff on the suit properties.

iii. In the alternative, Judgment against the Defendants for the losses incurred by the Plaintiff due to the disruption of the construction of the power lines

iv. Cost of the suit.

5. Together with the Plaintiff, the Plaintiff filed their application seeking for interim orders, pending the hearing of the same inter-party, for access by its servants and agents as well as the officers of the National Land Commission to land parcel No. Samburu Poro B/125,274,132 and 142. They also sought for the County Commander in charge of Samburu County to ensure the enforcement of the said order.

6. On the 25th July 2017 the above captioned ex-parte orders were granted and the matter scheduled for hearing interparty on the 25th September 2017. The Defendants entered their appearance and Defence on the 20th September 2017.

7. On 25th September 2017, Counsel for the Defendants had not filed their replying affidavit and sought for more time to do so. The court obliged him and directed for parties to file their written submissions upon service. The matter was scheduled for 20th November 2017 for mention to take directions. Come the 20th November 2017, the Defendants informed the court that they were yet to be served upon wherein the court directed that there be service effected.

8. Leave was also granted to the Plaintiff to file their further affidavit because, as the court was informed, the bone of contention in this matter was the valuation and compensation. Corresponding leave was granted to the Defendant to file and serve their response. The matter was set for highlighting of the parties' written submissions on the 7th February 2018.

9. However on the 22nd November 2017 the Applicants filed yet another application dated the 21st November 2017 under certificate of urgency wherein they sought to extend the interim orders granted on the 25th July 2017 which orders they had inadvertently forgotten to extend when the matter was lastly in court. The Application was allowed on merit.

10. On the 7th February 2018 when the matter came up for highlighting, despite the fact that parties had filed their respective written submissions to the application dated the 19th July 2017, the Defence Counsel informed the court that the said application had been overtaken by events as on the 1st February 2018, the Plaintiff's employees with the help of security officers had stormed into the suit premises and carried out the exercise of putting up the electricity transmission lines.

11. Defence Counsel sought to amend their defence to set up a counter claim and seek for compensation. Counsel also sought to file the witness statement as well as a valuation report.

12. In view of the said submission, the court found that the application dated the 19th July 2017 had been overtaken by events and leave was granted to the defence to amend their defence and file their further statements and documents. The matter was scheduled for mention to confirm compliance for the 15th March 2018 on which day the court was informed that the Defence had complied. Mention was set for the 29th May 2018 for pre-trial directions.

13. While awaiting for the pre-trial date, both parties filed Applications under certificate of urgency dated the 16th April 2018. The court ordered for both Applications to be served and the matter to proceed for hearing on the 23rd April 2018.

14. On the 23rd April 2018 both counsel submitted on their respective applications wherein the court made a ruling to the effect that the continuous filing of applications by counsel continued to fan hostilities on the ground between the parties. The court therefore dispensed with the applications and directed that parties maintain the status quo and the matter to proceed for hearing on priority basis.

15. Subsequently, the matter proceeded for hearing on the 14th May 2018 after the counsel for the defendant made an oral application to amend paragraph 15(a) and (b) of their counter claim and also to include paragraph 15(c) therein, thus making ksh. 8,878,198/= to be the total amount of claim. There was no opposition from counsel for the Plaintiff and the said application was allowed.

16. The Plaintiff called Johnson Muthoka as their first witness who testified, in Kiswahili language, while relying on his statement to the effect that he was a registered and licensed valuer heading the department of way leave acquisition in KETRACO. He sought to rely on his list documents filed on the 19th July 2017 and 10th May 2018 herein marked as exh 1-7.

17. He testified that apart from the 4th Defendant, he did not know the rest of the defendants. That KETRACO was established in the year 2008 wherein their mission was to build and maintain power lines from 132 kilovolts. That the lines also join county to county.

18. That in August the year 2014, they had placed a notice informing the public that they would be placing a transmission line through their parcels of land but that they would compensate the affected persons.

19. On the 24th April 2014, while working with the National Land Commission, they had written letters of offers to the persons who would be affected with the laying of the transmission lines. As per a valuation report, the value for Poro B and Samburu County was Ksh. 100,000/= per acre. The valuation for the houses and trees was to be separate.

20. The witness testified that the compensation was not done at 100% and further that the Land acquisition is provided under part 8 of the Land Act whereas the way leave is provided under part 10 of the Land Act. That they had a written recommendation for National Land Commission which had put compensation at a maximum of 30%.

21. That they did not take the land but got permission to place the post and pass the line over the affected people's land. That they had asked the people to do the following:-

i. For safety reasons they asked people to remove their houses under the wires and build them 60 meters away.

ii. Secondly they asked the people not plant trees that could mature up to a height of 12 feet.

22. That these measures did not reduce the use of the land. He went on to testify that the Ksh.100,000/= which they were offering persons living in Samburu in the year 2014 formed 30%, and was rejected but because of the urgency to build the line, they had sort for a meeting within Samburu wherein while they were at the county commissioner's office, they had asked for valuation from Nyahururu Office.

23. That on 17th March 2015, the land valuer from Nyahururu went to Samburu grounds and was given a valuation of Ksh. 200,000/=per acre. When they met with the locals, they (locals) had requested for compensation of 4 million shillings per acre. The Plaintiff tried to adopt the Ksh. 200,000/= but the locals rejected it. In the year 2015, the administration leaders of the area had had a meeting with them wherein they had agreed to pay people affected within Samburu County Ksh. 250,000/= per acre at 30% for the way leave. The people present signed the minutes. They then wrote other letters of offer for Ksh. 250,000/= at 30% which they distributed to the affected persons and paid almost

everyone. What now remained were three towers which were to be erected on the Defendants' land.

