Musungu & 8 others (Suing on their own behalf and on behalf of 208 as per the attached list marked schedule A) v Kenya Electricity Transmission Company (Environment & Land Petition 24 of 2021) [2024] KEELC 930 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 930 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT & LAND PETITION 24 OF 2021

LG KIMANI, J

FEBRUARY 22, 2024

FORMERLY MACHAKOS CONSTITUTIONAL PETITION NO. 4 OF 2017

BETWEEN

DANIEL MUTHUI MUSUNGU ..... 1ST PETITIONER

JAMES NZOMO MWASYA ..... 2ND PETITIONER

DARIUS MUTHUI MWASYA ..... 3RD PETITIONER

PATRICK MUUKULU NZUKI ..... 4TH PETITIONER

FRANCIS KILONZO MUTYANZEI ..... 5TH PETITIONER

CHARLES MUSEMBEI NZAMBII ..... 6TH PETITIONER

MUSINGILA MUSILI NGANDA ..... 7TH PETITIONER

MASAKUI MWANGANGI ..... 8TH PETITIONER

DENIS MUSOMBA NGUI ..... 9TH PETITIONER

SUING ON THEIR OWN BEHALF AND ON BEHALF OF 208 AS PER THE ATTACHED LIST MARKED SCHEDULE A

AND

KENYA ELECTRICITY TRANSMISSION COMPANY ..... RESPONDENT

JUDGMENT

1. The petitioners herein filed the amended petition dated 12th January 2017 and amended on 5th November 2019. They bring the petition on their own behalf and on behalf of other claimants named

in the Consent/Authority filed. The petitioners claim that they were proprietors of various parcels of land situated in the Mwingi Sub-County of Kitui County.

2. The Respondent is a State Corporation with the mandate to construct, operate and maintain the National Electricity Transmission Grid under which mandate it erected an electricity transmission line known as the Kindaruma-Mwingi-Garissa 132KV Transmission line.

3. In the course of erecting the electricity transmission lines, the Respondent is said to have created a wayleave trace 30 meters wide running across the Petitioner's properties. It is claimed that through the creation of easement rights, the Respondent paid compensation to the Petitioners and in the process their properties were undervalued. They complain that the Respondent paid some of them while in some instances, they did not pay any compensation. In other instances, they falsified documents to reflect amounts over and above what was paid.

4. The Petitioners aver that the amounts awarded were extremely low and consents/agreements entered into with the Respondent are reversible and can be avoided on account of the principles and or doctrines of inequality of bargaining power; illegitimate economic duress; unconscionable bargain; inequality of parties; unconscientious use of power; abuse of trust and confidence; breach of fiduciary duty; breach of public policy and fair play; constructive fraud and violation of standards of commercial morality.

11. The Petitioners set out particulars of their claim and stated that they are vulnerable peasant farmers and the Respondent took advantage of their status and financial need to unduly influence the terms of the agreements. They stated that the majority of the Petitioners are unemployed and poor, and not knowledgeable in matters of easements, wayleaves, valuation and compensation.

12. As a result of their poor financial position the Petitioners could not afford an independent valuation of their properties and their protests on compensation were met with threats. The Respondent used security personnel to intimidate and coerce the Petitioners.

13. They further claim that the Respondent enjoys a position of monopoly, influence and ascendency over the Petitioners and used the Provincial Administration to intimidate and eventually defraud them.

14. The Petitioners have now undertaken an independent valuation and claim a total sum of Kshs. 247,385,989/-.

15. The Petitioner's claim against the Respondent is in respect of violation and or for compensation for violation of their right to property under Article 40, right to fair administrative action under Article 47 right to equal protection by the law under both Article 27 and 50 of *the Constitution* and pray for:-

    i. A declaration that the agreements to pay the Petitioners the sum paid to them as compensation on account of the wayleave trace that traversed their properties is null and void.

    ii. A declaration that the Respondent violated the Petitioners' rights under Articles 27, 40, 47 and 50 of *the Constitution*.

    iii. An order that a reputable valuation company be appointed by the court and sanctioned to undertake a valuation of the Petitioner's properties for compensation. The Respondent is to meet the cost of the said exercise.

    iv. An order for compensation of each of the Petitioners as per sums and or valuation particularized under the list marked Schedule A attached herewith, the total sum being Kshs. 247,385,989/-

v. A mandatory injunction directed at the Respondent to pay the Petitioners as per valuation by the independent valuation report.

vi. General damages.

vii. Costs of the suit.

The Respondent's Replying Affidavit

16. The Respondent opposed the petition and filed a replying affidavit sworn by Ms. Edel Loko an Assistant Land Economist working for the Respondent. She stated that the Respondents' mandate is to build, operate and maintain high-voltage electricity lines connecting different parts of the country to the National Grid. In fulfilling its mandate, the Respondent erected and energized an electricity transmission line known as Kindaruma-Mwingi-Garissa 132KV traversing the Petitioners' parcels of land among others.

17. She averred that the Respondent followed the provisions of the Wayleaves Act, Land Acquisition Act, Registered Lands Act and *Energy Act* 2006 (all now repealed) and acquired the right of way but did not compulsorily acquire the petitioner's land. She stated that the project began on or about the year 2010 with the acquisition of the Environment Impact Assessment License and was completed on 12th May 2016 and thereafter energized. She further stated that the project followed the Kindaruma-Mwingi-Garissa 132kv Transmission Line Resettlement Action Plan and carried out a Public Consultation Process between October and December 2009.

18. Further, the project was subject to the Respondent's Resettlement Policy Framework dated 25th October 2011 and the Petitioners voluntarily committed to abide by the Respondent's rules and regulations on compensation which provided for reparation for limited loss of use of land and is normally set at 30% of the market value of the affected land area. She further stated that the land owner is only prohibited from planting trees/crops that at maturity exceed 12 feet and from erecting buildings or any form of structure under the wayleave trace.

19. She deposed that the Petitioners who had structures or crops/trees on their land were issued with a Structure Valuation Form and a Property Damage Form and that all the Petitioners who had any structure or crops/trees were fully paid. She denied falsification of any document and stated that the Respondent conducted independent valuations to determine compensation payable. She claimed that the date of the valuation report is the project cut-off date and land owners are not allowed to conduct any further valuations after that to prevent creating disputes on claims.

20. The compensation payable is calculated following its Resettlement Policy Framework (RPF) which policy is explained to all affected land owners through barazas held before the project begins.

21. She stated that the creation of easements and subsequent compensation package was based on a valuation report by an Independent Registered Land Valuer by the name of M/s CASTY MBAE dated 13th March 2014, and the said valuation was available to the Petitioners on request and was inspected by the Petitioners and other affected persons throughout the acquisition and no objection was raised.

22. She stated that the Respondent provided proof of payment to the Petitioners once they executed an easement agreement and they all granted the Respondent right of way over their lands by executing easement agreements. Further, the Petitioners who have not been compensated are those who are yet/have neglected to collect their cheques; and those who are yet to provide their bank details. The Respondent further stated that the Easement Agreements signed stipulate that any dispute

regarding the acquisition or compensation for the easement acquired can only be determined through Arbitration.

23. The Respondent also objected to the petition by raising a preliminary objection on the ground that Petitioners no. 11, 28, 60, 62, 98, 112, 127, 130, 138, 144, 159, 184, 186 and 205 in the Petitioners' schedule A are not affected by the transmission line as they do not exist in the Respondent's data and that the said nine Petitioners lack Locus Standi to sue on behalf of some of the Petitioners in schedule A who have not authorized them to sue on their behalf.

24. The Respondent further stated that the areas to which this petition relates have very few settlements and that considering the land terrain, the prevailing socio-economic activities and other factors, the Petitioners' properties were not undervalued.

25. It was further stated that the Petitioners willingly and without any duress accepted the wayleave compensation offer and submitted all requisite documents leading to compensation and they did not come up with any different valuation. The Petitioners' valuations were conducted in an attempt to obtain more money from the Respondent six (6) years after the project cutoff date of April 2010 and four (4) years after they granted the Respondent easement over their lands and were duly compensated for the same.

26. She stated that Section 6(2) of the Wayleaves Act Cap 292, operational at the time, stipulated the procedure to address the issues of compensation in the event of disagreement and that a Central Resettlement Committee was established to allow affected people to voice concerns about the resettlement and compensation process which was provided for under the Resettlement Action Plan.

27. She stated that the Petition was an afterthought and there was an inordinate delay and that the petition as framed and pleaded is fatally defective for failure to comply with the provisions of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

EVIDENCE AT TRIAL

28. The Petitioners called three witnesses while the Respondent called one witness.

29. PW1 Peter Kitaka Kimeu stated that he was a practising valuer with Clayton Valuers. He was instructed in 2019 by the Petitioners herein and others from Sosoma Ranch who claimed that the Respondent had created a way-leave over their land and they were not satisfied by the compensation paid. They requested an independent valuation of their properties. The Petitioners were in two groups the 1st being the Ngume groups stretching from Sosoma Ranch to River Mwania while the 2nd group stretched from River Mwania to Mwingi town. He stated that he carried out the valuation of the Petitioner's properties and produced the reports made in four volumes.

30. Upon cross-examination the witness was put to task on his understanding of the difference between compulsory acquisition of land and acquisition for purposes of creation of a way-leave and in the end, he stated that according to him they were the same. He confirmed that some of the valuation reports did not contain the value of the entire land. He further confirmed that he did not have evidence of the comparables used.