24. This created a problem because the line was to be completed in the month of June 2018. There was an agreement that if the line was completed later, than June 2018, the Government of Kenya was to pay a fine of Ksh. 2 billion at the end of the time limit, to the Government of Spain until the day they would complete the line.

25. The witness testified that when they realized that the line would not be completed by the due date, they had negotiated to be allowed more time. They wanted to save the Country. They had the three towers remaining. They had two months to complete the work. That they had been having negotiations with the 3rd Defendant.

26. That they had met on the 26th January 2017 in the 3rd Defendant's house wherein they had asked that he accepts the money paid to everybody else wherein he had refused their offer and requested for five million shillings per acre. He had also wanted to be paid for the trees in his shamba at Ksh. 5 million. Further he had also requested for compensation of the dams at Ksh. 5 million per dam and Ksh. 8 million per tower locations totaling to Ksh. 24 million contrary to what they had paid everybody else in Samburu at Ksh. 250,000/=. It was when the 3rd Defendant became difficult, that they decided to file the matter in court.

27. The witness testified that if they did not finish the line before July 2018, it will affect many people in Kenya. That the constructor was paid Ksh. 500,000 million per day which is paid by the Government. There was machinery, workers as well as armed personnel on the grounds who are paid using the tax payer's money.

28. In Cross examination, the witness reiterated that this case was filed on 3rd August 2017 after the first deadline of 1st June 2017. That they had negotiated and got an extension before the deadline. That between August 2017 and the present date, the tower foundation had been done and what remained was erection and stringing. That after the filing of this suit, no valuation had been done. That what they sought from the Defendants was only access.

29. He confirmed that a valuation had already been done before filing of this case. He however confirmed that the said valuation report was not in the documents before court although they had attached it.

30. He confirmed that on the 26th January 2017, they had had a meeting with the 3rd Defendant wherein their last offer had been Ksh. 400,000/= per acre at 40%, an offer which was declined and the matter filed in court.

31. The witness confirmed that although he had testified that the government of Kenya would be fined Ksh. 2 billion at the end of the time limit, yet he had no document to support the said evidence.

32. He further confirmed that they had had a meeting with administrator of Samburu County where they had negotiated for compensation for the land below Sanguta to somewhere near Baragoi at a valuation of Ksh. 200,000/= but the value was further negotiated for ksh. 250,000/= for the entire stretch of land to avoid discrimination and for the purpose of equity and justice. That the land was owned individually and a person who had done his valuation had a right to be paid. He confirmed that through their request, Mr. Simon Kanyi had done the valuation through office of the county commissioner and the valuation had been attached to his documents.

33. He also confirmed that the affected people were not to construct under the power line or plant trees that grew above height of 12 feet. All these provisions were contained in the easement document which was a policy document from the Act but which he had no copy.

34. He confirmed that although he did not have the document or a witness from National Land Commission, he had been involved in the coming up of the decision where there had been a recommendation by National Land Commission that the affected people be paid 30%. That the 30% however did not apply across the board.

35. When the witness was shown exhibit No. 1, he confirmed that the parcels of land that were affected by the way leave were Samburu No. 274, 215, 132 and 142 and further that they had been listed on the notice issued by the National Land Commission.

36. When the witness was shown photographs annexed to his application dated the 16th April 2018, he confirmed that he could see a forest which he was familiar with in the 1st photo, that the 2nd photo also showed the forest in the neighborhood where they sought to install the towers. That in Photograph 4(a) the tower was erected too close to the house. He confirmed that if a house is within 60 meters of the tower, then it would be demolished.

37. He explained that a house could be near the line but without 60 meters of the corridor but if the house is left, then it meant it was outside the corridor, but if it was within 60 meters, compensation would be paid. He confirmed that the Defendants had no house within their line but that if it turned out that they had a house within the corridor, they would be compensated. That KETRACO had not refused to compensate them for any vegetation that was within the corridor that would be cut down in the process.

38. In re-examination, the witness confirmed that in the schedule he had produced in court, the value they had paid everyone except the Defendant, was ksh. 250,000/=. That they had arrived at the sum based on a policy conducted after benchmarking. That the project was funded by the Spanish Government. The Way leave was paid for by the Government of Kenya whereas the construction and sub-station was paid for by the donors. That the Defendants had not executed any easement documents. That the agreement is registered once one accepted the letter of offer wherein they pay and register the easement before returning the title to its owner. The Plaintiff closed its case.

The Defence case;

39. The Defence called Simon Wanyiri Kanyi as their first witness wherein he testified (in English Language) to the effect that he was a licensed and registered valuer working with the Ministry of Lands. That he worked part time at Artex Realtors Ltd. He produced his year's practicing certificate as well as the Kenya Gazette as Df exhibit 3 and his certificate of Registration as Df Exhibit 1, 2 and 3.
40. He recalled that on the 18th May 2017. He had gone on the ground, in Samburu, and carried out an inspection wherein after he had proceeded to do an evaluation on the same. The witness then switched to Kiswahili language and proceeded to testify that he had got instructions from the 3rd Defendant. That he had done the inspection to determine the value of the land because the Plaintiff had wanted to pass their electricity wires thereon. That he had gone with the 3rd Defendant round the piece of land which was 4.6 acres. Thereafter, he had conducted his valuation which put the area to be affected by the Plaintiff's work at a value of Ksh at 3.2 million. He produced his report as Df Exhibit 4.
41. That he had also conducted a valuation on the 4th Defendant's parcel of land No. 142 which was approximately 1 acre, wherein he had valued the area to be affected at Ksh. 1.2 million. He produced the report as Df exhibit 5.
42. He also valued land No. 215, measuring 5.19 acres, belonging to the 1st Defendant, at ksh 2.1 million, which report he produced as Df Exhibit 6. The Valuation of plot No. 274 which measured 4.45 acres was put at Ksh. 2.2. Million, and the report produced as Df Exhibit 7.
43. The witness testified that the values on the respective parcels of land were different because of the difference in the location and value of the land. That some were nearer to services for example of plot No. 132 which was near the shopping Centre and a primary school.
44. That it was therefore possible to get different values on property on the same location. That they had conducted a general valuation for the Deputy County Commissioner basing the same on the general corridor. That they did not conduct a specific valuation but based the same on a general average. The valuation was therefore a general estimate.
45. On Cross examination DW 1 testified that he was a county valuer for both Samburu and Nyandarua County. That on 17th March 2015, he had conducted a valuation for the Deputy County Commissioner for Samburu County. This was to solve some dispute at the land county. That he was not aware that the pursuant to the valuation there was negotiations between the land owners and county. That he had not participated in the negotiations.
46. When the witness was referred to Df exhibit 4 at clause 6.3, he testified that the improvements were the trees, natural bushes and cider trees therein. That his instructor had wanted to know the value of land as per then but did not talk about the way leave compensation. That he had proceeded as directed and had given a lump sum value of the entire acreage.
47. That he was not able to distribute the figures. The improvement was defined by what was there on the land, for example the fences, posts, and the trees. That as far as Df exhibit 4 was concerned, the figures per acreage would be about Ksh. 682,000/= per acre.
48. The witness was further referred to Df Exhibit 5, wherein he stated that for one acre, the value was indicated as 1 million but this could have been a typing error on the figure which was supposed to reflect Ksh. 500,000/= for the entire parcel of the land.
49. On Df Exhibit 6, the witness testified that the value was approximately Ksh. 404,000/= per acre while in regard to Df exhibit 7, the value was approximately Ksh 494,000/= per acre. That the figures indicated were a global figure which included the trees.
50. That the value of the acreage the land depended on the utility nearby. That the developments on these land were minimal and the value of the land took approximately 80% of his report.
51. The witness confirmed that his report was in respect of the affected places of the way leave as per how the 4th Defendant had pointed out to him. That he had pointed out the parcels of land affected and the witness had conducted his valuation which was on the 18th November 2017 and 1st December 2017 which were the dates he had inspected the parcels of land.
52. He also confirmed that the report he had submitted to the County Commissioner was conducted in the year 2015 although he was not certain as he did not have the report in court.
53. He went on to state that the said report was on a general/average value, and could have been higher or lower. That when he had conducted his inspection, there had been a building that was relatively near the corridor although he could not recall on which land it had been. He confirmed to having not taken the measurement.
54. In Re-examination, the witness confirmed that there was a typographical error on Df Exhibit 5. And that he should have indicated Ksh. 500,000/= instead of Ksh 1.2 million. That the area affected was one (1) Acre
55. The next defence witness DW2 was William Lchada Lenkidi, the 3rd Defendant, who swore and stated in Kiswahili language that he was a farmer. That he had written and signed a witness statement which was filed on 21st February 2018. That he wished that the same be considered as his evidence. That he had also filed his list of documents as well as a supplementary list of documents and some photographs in court. That he wished to rely on the same as his evidence.
56. He testified that he did not know why they are in court. That his piece of land was No. Samburu Poro B/132. That his co- defendants who were in court had given him authority to plead this case on their behalf.

57. He testified that the 1st Defendant's land was No. 215, the 2nd Defendant's land was No. 274, while the 4th Defendant's land was No. 142.

58. That the plaintiff had wanted 60 meters wide of way leave to pass their electricity poles. That he did not stop them from passing the wire lines, all he wanted was to be compensated the valuation reports having been filed and produced in court.

59. That all they asked for, was for compensation as per the said reports. That the court had asked him to look for a valuer which he had done. That he also had reports from Kenya Forest Services. That the Plaintiff wanted to cut down the trees on the land wherein he asked to be compensated as per the said reports.

60. The witness confirmed that he had had a meeting with the Plaintiff in his house wherein the Plaintiff at first had offered him Ksh. 250,000/= before he later changed the amount to Ksh. 400,000/=. That by then the Plaintiff had stated that they would compensate him at 40% which he felt, he was being fleeced.

61. That he had refused the offer because it was too little. He also testified that unlike what the Plaintiff had testified, it was not true that after the lines were in place on the land, that they could still use the land. That by the power lines passing therein, it was too dangerous. He stated that the Plaintiff desired them to die. He further stated that the 'white man' had told them not to pass near the wires.

62. He produced photographs and testified that the 1st photograph showed the 4th Defendant's house where that the electricity wire had passed above it. The 2nd photograph showed the foundation of the tower on his land parcel No. 231, while the 3rd photograph showed the construction work on the 2nd Defendant's piece of land. The 4th photo was still the 2nd Defendant's land and lastly the 5th photo showed the trees that would be cut down, trees that he had planted. That some were are cider trees, others were Cyprus tees while others were natural vegetation. He produced the photographs Df exhibit 8(a-e)

63. He further testified that the Plaintiff had only conducted one meeting in the year 2014, which meeting had been held at the chief's camp. That he would not know if other meetings were held thereafter but that it was not true that only the four Defendants had not been paid, there were other 8 other people who had not been paid. He stated that the Plaintiff had taken people's land by force and was creating squatters in Samburu.