31. He also stated that his valuation included the value of land, trees and disturbance allowance. He confirmed that he was told that the Petitioners were not paid and that he was not aware that there was an agreed method of compensation. He further stated that he did not contact the Respondent while carrying on the valuation since the matters herein were adversarial.

32. The witness was referred to the valuations filed for several of the Petitioners including Sosoma Ranch, Titus Mwandikwa Mutunga and photographs of some of the properties. He stated that when it came to the loss of houses he relied on information given by the Petitioners. He did not get receipts for the construction of the said buildings but stated that the profession has rates that they use for different construction provided by the Ministry of Public Works. He also stated that where the Petitioners had been compensated he did not discount from the valuation the amounts paid.

33. On re-examination, he stated that the acquisition of way-leaves is carried out under the Land Acquisition Act and the acquiring entity is supposed to re-instate the person to the position he was in before the acquisition. They also pay for disturbance and inconvenience caused.

34. PW2 James Nzomo Muasya testified on his own behalf and on behalf of the other Petitioners. He adopted his witness statement dated 19/1/2023 and produced in evidence the documents filed. In the statement, he reiterated the claim as contained in the petition and summarized above. He stated that the Petitioners are vulnerable peasant farmers, with no source of income and little to no education and the Respondent being aware of this took full advantage to unduly influence the terms of the agreements.

35. They were unable to procure the services of an independent valuer at the time of entering into the agreements with the Respondent and as a result, the Respondent under-valued their land, trees, crops and property and paid very minimal compensation, while some Petitioners were not paid at all. Some houses and crops were damaged in the course of acquisition and no compensation was paid.

36. They procured the services of an independent valuer M/s Clayton Valuers Limited, who conducted valuation of their land, trees, improvements and disturbance therein. The said valuation was backdated, giving the market value as at the time of the transactions with the Respondent. The valuation revealed that the Respondent had undervalued their land, crops and improvements therein and the value of the properties for purposes of compensation amounts to Kshs. 247,385,989/- less any sums which may have been paid if any.

37. When testifying in court the witness confirmed that the Respondent put up electricity posts on his land. He made contradicting statements that he was not paid very well and he was not paid at all. He stated that his land was small and that 30 meters were taken and a further 60 meters on both sides of the poles and wires where they were told to stay away from that space totalling 150 meters that they were not to use. He testified that he had two parcels of land and was left with only 4 meters of land on both sides for building and cultivation. And he had to move out to another parcel of land yet he was not compensated.

38. He claims that he and other Petitioners ought to be compensated for land, trees, and crops. He stated that he had done terraces and they were not computed in the compensation. He further stated that the Respondent did not follow the law and violated the Petitioner's rights.

39. Upon cross-examination, he stated that he was not paid any money. When referred to certain documents he confirmed that he was paid a sum of Kshs. 263,310 which he signed for, he also confirmed that there were documents that showed that the 1st Petitioner was paid and he signed for the payment.

40. He also stated that he only signed for the land and did not sign when he was paid. He insisted that even though there was a letter dated 25th March 2015 which the 1st Petitioner signed, he was not paid. He confirmed seeing an agreement for a grant of easement for one Darius Muthui which he signed showing that he was paid. The witness was shown copies of cheques and several lists of people he knew who were paid from cheques. These were attached to the Respondent's replying affidavit.

41. He further stated that the Respondent entered their land by force and started clearing bushes and they were assisted by police, chief and sub-chief. There was also the area MCA, Governor, Senator and MP and thus they did not complain to any of their representatives because they were part of the process. He also stated that the money was sent to him after three months and he accepted the payment and did not return it.

42. He stated that he did not know that he could use the land acquired so long as crops were not high and, in his view, where the poles passed through, the land belonged to the Respondent.

43. PW3 Charles Musembi Nzambi adopted his statement dated 19th January 2023 and produced in evidence the documents filed in court. In the statement, he reiterated the claim as contained in the petition and summarized above and further stated that during the whole exercise, any complaint raised by the petitioners was met with threats that no compensation would be paid and that their land would be taken forcefully and security personnel and area Chiefs were used to intimidate and coerce us throughout the entire transaction.

44. He confirmed that he was paid by the Respondent the sum of Kshs. 432,000 for the portion of his land taken measuring 15.4 acres but payment was for 14.129 acres. He claims that they paid for land only but did not pay for the trees and crops. He confirmed that the land taken was 30 meters on which they were not to plant crops taller than 12 feet or put up houses. And also, the portion measuring 60 meters on the side of the lines.

45. He testified that when the Respondent put up the poles they did not involve them but were accompanied by sub-chiefs who said that they were government people who had work to do. He stated that the Petitioner claimed that their land was undervalued and some of the Petitioners were never paid.

46. Upon cross-examination, he stated that the people not compensated were from Sosoma Ranch, Mutunga Kimwele, Philip Nzomo and others as contained in the documents filed in court. He confirmed that the way-leave trace as shown on the many documents on record was 30 meters and not 60 meters.

47. The Respondent's case proceeded on 6th March 2023 DW1 Ms Edel Loko testified and relied on the replying affidavit sworn by Johnson Muthoka on 17th July 2017 and her replying affidavit sworn on 30/6/2020 and the attached documents as her evidence in chief. The contents of the said witness' affidavit are summarized above.

48. She confirmed carrying out the valuation of all the properties subject matter of this petition though the initial valuation was done by one Casty Mbae who gave a list of all affected parcels of land and was the one who did the valuation for each section/zone and for each parcel. She stated that the allegations of undervaluation were not true. She further confirmed on cross-examination that a survey was done for each parcel, pegs installed and a cadastral map prepared showing the location of the land.

49. She stated that the Respondent carried out public participation and met members of the public. The said members of the public had also been sensitized on the project during preliminary work which was done in 2009 and the Resettlement Action Plan (RAP) had evidence of this.

50. She testified that the Respondent did not refer to the National Land Commission or the Cabinet Secretary and there was no gazette notice as the preliminary work was done before the enactment of *Land Act* 2012.

51. The witness further explained the difference between compensation for land acquisition and wayleaves where for wayleaves one is paid 30% of the value of the land for loss of use of land while one is paid

100% for acquisition. She confirmed that the Petitioners were given agreements for grant of easements after accepting and signing a letter of offer and providing all documents. The letter of offer was given after preliminary work and the said letter was not take it or leave it letter but one was given 14 days to consider whether to accept or not.

52. The witness further confirmed that the wayleave trace was 30 meters wide and the same was measured from the centre line. She denied that the Respondent created 4 easements under the *Land Act*. She further confirmed that the parties had never undertaken arbitration over the dispute and the agreement provided that there would be no further compensation.

53. The witness confirmed that the petitioners whose trees were destroyed were paid and a list is attached and cheque numbers provided but she did not have a list of people whose structures were destroyed. That the rates used for crops damaged were from Kenya Forestry Research (KFS) and that the people being compensated knew of the rates used since meetings were held to explain. She stated that the petitioners who were not paid were the ones who did not go to collect their cheques.

54. She stated that there were no complaints of undervaluation and none of the petitioners rejected the money paid and complaints only came in the petition.

Petitioners' Written Submissions

55. Counsel for the Petitioners submitted that *the Constitution* and the *Land Act* 2012 dictate that where the State, National or County Governments or any public authority desires to deprive any citizen use of private property, it must be done in compliance with the law and it must make a just compensation under Article 40(3)(b). It is their submission that the acquisition of a public right of way in terms of a wayleave trace traversing the petitioners' properties forced the petitioners to enter into unconscionable contracts for compensation, while some of them were not compensated. The Petitioners seek to vitiate the compensation agreements between them and the respondent.

56. Regarding the constitutional threshold of the Petition, the petitioners submit that they have specifically pleaded at paragraph 4 of the Petition and have identified Articles 27, 40, 47 and 50 of *the Constitution* as having been violated by the respondent. They cited the case of Kefa Nyaga Kariuki v. Office Commanding Station Kikuyu Police Station & 3 others: Welton Kibiwott Tubei(Interested Party)(2022)eKLR. They also relied on the case of Sella Rose Anyango v Attorney General & Others (2021) eKLR on the same requirement.

57. On the matter of locus standi, counsel quoted from Article 22 of *the Constitution* on the right of any person to institute court proceedings claiming a right or fundamental freedom and relied on the case of Otolo Margaret Kanini vs Attorney General & 4 others (2022) eKLR where it was held that Articles 22 and 258 of *the Constitution* are anchor provisions on locus standi for constitutional petitions.

58. In respect of commercial or financial interests, counsel for the Petitioners submitted that the Petition complies with the provisions of Order 1 Rule 13 of the Civil Procedure Rules and/or as a representative suit under Article 22. They relied on the cases of Moses Onchiri Kenya Ports Authority & 4 Others (2017) eKLR and Evans Makoro & 32 members of the County Assembly of Kisii-vs Kisii County Assembly Service Board & 2 others (2017) eKLR.

59. On the issue of whether the compensation agreements are voidable or void, it was submitted that the agreements were against public policy on account of illegality, citing Article 40(3)'s provision on prompt payment in full and of just compensation when the state deprives someone of a property right.