64. On Cross examination, DW2 stated that indeed when they had met with the Plaintiff in his house, he had written the minutes of the meeting wherein he had asked for Ksh. 500,000 per acre so that if the Plaintiff had reduced it, then he could get at least Ksh. 2 million. That he had asked for Ksh. 5 million for the trees and ksh. 5 million for the dam. For all the 3 foundations, he had asked for Ksh. 8 million.

65. He also confirmed that the court helped him by asking him to get a valuation report which was drawn and he now wished to use the valuer's report for the Plaintiff to compensate them. He stated that he neither knew Semer Lesisiti, Lemeteki Lekitoli nor Elenders Isoju Titoe, people whom the court was informed, were neighbors to the 1st Defendant.

66. The witness informed the court that the 1st Defendant's neighbors lived very far from her and that he was speaking on her behalf. That it was not true that other people had been compensated at Ksh 20,000/= and 15,000/= per acre and not Ksh. 250,000/=.

67. The witness confirmed that he had a problem with the power line passing on his land before compensation. He stated that indeed if he was compensated on that very day then the Plaintiff would be free to go on his land the next day. He also reiterated that he had planted trees on his land and that the report from the Kenya Forest was produced as an exhibit in court putting the value of the trees at Ksh. 98,013/= for trees on his land No. 132. He also confirmed that there was a house beneath the line in parcel No. 142 and that there was no other house under the line.

68. Counsel for the Defence then sought to produce as evidence his supplementary list of documents, which application was not objected to and the same were marked as follows:

- i. Document No. 1 (copies of official searches for Samburu/Poro B 132,142 and 215) produced as Df Exhibit 9
- ii. Document No. 2 (copies of title deeds for Samburu/Poro B 142 and 215) produced as Df exhibit 10
- iii. Document No. 5 (Tree assessment Report for No.167) produced as Df exhibit 11
- iv. Document No. 6 (Tree assessment Report for No.215) produced as Df exhibit 12
- v. Document No. 7(Tree assessment Report for No.132) produced as Df exhibit 13
- vi. Document No. 8 (Tree assessment Report for No.142) produced as Df exhibit 14

69. The defence then closed its case and parties then filed their respective written submissions

Plaintiff's Submissions.

70. It was the Plaintiff's written submissions that the suit was commenced by way of Plaint dated 19th July 2017 seeking for orders of:

- a. An assessment of just compensation payable to the Defendants.
- b. Permanent Injunction against the Defendants either by themselves, their agents, employees from interfering with the works of the Plaintiff and attacking the servants and agents of the Plaintiff on the suit properties.
- c. In the alternative, Judgment against the Defendants for losses incurred by the Plaintiff due to the disruption of the construction of the power lines.
- d. Costs of this suit.

71. The Plaintiffs submitted that the said pleadings were pegged on the issue of Compensation wherein they sought the assistance of the court and other relevant bodies in arriving at a just determination for compensation on this matter based on valuations conducted at the beginning of the project.

72. That the Plaintiff had respect to the Defendants' right to property and it was on that basis that they had worked out the compensation due to the Defendants which offer was contained in the offer letters dated 24th October 2014 attached to its pleadings.

73. The plaintiff submitted that it was a State Corporation charged with the mandate of building electricity transmission lines and operating Kenya's National Electricity Transmission Grid pursuant to Sessional Paper No. 4 of 2004 on Energy. That they were also charged with improving the quality and reliability of electricity supply throughout the country, transmission of electricity to areas that were currently not supplied from the National Grid, evacuation of power from planned generation plants, providing a link with neighboring countries in order to facilitate power exchange and develop electricity trade in the region, reducing transmission losses and reducing the cost of electricity to the consumer by absorbing the capital cost of constructing electricity transmission lines.

74. That for them to achieve their mandate, they normally negotiated with land owners so that they would grant them a right of way over their land to enable construction of electricity transmission lines, in return for an amount of money that is calculated based on the value of the land, and the extent to which the landowner shall not be able to enjoy the use of the land as a result of the presence of a transmission line and therefore the right of way so granted was to be registered as an Easement under the Land Registration Act.

75. That the Plaintiff having noted that the way leave trace traversed along the Defendants parcels of Land known as Samburu Poro B/215,274,132,142, undertook searches to ascertain ownership and sought to engage the Defendants for grant of easement.

76. The areas to be affected by the Loiyangalani – Suswa line were published in the Standard Newspaper on 6th August 2014 which advertisement contained the total acreage of property to be affected by the said way leave.

77. The Plaintiff was then advised by the National Land Commission on the value of the properties belonging to the Defendants which was the basis on which it worked out the proposed compensation to the Defendants for the affected way leave trace.

78. The compensation initially offered by the Plaintiff as suggested by the National Land Commission was Kshs. 100,000/= per acre. This amount was not accepted by the Defendants which led to a series of stakeholder meetings with the Defendants and the Plaintiff's representatives. The Community's representatives then suggested a further valuation be conducted which valuation arrived at a value of Kshs. 200,000/= per acre.

79. That the affected land owners in the area with the exception of the Defendants agreed with the Plaintiff on this value and have since been duly compensated at the said rate.

80. The Plaintiff further submitted that when this project began, the value of the property was Kshs. 200,000/= per acre a fact which was conceded by the Defendants' valuer, Mr. Kanji had when he testified that although the current value of the property was Kshs. 400,000/= per acre, the value of the property as at the time of the offer and initiation of the project was Kshs. 200,000/= per acre which was the rate used to compensate the rest of the affected land owners in the area. The Plaintiff proposed that the same rate be used to compensate the Defendants and as the maxim of equity goes, equality is equity.

81. The Plaintiff submitted that at the initiation of the project, the Defendants demands were way above the value of the property and the principles of compensation in acquisition of way leaves and could not be justified. At that moment valuation had been conducted and the Defendants could not justify their demands.

82. That it was in bad faith for the Defendants to now demand compensation at the current market value while they refused to accept the same when offered to them. The Plaintiff relied on the decided case of **National Land Commission vs Estate of Sisiwa Arap Malakwen & Another [2017] eKLR** where the court found that the rate of compensation ought to be based on the value of the property at the time the initial valuation or project was conducted and not the value of the property at the determination of the suit.

83. They submitted that compensation ought to be a way of mitigating a loss or disadvantage suffered by a party due to the actions of another and not an opportunity for unfair gains and relied on the case of **National Land Commission vs Estate of Sisiwa Arap Malakwen & Another [2017] eKLR**

84. The Plaintiff urged the court to exercise its discretion to find a balance between the actions of organs acting on behalf of the state and in public interest and the rights of its citizens in making its award.

85. That the Defendants had demanded for compensation at the full value of their land even though they would only experience limited loss of the use of the same. That this proposition would greatly undermine the Plaintiff's duty and mandate as it would have to hold unnecessary

land at a great cost to the Plaintiff and the tax payer. That where a person was affected by the actions of a state corporation in the course of its duty that leads to a loss to the citizen, compensation ought to be fair means to recompense the loss and not a means of exploitation.

86. That compensation for way leave acquisition was normally limited to loss of use of land since there was no transfer of title or an outright purchase. As per the letter of offer given to the Defendants, only 60 meters of the property would be affected by the way leave. Which would have translated to 30% of the affected area as stated by the Defence witness DW1. This figure is then multiplied by the total amount of the property and value of the property to arrive at the compensation payable.

87. Reliance was placed on **Prinsal Enterprises Limited v Kenya Electricity Transmission Co. Limited [2018] eKLR** wherein the court found that a land owner is only entitled to compensation to the extent to which they have lost the use of their land and not for the entire property.

88. The Plaintiff drew their tabulation of the proposed amount of compensation as ;

Samburu/Poro B/274

30% * 4.95 acres @ Kshs. 200,000/= Kshs. 297,000/=

Samburu/Poro B/215

30% * 4.35 acres @ Kshs. 200,000/= Kshs. 261,000/=

Samburu/Poro B/142

30% * 0.84 acres @ Kshs. 200,000/= Kshs. 50,400/=

Samburu/Poro B/132

30% * 4.68 acres @ Kshs. 200,000/= Kshs. 280,800/=

TOTAL Kshs. 889,200/=

89. It was further the Plaintiff's submission that the Defendants had also claimed for damages for trespass in their Counterclaim as a result of the Plaintiff's actions. The Plaintiff thus read bad faith in the Defendants' action as this was an afterthought having noted that the Plaintiff was adamant to give compensation for the whole property.

90. That according to the Trespass Act Cap 294 Laws of Kenya, Trespass upon private land is defined as:

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

91. That from the above reading, trespass could only occur where a person enters another person's land without reasonable excuse. The Plaintiff submitted that in view of the negotiations between the parties, no trespass had occurred in this matter. That further, the following the back ground of this matter coupled with their mandate in itself was a reasonable excuse to enter the Defendants' property.

92. That in the alternative and without prejudice to the foregoing, in the event that the court found that trespass had occurred without reasonable or justifiable excuse, the Defendants have not suffered any prejudice from the same. Further the issue of trespass was not specified in the pleadings nor at the hearing. They relied on the case of **Ephraith N. Okwoyo vs. Kennedy Okioga Bwana [2014] eKLR** where Justice Okon'go held that:

“The plaintiff did not place any material before me on the basis of which I can assess general damages claimed. I would therefore not award any general damages to the plaintiff.”

93. The Plaintiff urged the court to dismiss the claim for trespass and to hold that the rate of compensation to the Defendants be based on the value of the property at the time the initial valuation or project was conducted.

Defendants' submission.

94. The Plaintiff's suit was opposed by the Defendants who submitted that upon the Plaintiff having filed their plaint dated 19th July 2017 wherein they had sued the defendants seeking for the four (4) reliefs set out in plaint. They had subsequent to filing their defence, amended the same wherein they had set up a counter-claim dated 21st February 2018.

95. That in the counter-claim, they had sought for payment of specific sums of money as particularized in paragraph 15.

96. The Defendant submitted that from the oral evidence that had been adduced in court, the following issues were not in dispute:-

- (a) 1st, 2nd, 3rd and 4th Plaintiff are the registered proprietors of Land Title Numbers Samburu/Poro B/215, Samburu/Poro B/274, Samburu/Poro B/132 and Samburu/Poro B/142 respectively.
- (b) Through Pexh6 a notice published on the Standard Newspaper of 6th August 2014 a clear copy being annexure “JN2” of plaintiff’s notice of motion application dated 19th July 2017, the suit properties are listed in Nos 23, 30, 34 and 36 as amongst properties which the plaintiff intended to acquire way-leave for purposes of construction of electricity transmission lines.
- (c) The Plaintiff had commenced the construction of the electricity line against which the Defendant resisted seeking compensation.
- (d) Defendants are entitled to compensation the only point of departure being the quantum.

97. That the above points of convergence made the suit before court one which was straight forward, a position further amplified by prayer (a) of the plaint whereby the plaintiff sought for assessment of just compensation payable to defendants. In the application dated 19th July 2017, the plaintiff sought for orders of access to the suit land for purposes of valuation by National Land Commission as can be discerned from prayers 2 ground 4 and paragraph 12 of the supporting affidavit.