60. Counsel quoted Sections 144 and 146 of the *Land Act*, 2012 on the procedure of creating a wayleave and Section 148 on compensation, the Petitioners submitted that the Respondent admitted they did

not follow the laid down procedure under the aforesaid sections of the Land as none of them make reference to the National Land Commission or application for a wayleave.

61. In view of this, the Petitioners submitted that the actions of the Respondent were in clear breach of the statute and are therefore against public policy and accordingly, the action and resultant contracts are capable of avoidance, relying on the holding in the case of Glencore Grain Ltd vs TSS Grain Milers (2002) 1KLR 606 and the case of Cornroad Construction Company (2020) eKLR. The Petitioners also cited the cases of Machareus Obaga Anunda-vs- Kenya Electricity Transmission Co. Ltd (2015) eKLR and the case of Kenya Electricity Transmission Co. Ltd-vs Lpeton Lengidi & 3 Others (2018) eKLR where the courts held that since the *Land Act* has an elaborate procedure to be followed in creating a wayleave.

62. Further, the Petitioners submitted that the valuation report that was the basis for compensation cannot be said to be a true valuation report since it does not indicate when the properties were inspected, the kind of services found in the property, the user of the land, the type of soil, the land use, whether there are improvements or not, the crops or the trees within the land, the terms of reference, limiting conditions if any and does not disclose the amount of compensation for each person. They also pointed out discrepancies in calculating the amounts awarded. On this matter, they relied on the case of Tennyson Nyinge Chilyalya & 60 Others V. Kenya Electricity Transmission Company Ltd (2020) eKLR.

63. The Petitioners also submitted that there was a lack of public participation since the documents in the Resettlement Action Plan had no evidence of any minutes or list of persons who attended the meetings held and the one meeting that was held in Mwingi town cannot be said to amount to meaningful public participation while relying on the cases of Robert N. Gakuru & Others-vs-Governor, Kiambu County & 3 Others (2014) eKLR and Justice Mrima's Richard Owuor & 2 Othersvs Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives & 7 Others (2021) eKLR and the case of Mui Coal Basin Local Community & 15 Others & 15 others v. Permanent Secretary Ministry of Energy & 17 Others (2015) eKLR where the three-judge bench of the High Court held that a public participation program must show intentional inclusivity and diversity.

64. The other issue that the Petitioners submitted is that the Agreements in question were entered into through coercion, intimidation, undue influence and duress, stating that the signing of the agreements was done in the presence of security officers and the provincial administration.

65. Further, the petitioners are poor and ignorant peasants who could not appreciate the legal processes of acquisition of a way leave and that no appeal mechanism was set up to deal with objections and/or disputes relating to the violations as alleged by the Respondent.

66. The Petitioners submit that there was proof of the agreements having been entered through undue influence, duress, or unconscientious use of power and on account of the inequality of the parties, the agreements are voidable and relied on the case of CIS v Director Crawford International School & 3 Others (2020) eKLR.

67. The Petitioners also submitted that the agreements amount to unconscionable contracts as they quoted from the cases of LTI Kisii Safari Inns Ltd & 2 Others v Deutsche Investments Und Enwicklungsgellschft ('Deg') & Others (2011) eKLR and other cases

68. The other element that the Petitioners have submitted is that there was constructive fraud where a party withholds relevant information from a weaker party to have a contract signed, relying on the holding in the case of Kaniki Karisa Kaniki v Comercial Bank Ltd & 2 Others (2016) eKLR.

69. Quoting from Article 47 of *the Constitution* of Kenya (2010), the Petitioners submit that the Respondent was obligated to hear the petitioner in relation to any matter or issue that may have been involved before arriving at its impugned decision and submit that this right was violated.

70. Counsel for the Petitioners made 7 categories of the Petitioners who were never compensated at all, those whose documents were falsified and those who were not fully compensated owing to undervaluation.

71. Further, they submitted that there was a property damage report produced by the Respondent that showed the trees or crops damaged in the respective petitioner's property but the valuation schedule only gives the value of the land but not the value for crops, vegetation and trees that were damaged.

72. It is therefore the Petitioners' submission that the Respondent has deliberately failed to provide to the court a clear and true account for the actual payments made and that the documents produced are only schedules of purported payments relating to some petitioners and other persons other than the petitioners.

73. Regarding undervaluation, the Petitioners challenged the Respondent policy of awarding 30% of the value of land for wayleave submitting that the *Land Act* 2012 does not provide for any applicable formula in valuation and the Petitioners submit that compensation ought to be 100% of the value of the affected land.

74. On general damages, the Petitioners relied on the Lpeton Lengidi case where the court determined the general damages for violation of the petitioners' right at Ksh.100,000.00 per petitioner where general damages was awarded at Ksh.150,000.00 for violation of constitutional rights, which sum the petitioners propose.

The Respondent's submissions

75. Counsel for the Respondent submitted that the Petition offends the doctrine of constitutional avoidance and quoted Section 13 of the *Environment and Land Court Act* on this court's jurisdiction and stated that the Petitioners' claim is a simple quest for monetary compensation disguised as a Petition. They relied on the cases of Emmanuel Nyongesa & 34 Others v. County Government of Trans Nzoia(2021) eKLR, Cod & Another-vs Nairobi City Water & Sewerage Company (2015) eKLR and the case of Eric Kiprotich Soi & Another-vs Director General Nairobi Metropolitan Services (2022) eKLR.

76. The Respondent also submitted on the doctrine of exhaustion stating that where there is a clear procedure for redress of any grievance prescribed by *the Constitution* or the Act of parliament, that procedure should be strictly followed and relied on the case of the Speaker of the National Assembly-vs James Njenga Karume (1992) eKLR where this principle was cited as well as the cases of Vitalis Ouma Osan-vs Kenya Power & Lighting Company Limited (2021) eKLR and Abidha Nicholus vs Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 Others (Interested Parties) (2021)Eklr.

77. Relying on the Court of Appeal's holding in the case of Abidha Nicholus-vs- the Attorney General & Others eKLR, the Respondent submits that the initial dispute should have been presented to the former Energy Regulatory Commission before the matter escalated to the Energy Tribunal and then subsequently to the Court as the third tier. They quoted from the *Energy Act* Number 12 of 2006 (repealed) Section 6 on the former Commission's power to investigate complaints or disputes between parties and Section 26 on appeals to the Energy Tribunal.

78. The Respondent also submits that the doctrine of freedom of contract dictates that a court cannot re-write the terms of a contract between parties to it and quoted the case of Githunguri Dairy Farmers Co-operative Society Ltd-vs- Attorney General & 2 Others (2016) eKLR and National Bank Kenya Limited vs Pipeplastic Samsolit (K) Limited & Another (2001)eKLR.

79. Regarding the allegation of coercion, the Respondent submits that there was no coercion because there was the consent of the Petitioners and offers were not made on a take it or leave it basis and they were not overly one-sided or harsh and therefore were not unconscionable but they were commensurate to the value of the easement. They relied on the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling).

80. On whether the Petitioners are entitled to the reliefs sought, the Respondent submits that the *Land Act* 2012 was not the applicable law at the time of the Wayleave acquisition since the process commenced in 2010 when the then applicable statutes were the Wayleaves Act CAP 292, the Land Acquisition Act CAP295 and the Registered *Land Act* and the *Energy Act* of 2006.

81. Quoting Section 47(1)(b) of the *Energy Act* of 2006 which was repealed by the *Energy Act* of 2019, the Respondent submitted that there was a time limit of three months after the construction of the electric supply line within which to claim compensation.

82. The Respondent also submits that the Amended Petition does not contain violations of Sections 144, 146 and 148 of the *Land Act* and that it is an issue raised in submissions but was not pleaded. Counsel submitted that parties are bound by their pleadings as held in Elizabeth O. Odhiambo-vs South Nyanza Sugar Co. Ltd (2019) eKLR.

83. Regarding the prayer for a fresh valuation, the Respondent submits that this comes 10 years after the project cutoff date, in contravention of Section 4(2)(b) of the Land (Assessment of Just Compensation) Rules 2017 under the *Land Act* submitting that it contemplates that valuations are to be based on the value of the properties as at the date of notice of intention to acquire.

84. On the mode of valuation at 30% of the value of the land for an easement, it was submitted that this has been widely accepted by the Courts and cited the case of Kenya Electricity Transmission Company Limited-vs-James Kinoti M'twerandu (2018) eKLR and the case of Dobbin Mutiso Ndolo-v-Kenya Kenya Electricity Transmission Company Limited(2020)eKLR where this was applied.

85. It was also submitted that the Petitioners freely and willfully contracted with the Respondent who were afforded ample time to raise any concerns when the Respondent held 5 consultative meetings with them. It was also submitted that there was no evidence of the use of force in compelling the Petitioners to contract with the Respondent.

86. Counsel for the Respondent also submitted that they did not acquire proprietary rights over the Petitioners' parcels of land through compulsory acquisition since there was no cancellation of title or taking possession of the land but only created an easement as they quoted Section 138(2) of the *Land Act* 2012 that there is no claim for total loss of use of land.

87. Commenting on the Valuation filed by the Petitioners which was prepared by Clayton Valuers Limited, counsel for the Respondent submitted it was prepared based on compensation for compulsory acquisition. Further, the Valuation does not disclose the values of the properties at the time of taking their offers, does not specify whether the assigned values of the properties were based on comparable market, income or cost valuation approach and does not disclose how the value of the trees and the

buildings was arrived at. The Respondent therefore submits that the Valuations by Clayton Valuers were merely speculative but also exaggerated and therefore unreasonable in the circumstances.