98. That the plaintiff had never utilized the access granted to them because no valuation report by National Land Commission had been tendered in court as evidence.

99. That DW1 the valuer –Simon Kanyi had produced as Dexh4, Dexh5, Dexh6 and Dexh7 various valuation reports compiled in respect to the suit properties which evidence was not controverted through a contrary valuation report. Thus the said evidence remained unchallenged.

100. The Defendant submitted that through the evidence of DW1 the site had been visited and a professional valuation of the assessment of the value of land affected by way-leave corridor carried out.

101. That further the value which the plaintiff purported to offer as compensation had been informed by a general valuation which he had carried out at the behest of Plaintiff upon request by the County Commissioner Samburu which general valuation could not override specific valuation

102. The 3rd Defendant, DW2 testified on behalf of the other Defendants, who had executed an authority under Order 1 Rule 13(1) Civil Procedure Rules allowing him to plead on their behalf that indeed the Plaintiff had started work along the way leave corridor before compensating them.

103. They submitted that Article 40 of the Constitution of Kenya guaranteed private citizens a right to ownership of property. That these rights could only be limited in a manner that was consistent to the law and in this case subject to compensation.

104. That the Plaintiff herein craved on the principle of public interest as a justification of forcefully constructing the electricity transmission line through defendants’ land parcels without a way-leave.

105. They further submitted, while relying on an undisclosed authority, that their claim for compensation for value of land was adequately supported by the figures set out on the valuation reports. That the Plaintiff’s contention that compensation should be at the rate of 30% was not supported by any documentary evidence either in form of a valuation report or a formal opinion published by any expert in that field. That the 30% rate could only be said to be based on PW 1’s personal opinion which the court should disregard.

106. The Defendants’ submissions were that the rights to ownership of property as enshrined under Article 40 of the Constitution should be upheld and protected at all times and cannot be violated at whims as the Plaintiff in this case sought to advocate. That Violation of this right as the Plaintiff did should at all times be redressed through an award of general damages and that it was on that note that Defendants sought for general damages.

107. They sought that since they did not have a fast and hand rule when it came to assessment of damages payable for violation of constitutional rights, that in the instant suit, that the court finds that Plaintiff acted with impunity when it constructed a tower and cleared vegetation along the way-leave corridor without the consent from the Defendants.

108. That such a violation ought to be discouraged by awarding punitive and exemplary damages as a deterrent measure.

109. The Defendants sought for an award of Ksh 2,000,000/= as general damages for each Defendant.

110. They also sought for Judgment against the plaintiff for:-

- (a) Monetary compensation as pleaded in paragraph 15 of the counter-claim.
- (b) General damages at the rate of Ksh 2,000,000/= for every plaintiff for trespass and violation of rights enshrined under Articles 40 of the Constitution of Kenya.
- (c) Costs of the suit and the counter-claim.

Analysis and determination

111. I have also considered the parties' respective submissions and the authorities cited in support thereof. What is not disputed is that the Defendants herein are the registered proprietors of parcels of land Title Numbers Samburu/Poro B/215, Samburu/Poro B/274, Samburu/Poro B/132 and Samburu/Poro B/142 respectively (hereinafter referred to as the suit properties). The defendant is a state owned corporation registered under the Companies Act, Cap 486 Laws of Kenya and regulated under the State Corporations Act, Cap 446, Laws of Kenya.

112. The mandate of the defendant is to plan, design, develop, maintain and operate the Republic of Kenya's national electricity transmission grid. In the discharge of its mandate aforesaid, in the year 2013, the Plaintiff was in the process of constructing 436 km, 400 kV Loiyangalani – Suswa Electricity transmission line with a way leave trace for 60 meters wide, which was to traverse several parcels of land including the suit properties herein.

113. On 6th August 2014 the National Land Commission Plaintiff placed a notice in the Standard Newspaper informing the public including the Defendants herein that they would be placing a transmission line through their parcel of land but that details of the compensation would be communicated to the affected persons individually.

114. Subsequently on the 24th October 2014, the Plaintiff wrote to all the Defendants informing them that it was in the process of constructing the said electricity transmission line and that it would require portions of their suit properties for that purpose. The Plaintiff offered to pay the 1st Defendant a sum of Kshs. 130,500/= as compensation for his portion of land measuring approximately 4.35 acres, the 2nd Defendant was offered a sum of Ksh. 148,500/= as compensation for his portion of land measuring approximately 4.95 acres, the 3rd Defendant was offered a sum of Ksh. 140,400/= as compensation for her portion of land measuring approximately 4.68 acres and lastly the 4th Defendant was offered a sum of Ksh. 25,200/= as compensation for his portion of land measuring approximately 0.84 acres lands which were going to be affected by the said transmission line.

115. The Defendants were asked to convey their acceptance vide a written acceptance within 14 days from the date of receipt of the notice.

116. It is on record that the Defendants did not tender in their written acceptance and what followed was a series of meetings wherein the persons affected by the laying of the power line had contested the compensation they had been offered, questioning the manner in which it was put forward and the formula that the Plaintiff had followed in arriving at the same. There were also queries on their safety.

117. According to the evidence adduced in court by PW1, there were further consultations and meetings with administrator of Samburu County where they had negotiated for compensation for the land below Sanguta to somewhere near Baragoi at a valuation of Ksh. 200,000/= but the value was further negotiated for ksh. 250,000/= for the entire stretch of land to avoid discrimination and for the purpose of equity and justice. This proposal was also rejected by the Defendants.

118. On the 25th July 2017 the Plaintiff was granted interim orders, pending the hearing of the same inter-party, for access by its servants and agents as well as the officers of the National Land Commission to land parcel No. Samburu Poro B/125,274,132 and 142.

119. The Plaintiff argued that the electricity transmission towers that they were constructing on the suit properties were intended for the common good of the public and that they were ready, willing and able to pay the Defendants a just compensation as per earlier suggested, for the portions of the suit properties which would be affected by the said way leave.

120. Before the Application could be heard inter-party and while the temporal order was still in force the court was informed that the Plaintiff's employees with the help of security officers had stormed into the suit premises and carried out the exercise of putting up the electricity transmission lines thereby defeating the purpose of the application.

121. The Defendants' case is that notwithstanding the fact that compensation for the portions of the suit properties in respect of which the Plaintiff wanted to acquire a way leave had not been agreed upon, the Plaintiff had proceeded to take possession of the said portions of the suit properties on 1st February 2018, and had carried out the exercise of putting up the electricity transmission lines without the Defendants' consent.

122. The Defendants' stand was that the arbitrary acquisition of the said portions of suit properties by the Plaintiff was illegal and contrary to the provisions of Articles 40 of the Constitution of Kenya 2010. They therefore sought for an order compelling the Plaintiff to pay them compensation as was stipulated in paragraph 15 of their counter-claim. They also sought for general damages of Ksh 2,000,000/= for trespass and violation of Articles 40 of the Constitution.

123. Having summarized the case above, I find the issues for determination as being:

- i. Whether the Plaintiff's entry onto the suit properties and construction thereon of electricity transmission towers was illegal and unconstitutional.
- ii. Whether the Plaintiff is liable to compensate the Defendants in respect of the space taken by the electricity power lines on the suit property.

124. Article 40 (3) of the Constitution provides as follows:-

“(3) The state shall not deprive a person of property of any description, or any interest in; or right over property of any description unless the deprivation –

- a. results from an inquisition of land or a conversion of an interest in land or title to land in accordance with Chapter Five; or
- b. is for public purpose or in the public interest and is carried out in accordance with this constitution and any Act of Parliament that –
 - i. requires prompt payment in full of just compensation to the person; and
 - ii. allows any person who has an interest in; or right over, that property a right of access to a court of law.”

125. Section 144 (1) of the Land Act, provides as follows:-

“Unless the commission is proposing on its own motion to create a way leave, an application, for the creation of a way leave shall be made by any state department, or the county government, or public authority or corporate body to the commission.”

126. As noted from the above captioned provisions, wherein on one hand the Plaintiff herein only required a way leave over the suit properties through which the electricity transmission line could pass on the other hand, the Land Act provides for the procedure through which a way leave is to be acquired.

127. In the case of *Machareus Obaga Anunda v Kenya Electricity Transmission Co. Ltd [2015] eKLR*. Justice S.Okong’o set down the procedure for acquisition of a way leave as follows:

‘Section 144 (4) of the Land Act provides that an applicant for a way leave shall serve a notice of its application for the creation of a way leave to all persons occupying the land over which the way leave is sought, the County Government within whose jurisdiction the land is situated and any other interested person. After service of the said notice, the commission is supposed to publish the application along the route of the proposed way leave. Section 146 of the Act requires the commission to consider all representations and objections received pursuant to the said notices and recommend to the cabinet secretary whether to carry out a public inquiry into the representations and objections or refer the application for the way leave to the county government or to initiate and facilitate negotiations with the persons who have made representations on the application with the applicant with a view of reaching a consensus on the application. The cabinet secretary is supposed to determine whether or not to create away leave after considering as the case may be the recommendation of the commission, or the advice of the county government or the outcome of any negotiations that may have been reached between the applicant for the right of way and those who had made representations or objections. If the cabinet secretary decides to create a right of way, it shall make an order to that effect which order shall among others be published in the Kenya Gazette. Once the order is made, any person who had made representation or objection to the application for the creation of a right of way may appeal against the decision of the cabinet secretary to the court on a point of law.’

128. Section 148 (1) of the Land Act provides as follows

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 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.

129. Section 148 (4) of the Act stipulates that:

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.

130. Section 148 (5) of the Act further states that;

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.

131. In essence this provision gives the person dissatisfied with the compensation offered, to apply to court to determine the amount payable and the method of making payment.

132. From the above provisions, it is clear that the Act has an elaborate procedure to be followed when one wants to create a way leave over private land procedures which were clearly not followed by the Plaintiff herein. A part from the letter dated 24th October, 2014 through which the Plaintiff notified the Defendant of its intention to acquire a way leave over the suit properties through which letter it also made an offer for compensation, as well as the publication of the application for the said way leave, there was no other evidence adduced in court that the other procedures in Section 148 of the Land Act were followed. Further there was no evidence placed before me confirming that the Cabinet Secretary had made an order creating a way leave in favor of the Plaintiff.

133. I find that no way had leave been created in favor of the Plaintiff as provided by law and no compensation was paid to the Defendants.

That even if a way leave had been lawfully created, which is not the case here, constitutionally speaking, it was imperative that the Plaintiff first compensates the Defendants.

134. On this basis, I am satisfied that the Plaintiff's entry and laying of electricity power lines on a portion of the suit properties herein was illegal and unconstitutional.

135. Having found so, the other 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 Plaintiff lay on the suit property.

136. It was not in dispute that compensation has not been made which is in contravention of **Article 40 (3) of the Constitution**. That Despite nonpayment, the Plaintiff moved on the suit land and constructed the power lines thereon.