88. On whether the Petition has proven violation of the Petitioners' rights under Articles 27, 40, 47 and 50 of *the Constitution*, the Respondent submits that there was no infringement on the right to property and the Petition as filed does not meet the threshold for constitutional petitions as set down in the case of Sella Rose Anyango v Attorney General & others (2021) eKLR.

89. On the claim that their right to fair administrative action was infringed, the Respondents stated that the Petitioners failed to voice any concerns to the Central Resettlement Committee at the time.

90. Counsel for the Respondent also was of the opinion that prayers v and vi should have been pleaded in the alternative as granting the two together would result in an absurdity.

Analysis and Determination

91. The Court has considered the petition herein and the replies thereto, evidence at the trial, submissions and authorities cited and the issues drawn by Counsel for the Parties. The Court considers the following as the issues arising for determination.

    i. Whether the (9) petitioners have locus standi to bring the petition on behalf of the other petitioners;

    ii. Whether the petition offends the doctrine of Constitutional avoidance;

    iii. Whether the petition offends the doctrine of exhaustion;

    iv. Whether in creating a public right of way and/or way-leave over the petitioner's properties the Respondent violated the law;

    v. Whether the compensation agreements between the petitioners and the respondent in respect of compensation are valid or the same are voidable and or void;

    vi. Whether the Petitioner's Constitutional Rights were violated

    vii. Whether the petitioners are entitled to the reliefs sought

i) Whether the (9) petitioners have locus standi to bring the suit on behalf of the other petitioners;

92. The Respondent challenged the petition on the ground that the nine petitioners on the face of the petition lack locus standi to sue on behalf of some of the Petitioners listed in the schedule attached to the petition since they have not signed an authority to sue on their behalf.

93. Article 22 of *the Constitution* of Kenya gives every person the right to enforce the Bill of Rights by instituting court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated infringed, or threatened. The article goes on to state that;

    (2) In addition to a person acting in their interest, court proceedings under clause (1) may be instituted by--

        (a) a person acting on behalf of another person who cannot act in their name;

        (b) a person acting as a member of, or in the interest of, a group or class of persons.

        (c) a person acting in the public interest; or

        (d) an association acting in the interest of one or more of its members.

94. The procedure for instituting a constitutional petition is guided by the provisions of Article 22(3) of *the Constitution* and under Article 23(3), the Chief Justice is enjoined to make rules inter alia establishing court proceedings which satisfy the criteria that the rights of standing are fully facilitated and formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum. In particular, the court is obliged, if necessary, to entertain proceedings on the basis of informal documentation. The said Article further provides that while observing the rules of natural justice, the court is not to be unreasonably restricted by procedural technicalities.

95. The Rules envisaged above were promulgated as *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the same provided that a person acting as a member of, or in the interest of, a group or class of persons has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

96. The court finds that the petition herein fits the description envisaged under Article 22 of *the Constitution* and Rule 4 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

97. Rule 4 repeats the provisions of above Article 22 and provides that where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated, infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to the rules and that a petition may be instituted by—

    a. a person acting on behalf of another person who cannot act in their own name;

    b. a person acting as a member of, or in the interest of, a group or class of persons;

    (c) a person acting in the public interest; or

98. In the present case, the heading of the Petition lists the 9 Petitioners and goes on to add " suing on their own behalf and on behalf of others who have signed the authority/consent herein." In the body of the petition, the Petitioners describe themselves as "proprietors of various parcels of land situated in Mwingi Subcounty of Kitui County while the respondent erected an electricity transmission line known as Kindaruma-Mwingi-Garissa 132 KV Transmission line which line traversed the petitioner's parcels of land"

99. The Petitioners have attached to the petition a list of the persons who are said to be members of this group. In the circumstances of this case, I am inclined to agree with the Counsel for the Petitioners that the nine Petitioners rightfully and legally represent the parties listed as envisaged under Article 22 (b) of *the Constitution*.

100. As to whether the Petitioners ought to have complied with the provisions of Order 1 Rule 8 and/or 13 of the Civil Procedure Rules, the Court notes that the proceedings herein were not initiated under the *Civil Procedure Act*, and they are not subject to the Civil Procedure Rules, but *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013. The said rules do not provide for the requirement for the persons represented to sign a consent and/or authority to be represented in the petition. In this regard I agree with the findings in the case of Francis Angueyah Ominde & another v Vihiga County Executive Committee Members Finance Economic Planning and

3 others; Controller of Budget and 10 others (Interested Parties) [2021] eKLR where the court took this position and stated that;

> " 11. On the matter of the joinder of the 2nd petitioner, it should be pointed out that the constitutional petitions are governed and regulated by *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which govern processes that are brought under the *Civil Procedure Act*, Cap 21, Laws of Kenya. So far as procedure is concerned, *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, captures the spirit of Article 159(2)(d) of *the Constitution*, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of *the Constitution*. The focus is trained on substance rather than process. *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.
>
> Two issues are raised concerning the above. One, it is about the 1st petitioner initiating the proceedings jointly with the 2nd petitioner, but without filing an authority executed by the 2nd petitioner to include him in the petition. I have carefully and scrupulously scoured through *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, and I have been unable to find a provision or rule which requires such an authority. It is a requirement under the Civil Procedure Rules, but the proceedings before me were not initiated under the *Civil Procedure Act*, and they are not subject to the Civil Procedure Rules, but *the Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013."

ii. Whether the petition offends the doctrine of Constitutional avoidance;

101. Counsel for the Respondent submitted that the petition herein is inimical to the established doctrine of Constitutional avoidance and Section 13 (2) of the *Environment and Land Court Act* 19 of 2011 which provides for the jurisdiction of the Environment and Land Court in particular Section 13 (2) (d) states that "relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land." They also relied on Section 13 (7) of the Act for the provisions on remedies available. They claim that this position is supported by the decision in Emmanuel Nyongesa & 34 Others vs. County Government of Trans Nzia (2021) e KLR where the court stated that the constitutional jurisdiction is a very specific jurisdiction which is not open to general claims and it frowns upon the practice of bringing ordinary disputes to the constitutional court. Constitutional jurisdiction is invoked under Articles 22 (1) and 23 of *the Constitution* by filing a petition and seeking the relief provided for.

102. The Respondent holds the view that the claim by petitioner is a contractual claim for monetary compensation that can be instituted through a normal civil suit as opposed to a Constitutional Petition and the *Environment and Land Court Act* provides alternative remedies. Counsel submitted that this court lacks jurisdiction to deal with the issues raised in the petition. The Respondent claims that the

instant petition does not raise any constitutional issues and the constitutional court cannot be used as a general substitute for the normal procedures.

103. Constitutional-Avoidance Doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition page 377 defines it as:

> "The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion."

104. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court defined the principle of constitutional avoidance in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR.

> " The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
>
> > "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
>
> Similarly, the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)). From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."

105. Reading through the petition herein the Petitioners challenge the compensation awarded by the Respondent on the ground that it fails to meet the criteria set under Article 40 (3) (b) of *the Constitution* where the State is prohibited from depriving a person of property of any description, or of any interest in, or right over, property of any description unless the deprivation is for a 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 just compensation for the loss of their land.

ii. allows any person who has an interest in, or right over, that property a right of access to a court of law.

106. From the definition of the doctrine of Constitutional Avoidance, the question then is whether the claim by the Petitioners was a general ordinary claim that can be properly decided on another basis without determining the constitutional issue raised. Further, whether the claim before this court is merely one for compensation for the acquisition of a wayleave and the contracts arising therefrom and if it has been properly laid before this Court as a constitutional issue.

107. In the court's view, the claim by the Petitioners is about adequacy and fairness of the compensation awarded to them and involves a challenge to how the compensation was arrived at and the manner in which agreement for compensation was made. In other words, was the compensation "full and just?"

108. The Petitioners claimed that the Respondent, while in the course of erecting the electricity transmission line Kindaruma-Mwingi-Garissa 132KV which traversed their parcels of land, created a wayleave trace of 30 meters but did not pay or they made inadequate payment of compensation for the said wayleave. They claim that a fair compensation as per their valuation is a total sum of Kshs. 247,385,989/-.

109. The Petitioners claim that the amounts awarded to them were extremely low and consents/agreements entered into are reversible and can be avoided on account of the principles of inequality of bargaining power; illegitimate economic duress; unconscionable bargain; inequality of parties; unconscientious use of power; abuse of trust and confidence; breach of fiduciary duty; breach of public policy and fair play; constructive fraud and violation of standards of commercial morality.

110. The Petitioners pray for a declaration that the compensation agreements were null and void and in violation of their rights under Articles 27, 40, 47 and 50 of *the Constitution*. They further seek an order that a reputable valuation company be appointed by the court to undertake a valuation of the Petitioner's properties for the purpose of compensation and the same be paid for by the Respondent. They also seek an order for compensation for the total sum of Kshs. 247,385,989/-

111. Section 2 of the *Land Act* defines a "full and just compensation" as follows;

> " full" in relation to compensation for compulsorily acquired land or creation of wayleaves, easements and public rights of way means the restoration of the value of the land, including improvements thereon, as at the date of the notice of intention to acquire the land and any other matter provided for in this Act".
>
> "just compensation" in relation to compulsorily acquired land or creation of wayleaves, easements and public rights means a form of fair compensation that is assessed and determined through criteria set out under this Act."

112. It was held in Katra Jama Issa v Attorney General & 3 others [2018] eKLR that;

> "...Compensation of compulsorily acquired property be quantified in accordance with the principle of equivalence. A person is entitled to compensation for losses fairly attributed to the taking of his land but not to any greater amount as "fair compensation requires that he should be paid for the value of the land to him, not its value generally or its value to the acquiring authority" (emphasis added)"

113. Determination of whether or not there is full and just compensation for acquisition of land for purposes of a wayleave or public right of way is provided for under Section 148 of the *Land Act* Cap 280 Laws of Kenya which provides for compensation in respect of public right of way. Subsection (1) states that;

> " 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 wayleave, 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."

114. Sub-section 5 states that in case of disagreement over compensation one has a right to access a court of law and 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."

115. The Court to which one seeks redress under Section 148 is provided for under Section 150 of the *Land Act* which provides for the Jurisdiction of the Environment and Land Court and states;

> "The Environment and Land Court established in the *Environment and Land Court Act* (Cap. 8D) and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

116. The jurisdiction of the Environment and Land Court as envisaged under Section 150 of the *Land Act* is under Section 13 of the *Environment and Land Court Act* which provides that;

> "(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> 2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have the power to hear and determine disputes—
>
> a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources
>
> b. relating to compulsory acquisition of land
>
> c. relating to land administration and management
>
> d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
>
> e. any other dispute relating to environment and land."

117. From the foregoing, it is clear that the *Land Act* implements the provisions of Article 40 of *the Constitution* of Kenya and provides for the right to full and just compensation and the process to be followed and compensation payable to any person for the use of land with respect to a wayleave. In addition, it provides for compensation for any damage suffered in respect of trees crops and buildings based on the value of the land as determined by a qualified valuer.

118. The *Land Act* envisages the possibility of an agreement between the parties on compensation but if there is no agreement as to 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, the person aggrieved may apply to court for determination of the amount and method of payment of compensation.

119. The Court notes the timelines in the present case for the various processes and activities among them, that the schedule of valuations of the Petitioners' properties by the Respondent made by one Casty Mbae is dated 13th March 2014, the agreements for compensation for limited loss of use of properties have various dates between the year 2014 and 2015 and the sample Agreements for grant of easements date between 2015 and 2017. Further, the payments seem to have been made between 2014 and 2015. During this entire period, the *Land Act* No. 6 of 2012 was already in place since its date of commencement was 2nd May 2012.

120. The Court notes that the process through which one could lodge a claim for compensation in case a party was dissatisfied with the awards made was available to the Petitioners. The Court is persuaded from the above provisions of the law that there existed under the *Land Act* a process through which the Petitioners' grievances with regard to the right to compensation, the process through which the quantum of the awards is arrived at and the compensation awarded by the Respondent would have been settled without resorting to filing a Constitutional petition.

121. The Court has also noted the existence of another alternative means of settling the Petitioners' grievances through the internal Grievances Redress Mechanisms within the Resettlement Action Plan (RAP) dated March 2010 exhibited by the Respondent. According to the RAP, one of the key issues raised by stakeholders consulted included "concerns over compensation and valuation of property, compensation procedures and legal redress procedures through what they called the land tribunal." The RAP noted that the issues raised during meetings were "undervaluation of structures, land, crops as well as complete neglect to value natural trees used for beekeeping" and stated that "this was one of the recipes for grievance during the implementation of the project."

122. The RAP gave a step-by-step process for registering a grievance and provided for redress which included the local Area Resettlement Committee, and the Central Resettlement Committee and if the grievance was not settled the same was referred to the Commissioner of Lands, the tribunal or to court. It is noted that the petitioners did not state that the said dispute resolution process did not exist as stated by the Respondent and neither did they claim not to have been aware of the same.

123. The other dispute resolution mechanism that existed throughout the project period was under the *Energy Act*, No. 12 of 2006 (repealed) which was in force until it was repealed by the *Energy Act* No. 1 of 2019. Section 4 of the *Energy Act* 2006 established the Energy Regulatory Commission whose objects and functions are inter alia to; regulate— (i) importation, exportation, generation, transmission, distribution, supply and use of electrical energy;

124. Section 6 provides for the powers of the commission among them:

> enforce and review regulations, codes and standards for the energy sector;
>
> I. investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act; to—
>
> (o) impose sanctions and penalties on persons who are in breach of any of the provisions of this Act or any regulations made thereunder;

125. Section 46 of the repealed *Energy Act* 2006 provides for permission to survey and use land to lay electric supply lines and states that;

> "(1) No person shall enter upon any land, other than his own—
>
> a. to lay or connect an electric supply line; or
>
> b. to carry out a survey of the land for the purposes of paragraph (a), except with the prior permission of the owner of such land.
>
> (2) The permission sought in subsection (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry."

126. While Section 47 provides for payment of agreed compensation and states that;

> "An owner, after receipt of the notice and statement of particulars under section 46, may assent in writing to the construction of the electric supply line upon being paid such compensation as may be agreed and any assent so given shall be binding on all parties having an interest in the land, subject to the following provisions-"

127. Section 48 of the repealed *Energy Act* 2006 provides for a situation where there was an objection to the proposal to lay the power lines and provides that the Energy Regulatory Commission would determine the loss and damage likely to be caused, assess the compensation and distribute it to the rightful owners. The said Section states that;

> "An owner shall be deemed to have assented to a proposal to construct an electric supply line on his land if he fails to notify, in writing, the person desiring to construct an electric supply line, of his objection thereto within sixty days after the service on him of the notice required by section 46 and in the event of an objection, the Commission, on application by the licensee, shall determine—
>
> a. what loss or damage, if any the proposed electric supply line will cause to the owner, or the occupier or other person interested in the land;
>
> b. whether any loss or damage that may be caused is capable of being fully compensated for by money.
>
> (2) The result of a determination under subsection (1) shall be as follows—
>
> (a) if the Commission determines that loss or damage will be caused to the owner, occupier or other party interested in the land and that the loss or damage is—
>
> (i) of a nature that may be fully compensated for by money, the Commission shall proceed to assess the compensation and to apportion it amongst the owner, occupier and other parties who may in the judgment of the Commission be entitled to compensation and on payment of the sum so assessed the person giving notice may proceed to construct or lay the proposed electric supply line;
>
> (ii) not of a nature that may be fully compensated for by money the person giving notice shall not be entitled to construct or lay the proposed electric supply line;

(b) if the Commission determines that no loss or damage will be caused to the owner, occupier or other party interested in the land the person giving notice may forthwith proceed to construct or lay the electric supply line."

128. Under Section 26 and 107 of the same Act, an appeal against the decision of the Commission lay with the Energy Tribunal and under the schedule to the Act Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.

129. From the foregoing provisions, the Petitioners had a choice of the forum through which they would have been able to seek resolution of their dispute on compensation through a normal suit under the *Land Act* or the provisions of the *Energy Act* 2006 and also under the internal grievance resolution mechanism under Resettlement Action Plan.

130. From the foregoing and following the definition of the principle of Constitutional avoidance given in the Blacks Law dictionary and the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (supra), the Court is persuaded that the issues of compensation for acquisition of wayleaves and the agreements for compensation arrived at raised in this petition could have been and ought to have been decided on another basis other than by way of a constitutional petition.

131. Further, throughout the petition and submissions by Counsel, the Petitioners claim that the easement compensation agreements are void and/or voidable for various reasons; that they are against public policy, they were not based on any valuation reports and hence tainted with illegality. They claimed that the agreements were obtained by intimidation, and they amount to unconscionable contracts. Further, the Petitioners claim that some of them were not compensated at all while for others their compensation details were falsified while others had their properties undervalued and underpaid. Further, the legal authorities cited in support of the complaints are mainly based on contracts. The said authorities are mainly ordinary suits as opposed to constitutional petitions and include inter alia LTI Kisii Safari Inns Ltd & 2 Others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others [2011] eKLR, Sharok Kher Mohamed Ali & Another V Southern Credit Banking Corporation Limited [2008] eKLR, Madhupaper International Ltd & Another V. Kenya Commercial Bank Ltd.

132. In the present case, the claim involved compensation for the acquisition of wayleaves and the contracts arising therefrom and the said claim was, in the Court's view, not properly laid before that Court as a constitutional issue. This is, therefore, not a proper question falling for determination by this court sitting as a constitutional court.

134. It has been variously held that not all breaches by public bodies amount to a violation of constitutional rights. On this issue, the Court in Tony Munene Commissioner of Lands & 5 Others [2012] eKLR held that;

> " 4. It is correct and proper that every litigant is granted unhindered access to relief to protect guaranteed rights under *the Constitution* but it has been said time and again that the provisions of Article 22 are not intended to bypass or undermine the usual dispute resolution process and established procedures for ventilation of disputes (see Rashid Allogoh and Others v Haco Industries Limited Nairobi CA Civil Appeal No. 110 of 2001 (Unreported), Harrikisoon v Attorney General of Trinidad and Tobago [1980] AC 265 and Methodist Church in Kenya and Another v Rev. J. Muku and Another Nyeri CA Civil Appeal No. 233 of 2008 (Unreported)).

5. As I have stated before, Article 40 protects property rights which are acquired under the law (see Joseph Ihugo Mwaura and Others v Attorney General and Others Nairobi Petition No. 498 of 2009 (Unreported), Philma Farm Produce and Supplies and Others v The Attorney General and Others Nairobi Petition No. 194 of 2011 (Unreported)). Various statutory enactments like the Registration of Titles Act (Chapter 281 of the Laws of Kenya) fulfil the protection guaranteed by *the Constitution* by providing an orderly manner of acquisition, holding and disposal of property. Where disputes arise between parties, the ordinary procedures for dispute settlement are invoked. This is evidenced by the fact that our courts, on a day-to-day basis, deal with land cases within the framework established by *the Constitution* to protect property rights.

135. In The case of Harrikisoon v Attorney General of Trinidad and Tobago [1980] AC 265 cited above, the Privy Council reasoned that though there is a right to apply to the court for redress when any human right or fundamental freedom is breached, its value will be diminished if it is allowed to be misused as a general substitute for the normal procedure for the invoking judicial control of administrative action.

ii. Whether the petition offends the doctrine of exhaustion;

136. The Respondent has challenged this Petition stating that it offends the doctrine of exhaustion under Article 159 (2) (c) of *the Constitution* of Kenya provides for alternative dispute resolution mechanisms. The said Article states that;

1. Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

2. In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

137. In the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR it was held that:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."

138. Further, in the case of Vitalis Ouma Osan-vs Kenya Power & Lighting Company Limited (2021) eKLR the Court found that:

> "I do find that this dispute revolves around development of Energy infrastructure namely Electricity Supply lines on the alleged Plaintiff's land which is private land. The Plaintiff is aggrieved with the act of the defendant.
>
> Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector arising under the Act to the Tribunal. The plaintiff has no option but to refer the dispute to the Tribunal. The Tribunal has the Jurisdiction to grant the orders being sought by the plaintiff.....

In view of the above, this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act. The Preliminary Objection is upheld and the suit is struck out."

139. The Court in the case of Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others [2021] eKLR found as follows on the matter of compensation for wayleaves:

> " Determination of quantum of compensation in respect of wayleave is not a matter for the constitutional court. There exist ample statutory options for resolving such a dispute. By way of example, Section 148 (5) of the *Land Act*, 2012 as well as Land (Assessment of Just Compensation) Rules 2017 (LN 283 of 2017) make ample provision for resolving the kind of dispute that the petitioner has presented to this court without recourse to the constitutional jurisdiction of the court."

140. It is this court's finding that alternative dispute resolution mechanisms existed and have been provided for to deal with disputes like the one in this petition and the Petitioners have not shown that they exhausted the said mechanisms before invoking the jurisdiction of this Court. The existing mechanisms include the repealed *Energy Act* 2006 as well as under the *Land Act* 2012 as discussed extensively elsewhere in this judgement.

141. Alternatively, the Court finds that the Respondent showed the existence of internal grievances Redress Mechanisms contained in the Resettlement Action Plan (RAP) dated March 2010 also discussed extensively elsewhere in this judgement.

142. In the present case, the court is satisfied that when the offer for compensation was made to the Petitioners by the Respondents the same was accepted by signing the letters of offer and receiving payment for the limited loss of use of their land and damage to their crops/trees. In the court's assessment of the evidence adduced, the Petitioner's grievances had been noted in the Resettlement Action Plan seem to have been resolved to the satisfaction of the parties since the Petitioners signed the letters of offer, and easement agreements and received payment and one of them engaged the dispute resolution mechanism prior to their acceptance. It has been averred that the Petitioners who did not receive payment are the ones who did not collect their cheques and/or did not give their bank details.

143. The Supreme Court of Kenya in Petition No. E007 of 2023 Between Abidha Nicholus Versus The Attorney General & Others in a judgement dated 28th December 2023 found that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. The court stated that;

> " [104] Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others

(Interested Parties) [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:

> "In the instant case, the Petitioners allege a violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court." [Emphasis ours].

[105] We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.

[106] The restraint and effective remedy rule, which we find favor in, is what led the Supreme Court of India in United Bank of India vs Satyawati Tondon & Others; (2010) 8 SCC to state as follows:

> " ...we are conscious that the powers conferred upon the High
> 44 Court under Article 226 of *the Constitution* to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of *the Constitution*.45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of *the Constitution* and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision,

etc. and the particular legislation contains a detailed mechanism for redressal of his grievance." [Emphasis ours]

144. Following the above Supreme Court of Kenya Authority, the court has scrutinized the petition and the evidence adduced, the court is of the opinion that the Petitioners have not satisfied the court that the existing alternative means of redress stated herein and available to the Petitioners were inadequate in addressing the issues at hand. The Court has scrutinized the purpose for which the Petitioners are seeking relief in this petition especially the prayers in the petition and noted that prayers 1, 3, 4, and 5 relate to the quantum of compensation as the Petitioners seek declaration that the agreements to pay compensation on account of the wayleave trace is null and void, an order for valuation of the Petitioners properties for purpose of compensation, an order for compensation to the total sum of Kshs. 247,385,989/- and a mandatory injunction directed at the Respondent to pay the Petitioners as per valuation by the independent valuation report.

145. The scrutiny reveals that the Petitioner's basic claim is to have the compensation awarded to them be paid to those not paid and/or enhanced to the level of the valuation made in the reports the Petitioners produced in court. In the court's view if this was done the Petitioners would not have any further grievance. In the court's view it has not been demonstrated that the "claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court". In the court's view the Petitioners have not demonstrated that the said claims amount to constitutional claims.

146. In conclusion, the petition herein offends the doctrine of constitutional avoidance and the exhaustion theory and the same cannot stand.

iv) Whether in creating a public right of way and or way-leave over the petitioner's properties the respondent violated the law;

147. The petitioners challenged the Respondent for not having followed the procedure laid down in law for acquisition of wayleaves stating that the agreements signed arising out of the process of compensation followed by the Respondent were against public policy and thus illegal. They challenge failure in the first instance to petition the National Land Commission to commence the process of acquisition of wayleaves. They accused the Respondent of going directly and appointing a valuer whose valuations are the basis for the impugned assessments and agreements. They claim that the Respondents were in breach of the law and their actions were against public policy and that such failure renders the agreements void and/or voidable for immorality, illegality and in violation of public policy. They relied on the cases of Glencore Grain Ltd V. TSS Grain Millers (2002) 1KLR 606 and Comroad Construction & Equipment Ltd V Iberdrola Engineering & Construction Co. (2020) eKLR among other authorities.

148. The Petitioners further contend that non-compliance with section 144 of the *Land Act* amounts to an unconstitutional action and cited several authorities in support of the submission that the elaborate procedure of creating a wayleave over private land under the *Land Act* must be followed.

149. The Petitioners' Counsel challenge the compensation agreements on various grounds; They argue that the valuation of land by the Respondent was carried out in the year 2014 and the offers for compensation were made in 2015, thus the law applicable to the acquisition of the wayleaves and compensation thereof was Article 40 of *the Constitution* of Kenya 2010 and the *Land Act* No. 6 of 2012, Sections 143 to 149 specifically Sections 144, 146 and 148. The said sections provide for the power of the National Land Commission to create public rights of way for the benefit of the national or county government, a local authority, a public authority or any corporate body. Section 144 gives

details of the process of applying for wayleaves where the application is made to the National Land Commission by any state department and states in the relevant parts that;

(2) An application shall be made in the prescribed form and shall be accompanied by any prescribed information or other information that the Commission may, in writing require the applicant to supply and the Commission shall not begin the process of creating a wayleave until all prescribed or required information has been submitted to it.

(4) The applicant shall serve a notice on—

(a) all persons occupying land over which the proposed wayleave is to be created, including persons occupying land in accordance with customary pastoral rights;

(b) The county government in whose area of jurisdiction land over which the proposed wayleave is to be created is located;

(c) all persons in actual occupation of land in an urban and peri-urban area over which the proposed wayleave is to be created; and

(d) any other interested person.

(5) along the route of the proposed wayleave calculated to bring the application clearly and in a comprehensible manner to the notice of all persons using land over which the proposed wayleave is likely to be created.

150. Section146 provides that the Commission on receipt of all information required may inter alia forward to the Cabinet Secretary all representations made concerning the wayleave creation and the Cabinet Secretary may consider appointing a Public Inquiry to consider the representations or initiate and facilitate negotiations between those persons who have made representations on the application and the applicant with a view to reaching a consensus on that application. Section 146 (4) states that;

> "(4) The Cabinet Secretary may, by order in the Gazette, create a public right of way under this section subject to any amendments, limitations and conditions, including conditions as to the costs of constructing and maintain a public right of way.

151. Under Sub-section (6) The order of the Cabinet Secretary to create a public right of way shall—

(a) delineate the route of that public right of way;

(b) be published in the Gazette;

(c) be notified to a county government having jurisdiction along the route of the public right of way;

(d) be publicized in any manner which is calculated to bring it to the attention of people occupying and using land along the route of the public right of way, and (e) come into force thirty days after it has been published in the Gazette.

(7) Any person who makes any representation or objection to an application to create a public right of way, within six weeks after the order has been made, may appeal to the Court on a point of law against an order made by the Cabinet Secretary under this section, but apart from such an appeal, an order of the Cabinet Secretary shall not be questioned by way of judicial review or otherwise in any court.

152. On the other hand, the Respondents' Counsel argues that in the first place, the *Land Act* was not the applicable law at the time the wayleaves were created, the applicable law was the Wayleaves Act, Land Acquisition Act, Registered *Land Act* and *Energy Act* 2006 (now repealed) since the preparations for the acquisition of wayleaves commenced in the year 2009. The reason behind this argument was that the project herein began on or about the year 2010 with the acquisition of the Environment Impact Assessment License and was completed on 12th May 2016. The Respondent stated that they carried out Public Consultation between October and December 2009. For the reasons that the project period traversed the time before the promulgation of *the Constitution* of Kenya 2010 and the commencement of the *Land Act*, and based on the transitional provisions under the *Land Act* Section 162, the applicable law was the Wayleaves Act, Land Acquisition Act, Registered *Land Act* and *Energy Act* 2006 (now repealed). Section 162 provided that;

> "(1) Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.
>
> (2) Unless the contrary is specifically provided in this Act or the circumstances are such that the contrary must be presumed, if any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act."

153. The Respondent further opposed this submission by Counsel for the Petitioners and submitted that the Appellants are advancing a novel claim of violation of the provisions of Sections 144, 146 and 148 of the *Land Act* 2012 not pleaded in the petition involving the process of acquisition of the wayleaves to completion of the process. They rely on the case of Elizabeth O. Odhiambo vs South Nyanza Sugar Co. Ltd (2019) eKLR.

154. The Court has considered the Petitioner's claim as pleaded in the Amended Petition. In a nutshell, the Petitioners pleaded that the Respondent in assessing the value of their properties undervalued them, paid some of the Petitioners while in some instances they did not pay any compensation while in others they falsified documents to reflect amounts over and above what was paid.

155. They state that this conduct led to violation of their right to property under Article 40, right to fair administrative action under Article 47 right to equal protection by the law under both Article 27 and 50 of *the Constitution*.

156. From the above matters pleaded in the Petition, the court is not persuaded that compliance with Sections 144, 145 and 146 of the *Land Act* was pleaded in the petition. The Petitioners did not challenge the process adopted by the Respondent in the acquisition of the wayleave and this only came out during submissions by Counsel, in what the Court considers to be a claim made in order to make the petition have a constitutional angle.

157. The challenge to the process under the above-mentioned Sections would have required the Respondent to show that inter alia that they commenced the process of acquisition by applying to the National Land Commission in the prescribed form accompanied by any prescribed information, that they served a notice on all persons occupying land, the county government and all persons in actual occupation of land. Under Section 146 the Respondent would have been required to show that a public inquiry was carried out and that the acquisition was gazetted.

158. It is the Court's respectful view that no such challenge was pleaded in the petition as would have placed the Respondent under obligation to set out the details set out above.

159. Following the authority of Elizabeth O. Odhiambo vs South Nyanza Sugar Co. Ltd (supra) the court finds that the Petitioners are bound by their pleadings and unless amended the evidence and submissions made cannot deviate from the said pleadings. The Court is also guided by the authorities of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014]eKLR where it was held that:

> " It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

160. Similarly, in David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR the court of Appeal held that:

> " Courts are normally bound by the pleadings of the parties so as to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

161. In the circumstances of this case, the Court finds that the Respondent was not by way of the pleadings filed notified and called upon to show compliance with Sections 144 and 146 of the Sections 144 and 146 of *Land Act* and thus the Petitioner's submission on this issue is found to have no merit.

162. Even though the Court has found that the Petition herein violates the doctrine of avoidance and the exhaustion theory the court will consider the other grounds relied on in the petition.

v) Whether the compensation agreements between the petitioners and the respondent in respect of compensation are valid or the same are voidable and or void;

163. The Petitioners challenge the awards made to them by the Respondent on the grounds that they were not based on any valuation. Counsel submitted that the schedule exhibited by the Respondent showing the values of the properties and the amounts to be paid cannot be said to be a valuation report. It does not indicate when the properties were inspected, service found on the land, the user of the land, the type of soil, or whether there were improvements, crops trees within the land. It does not indicate terms of reference, limiting conditions etc.

164. Further, the Petitioners contend that the schedule does not indicate the amount of compensation for each petitioner and the total trace value. They contend that a valuation ought to comply with the *Land Act* by providing the value of the land, the value of crops trees and the amount arrived at as compensation. The Respondent's witness also did not undertake the valuation but she only prepared the schedule based on some purported valuation reports by a third party.

165. The schedule of the values given to the Petitioner's parcels of land was annexed to the replying affidavit of the Respondent. The said schedule is said to have been prepared by one Casty Mbae a registered valuer on 13th March 2014. It is noted that the valuation reports that gave rise to the schedule were not produced in court.

166. It was stated by the said Edel Loko the Respondent's witness, that the Petitioners came from various locations in Mwingi Sub-County where land was valued and values obtained for the same were Endui-Kshs. 150,000, Nguni-Kshs. 150,000, Mbuvi-100,000, Ukasi-100,000, Imba-100,000. No basis was given for the above-mentioned valuation yet that statement formed the basis upon which all the parcels of land listed on the schedule produced in court were made. The schedule did not give the qualifications of the person who carried out the valuation, the date and time when the valuation was carried out and whether or not the land owners were present when the same was carried out.

167. Further, the Respondent produced in court a crop compensation schedule dated 13th March 2014 supposedly based on the sample structure valuation forms and property damage forms for the crops/ trees which were issued by the Respondent. However, it is noted that the said forms did not have the amount the structures and crops were valued at.

168. The Respondent's witness testified that they used the Kenya Forestry and Agriculture crop valuation schedule to value the individual amounts the land owners were entitled for crops/trees. The said schedule was not produced in court. A schedule was attached to the Respondent's replying affidavit stamped with the Respondent's stamp dated 12th March 2014 and is titled "Crop Compensation Kindaruma-mwingi -garissa Tl Reconciliation". The amounts stated to have been paid as crop compensation are not explained as to how they were arrived at.

169. From the foregoing observations, it is the court's view that the valuations made of the Petitioner's properties fell short of what would be considered valuation reports for purposes of compensation.

170. On the other hand, the Petitioners produced valuation reports by Clayton Valuers Ltd. It is noted that the reports generally follow the same format and the following issues are noted. The reports in the 1st bundle for Petitioners 1-80 show that valuation was carried out on 28th May 2019 but the values of the properties were the current market value as of April 2014. The reports do not explain how the figures given in the reports are arrived at.

171. The reports were said to be based on market values and the definition of "market value" as "the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and willing seller in an arms-length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion." When cross-examined during the hearing, the valuer stated that the reports do not contain comparables to show that indeed a parcel of land within the area in question was sold at the value that was given in the reports. The valuer further informed the Court that the information on comparables was a back office function that was not necessary for the valuation report. In the court's view it was important that any figures given be supported and in the end, the report herein by Clayton consists of amounts that are unsupported and arrived at five years after the initial valuation by the Respondents.

172. Further, the said report did not take into account the distinction between outright compulsory acquisition of land and acquisition for purposes of way leave or public right of way. Black's Law Dictionary defines wayleave as "A right of way (usually created by an express grant) over or through land for the transportation of minerals from a mine or a quarry. (2) The royalty paid for such a right." The reports do not seem to have taken into account the fact that compensation with respect to a wayleave, is for the limited use of land and damage suffered in respect of trees, crops and structures. The reports gave the value of the land and the trees and a disturbance allowance.

Further, on cross-examination the valuer informed the court concerning the values given to the trees and crops that he used the Kenya Forestry Services while the said schedule was not produced in Court.

173. In the court's view, the report by the Clayton Valuers lacked crucial information relevant in concluding that the values of the Petitioners' parcels of land given in the said reports were the correct values as opposed to the values given by the Respondent.

174. In the present case, the court is satisfied that notwithstanding the shortcomings in the Respondent's schedule of valuations given for the limited loss of use of land the value of trees, crops and structure, when the offer for compensation was made to the Petitioner by the Respondents in accordance with the valuations made, the same was accepted by the Petitioners. The acceptance was evidenced by the signed letters of offer, Agreements for grant of easements and signed acceptance of payment. The court's assessment of the evidence adduced shows that by the petitioners as noted in the Resettlement Action Plan seem to be the same ones in this petition. The evidence before the court shows that the issues were resolved to the satisfaction of the parties since the Petitioners signed the agreements for compensation.

Whether the Agreements were entered into by Intimidation, Undue Influence, Duress and Coercion and were thus Voidable and or Void;

175. The question of whether or not the agreements were entered into by intimidation, undue influence, duress and coercion is answered by looking at the letters of offer by the respondent to the Petitioners. For instance, through letters from the Respondent dated 25th March 2015 or other various dates titled "Compensation For Limited Loss Of Use Of Land" The Petitioners were offered different sums of money. Part of the letters stated as follows;

> " It is our hope that this letter will receive favourable consideration from your end with its acceptance by you being key to allowing us to process your dues being the compensation for your land. Kindly convey your written acceptance of this offer within fourteen (14) days from the date of receipt of this offer."
>
> "In the meantime, please submit to KETRACO copies of your title deed certificate, National Identity Card/Passport, 2 No. Passport size photographs, PIN certificate and bank details to enable us to commence compensation."

176. The said letters also contained a part titled "ACCEPTANCE OF OFFER" which required the name, ID NO. and signature of the land owner. Among the letters exhibited by the Petitioners were signed by Daniel Muthui Musungu-1st Petitioner, three letters of offer signed by Francis Kilonzo Mutyanzei, three letters of offer signed by Musingila Musili Nganda-7th Petitioner, Justus Mwanzia Kimwele Samson Kusina Musyoki, Sammy Mwangangi Musyoki and many others whose letters of offer were contained the same terms and were signed by the land owners.

177. Further, the Petitioners exhibited forms on the Respondent's letterhead titled " Property Damage Report". The said reports also took a format similar to all and contained a description of the crops and/or trees destroyed by the respondent. It contained the land owner's signature having stated as follows; " I... agree that the damage detailed above is the full extent of damage to my crops on the above-said plot caused by the Kenya Electricity Transmission Company Ltd during survey/construction /maintenance of the above mentioned works."

178. The Respondent further exhibited a schedule of payment for destroyed crops Named "Crop Compensation -kindaruma -mwingi Garissa Tl-reconciliation which consists of a list of land owners and the compensation payable which negates the Petitioner's claim that the compensation by the Respondent only consisted of payment for loss of use of land and did not include compensation for crops, trees and structures destroyed.

179. Arising from the foregoing, Petitioners had an opportunity to have their grievances addressed by the time of the letters of offer and the property damage reports were made in the years 2014 and 2015. The Petitioners were given letters of offer and given time to consider the offer before accepting the same. They were also required to bring to the Respondent documents of title and identification. In the Court's view, the Petitioners had ample time to consider the offer made and seek advice if any was needed.

180. The Petitioners witness number 2 told the court that the police, area chief and askaris, D.O., MCA, and Governor and Member of Parliament were all involved in coercing them to sign documents claiming that this was a government project. These statements were countered by the Respondent who stated that the presence of the government officials was for purposes of identification of the persons claiming compensation. It is noted that the Petitioners did not give specific instances of the particular Petitioners being intimidated and forced to sign especially considering that the documents were signed by different petitioners on different days and over a long period of time. The Court further noted that Petitioners Witness No. 2 in his testimony was not consistent in his evidence as to whether they were paid any compensation and it was only after being shown signed letters of offer and schedule of payments that he confirmed payment for himself and for other Petitioners.

181. The Court is satisfied that the evidence adduced before the court did not show any elements of intimidation, undue influence, duress and/or coercion. In the Court's view, the Petitioners voluntarily signed acceptance of the offers and other documents and provided the relevant supporting documents to facilitate payment. The petitioners were given ample time to consider the offer made and seek advice before signing and accepting payment.

182. The Petitioners also claim that the agreements entered into with the Respondent were unconscionable due to duress and coercion as they were signed under the supervision of the Chief and police, and also that there was constructive fraud since they were a weaker party. In the case of LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Enwicklungsgellschaft ('Deg') & others [2011] eKLR relied on by the Petitioners, the Court noted as follows about unconscionable bargains:

> " Unconscionable bargains
>
> This is also an equitable doctrine. There are at least three prerequisites to the application of a doctrine, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain reveal conduct which shocks the conscience of the court. Secondly, the victim must have been suffering from certain types of bargaining weakness, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that the behaviour of the stronger party is morally reprehensible."

The court went on to state that;

> " The courts will only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concepts of unconscionable conduct and the exercise by the stronger of coercive power are thus brought in...."

183. The Court in the case of Euromec International Limited v Shandong Taikai Power Engineering Company Limited (Civil Case E527 of 2020) [2021] KEHC 93 (KLR) (Commercial and Tax) (21 September 2021) (Ruling) cited by the Petitioners broke down unconscionability as follows:

> " Unconscionability consisted of the two-pronged test:

a. procedural unconscionability hinged on the circumstances surrounding contract formation, such as whether a provision was offered on a take-it or leave-it basis or buried in the fine print.

b. Substantive unconscionability arose when a term was overly harsh or one-sided. But more importantly, unconscionability isolated terms to which parties did not assent in any meaningful way. Thus, when a party of little bargaining power, and hence little real choice, signed a commercially unreasonable contract with little or no knowledge of its terms, it was hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. Indeed, modern unconscionability empowered courts to strike down provisions that fell outside the circle of assent which constituted the actual agreement."

184. The court is of the view that based on the above definition of unconscionability, the evidence adduced by the Petitioners fell short of the required standards to show that the offers made to the Petitioners for compensation were given on a take-it-or-leave-it basis or that the Petitioners did not meaningfully accept the offers made. In the Court's view, it has not been shown that the terms of the offer and agreement were overly harsh or one-sided. It has also not been proved that the Respondents used any coercive power and pushed the Petitioners to the wall and into accepting the compensation as offered.

185. Further, the alternative valuations conducted by the Petitioners were conducted many years after the wayleaves had been acquired and they appear to the Court to have been conducted to enhance the awards to the Petitioners and do not seem to be a fair reflection of the values of the Petitioners parcels of land as acquired for purposes of creation of a wayleave.

186. The Petitioners claim that the agreements entered into were forced on them through coercion and intimidation through the involvement of security officers and Provincial administration. That the local chief signed the contractual documents and that the involvement of security personnel in a private engagement was in bad faith. The Petitioners also claim to be poor and ignorant of the legal process of wayleave acquisition. The Respondents deny these allegations.

187. The court has considered the Petitioner's claim that they are persons with little or no education and did not understand the process of acquisition and compensation for wayleaves. The Court notes that none of the Petitioners adduced evidence as to his/her level of education to show that they had no understanding of the process of acquisition of wayleaves. The bundles of documents produced in court show that the Petitioners signed the letters of offer from the 1st Respondent for compensation and the property damage forms. None of the Petitioners claim that they were not able to read and understand the said forms and neither do they deny signing the same. The witnesses for the Petitioners while being cross-examined were referred to the documents produced by both parties and none of them claimed they could not read.

188. Further, the Petitioners have not shown in what way the fact of the financial superiority of the Respondent was used to coerce them into entering into the agreements for compensation. The Petitioners did not adduce any evidence of their financial capacity and the only information that can be gathered was that they owned land and they were able to contract the valuers Clayton Valuers to carry out valuation of their properties.

189. Further, the claim that the security personnel and the area chief were used to coerce and intimidate was not proved. The Petitioners did not cite any specific instance of intimidation to any one person. Instances of threats were also not stated and the general statement that there was intimidation and

coercion throughout the entire transaction was, in the Court's view, insufficient as proof. In the court's view, the presence of security personnel by and of itself without any further evidence cannot be interpreted to show coercion, intimidation and undue influence.

190. The Court notes that from the time of the Respondents' schedule of valuations of the Petitioners' properties dated 13th March 2014, signing of Property Damage Reports in the year 2013, the time of signing letters of offer in 2015 and Agreements for Grant of Easements between the years 2015 and 2017 is a period of about four years. The Petitioners did not show that during this entire period, they experienced continued coercion and intimidation from the Respondents and were unable to seek redress for their grievances, if any.

191. The Respondent further attached documents showing proof of payment of the compensation amounts. The said payments are shown to have been made between 2013 and 2015. From the documents shown to the court, it is clear that the Petitioners were offered compensation which they voluntarily entered into the agreements and there was no intimidation, coercion or undue influence.

192. From the above discussions, the Court is of the view that what the Petitioners seek is for this Court to rewrite the contracts entered into with the Respondent for compensation for the acquisition of wayleaves and the Court is not entitled to rewrite the said contracts in the circumstances of this case. In National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd (2002) 2 E.A. 503, (2011) eKLR the Court of Appeal stated as follows: -

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

vi) Whether the Petitioner's Constitutional Rights were violated

193. The Petitioners claim that their rights under Articles 27, 40, 47 and 50 of *the Constitution* have been violated by the Respondent. Article 27 provides for the equality of rights for everyone and freedom from discrimination while Article 47 guarantees the right to fair administrative action. Article 50 guarantees the right to fair hearing while Article 40 guarantees the property right and provides for compulsory acquisition of property by the state.

194. Arising from consideration of the Petitioners claim in its totality, it is the Court's view that the Petitioners have not proved that their Constitutional rights under Articles 27, 40, 47 and 50 of *the Constitution* of Kenya were violated by the Respondent.

vii) Whether the petitioners are entitled to the reliefs sought

195. From the foregoing findings, the Court is satisfied that the Petitioners have not proved that in creating a public right of way and or way-leave over the Petitioner's properties the Respondent violated the law. The Petitioners also failed to prove that the compensation agreements between them and the Respondent and the sum paid to them are null and void. The Petitioners failed to prove that the Respondents violated their rights under Articles 27, 40, 47 and 50 of *the Constitution* and that they were entitled to an order for the appointment of a reputable independent valuation company to undertake a valuation of the Petitioners' properties for purposes of compensation. The Petitioners further did not show that they were entitled to a mandatory injunction directed at the Respondents to pay the Petitioners as per the valuation by the independent valuation report.

196. The final order of the Court is that the Petition herein is not properly before this court, it lacks merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF FEBRUARY 2024.

HON. L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

The judgement is read virtually and in open court in the presence of-

J. Musyoki Court Assistant

Kalii holding brief for Mutua SC for the Petitioners

Ms. Moga & Lutta for the Respondent