137. However, Looking at the documents adduced as evidence herein, it is clear that the parcels of land to be affected by the transmission lines were published and the Defendants notified on the offer on compensation of Ksh. 100,000/= per acre which offer was disputed and the Plaintiff raised it to Ksh. 250,000/= per acre which offer was still rejected thus giving rise to the present suit.

138. It is important to point out here that this was not a compulsory acquisition as known in law but rather a way leave trace which affects the Defendants' 14.82 acres. This being a public right of way, the Section governing its creation is Section 143 of the Land Act through the National Land Commission. Section 143 (2) defines the public right of way as follows;

“A public right of way may be –

(a) a right of way created for the benefit of the National or county government, a local authority, a public authority, or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions referred to in this Act as a way leave; or

(b) a right of way created for the benefit of the public referred to in Section 145 if this Act as a communal right or way.

139. And according to Section 145 sub-section 4;

“A way Leave shall authorise persons in employment to or who are acting as agents of or contractors for any of the organizations, authorities and bodies to enter on the servient land for the purpose of executing works, building and maintain installations and structures and in setting all such works, installations and structures on the servient land and to pass and re-pass along the way leave in connection with purposes of those organizations, authorities or bodies.”

140. From the above provision, the Plaintiff's agents are allowed to enter the servient land and undertake construction of power lines and indeed, construction of the power lines has been done.

141. It is also clear that the Plaintiff's last offer for compensation as at 26th January 2017 was of Ksh. 400,000/= per acre at 40% for the way leave, up from ksh. 250,000/= that was agreed after the negotiations by the local people. There was no valuation report adduced as evidence in court by the Plaintiff.

142. The Defendants say that it is inadequate and have attached valuation reports by their valuer Artex Realtors Limited wherein the property was valued on 18th November 2017 showing the value of the portion of the land affected by the power lines to be Ksh. 2.2 Million for the 1st Defendant, Ksh. 2.1 Million for the 2nd Defendant(valued on 1st December 2017), Ksh at 3.2 Million for 3rd Defendant and Ksh. 1.2 Million for the 4th Defendant's use of land.

143. This wide difference in the compensation gives rise to the question of how much the Defendants should be paid for use of their land. My understanding of the whole suit is that it is really on the amount payable as compensation and not the creation of a way leave on his land.

144. The Defendants have also sought for general damages of Ksh 2,000,000/= for every Defendant for trespass and violation of Article 40 of the Constitution.

145. **Section 148(5) of the Land Act provides as follows:**

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.

146. The Defendants called their first witness DW 1 a registered valuer working with the Ministry of Lands who produced Valuation reports to all the suit lands wherein he was of the view that the open market value of the suit properties to be utilized by the Plaintiff would total to Ksh. 2.2 Million for the 1st Defendant, Ksh. 2.1 Million for the 2nd Defendant(valued on 1st December 2017), Ksh at 3.2 Million for 3rd Defendant and Ksh. 1.2 Million for the 4th Defendant's. On the other hand the Plaintiff has offered the Defendants a sum of Ksh. 400,000/- per acre

147. Keeping in mind that the laying of the power lines does not take away the Defendants' land, but only restricts the Defendants from growing trees/crops which exceed twelve feet from the ground or putting up structures which constitute a hazard to the electric line or occupier within the trace area of the power line. Further, that this was not a compulsory acquisition and therefore the Plaintiff is not purchasing the suit lands, it would therefore appear to me that an average value would be a reasonable value of the said portion of land.

148. I have considered the fact that the last offer for the compensation at Ksh 400,000/= per acre was floated by the Plaintiff in the year 2017. I have also considered the assessment report on the trees, from Kenya Forest Service regarding the suit lands. To this effect I enter judgment in favour of the Defendants for compensation for loss of land and trees as follows:

i. Loss of 4.45 acres from Land Title No.

Samburu/Poro B/274 owned by

2nd Defendant Kshs. 1,900,000/=

ii. Loss of 5.19 acres from Title No.

Samburu/Poro B/215 owned by

the 1st Defendant Kshs. 2,050,000/=

iii. Loss of 4.69 acres from title No.

Samburu/Poro B/132 owned by

the 3rd Defendant Kshs. 2,400,000/=

iv. Loss of one (1) acre from Title No.

Samburu/Poro B/142 owned by

the 4th Defendant Kshs. 800,000/=

v. Trees to be cleared within the corridor Kshs. 178,198/=

Total Kshs. 7,328,198/=

149. Having found that the Plaintiff violated the Defendants right as enshrined in Article 40 (3) (b) of the Constitution, I herein award each Defendant Ksh. 100,000/=.

150. In effect therefore the Plaintiff's prayer (i) succeeds as court has made an assessment of just compensation payable to the Defendants.

151. Prayer (ii) of the plaint fails due to the fact the same was overtaken by events that took place on the 1st February 2018, when the Plaintiff's employees with the help of security officers stormed into the suit premises and carried out the exercise of putting up the electricity transmission lines. Unless there is some pending work to be done to which effect and upon payment of compensation, there shall be a Permanent injunction against the Defendants either by themselves, their agents, employees from interfering with the works of the Plaintiff and/or attacking the servants and agents of the Plaintiff on the suit properties

152. I am unable to enter Judgment against the Defendants for the losses incurred to the Plaintiffs due to the disruption of the construction of the power lines because the Plaintiff has not placed any material before me on the basis of which I can assess the loss so claimed.

153. Accordingly, judgment is entered in favour of the Defendants in their counter-claim in the sum of **Kshs. 7,728,198/-** to be paid by the Plaintiff within 45 days from the date of delivery of this judgment.

154. Costs to the Defendants.

Dated and delivered at Nyahururu this 29th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE