Mwoni & 7 others v Kenya Electricity Transmission Company Ltd (Environment & Land Petition 23 of 2021) [2024] KEELC 929 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 929 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT & LAND PETITION 23 OF 2021

LG KIMANI, J

FEBRUARY 22, 2024

BETWEEN

JULIUS N MWONI ..... 1ST PETITIONER

STEPHEN PETER MUTHUVI ..... 2ND PETITIONER

BEN MUTUA MUTHEI ..... 3RD PETITIONER

HARRISON MWENGA MUSYOKA ..... 4TH PETITIONER

NGUNO KITHAE ..... 5TH PETITIONER

BONIFACE MBOYA MAANZO ..... 6TH PETITIONER

DAVID MUSYOKA KALAI ..... 7TH PETITIONER

DAVID MUSYOKI KALAION BEHALF OF OTHER RESIDENTS OF MWINGI SUB-COUNTY). ..... 8TH PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LTD ..... RESPONDENT

JUDGMENT

1. Before the court is an Amended Petition dated 13th March 2017 and Amended on 5th November 2019, where the Petitioners aver that they are proprietors of various parcels of land situated in Mwingi Sub-County of Kitui County. The Petitioners claim that the Respondent is a State Corporation with a mandate to construct, operate and maintain the National Electricity Transmission Grid erected an electricity transmission line known as Kindaruma-Mwingi-Garissa 132KV Transmission line which line traversed their parcels of land.

2. The Petitioners state that the Respondent created a wayleave a trace of 30 meters wide running across the Petitioners' properties and paid compensation as per the attached schedule.

3. The Petitioners claim that in some instances, the Respondent did not pay compensation, they falsified documents to undervalue and underpay them. From independent valuation, they then claim a total sum of Kshs. 94,071,295/= as the value of their properties.

4. The Petitioners state that the consents/agreements that they signed for compensation 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. Their reasons are that the Petitioners are vulnerable peasant farmers and are not knowledgeable in matters of easements, way leaves, valuation and compensation and cannot afford independent valuation of their properties.

5. The Petitioners claim violation of their Constitutional rights under Articles 27, 40, 47 and 50 of *the Constitution* of Kenya 2010 and that their protests were met with intimidation, coercion and threats by the use of security personnel.

6. The Petitioners seek the followingorders:

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

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

    iii. An order that a reputable independent valuation company be appointed by the court and sanctioned to undertake a valuation of the Petitioners' properties for purposes of 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 B is attached herewith, the total sum being Kshs. 94,071,295/=.

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

    vi. General Damages.

    vii. Costs of the suit.

Respondent's case

7. Ms. Edel Loko, the Assistant Land Economist swore a replying affidavit on behalf of the Respondent and deposed that the Respondent erected and energized electricity transmission line known as Kindaruma-Mwingi-Garissa 132KV traversing the Petitioners' parcels of land among others as part of its mandate to build, operate and maintain high voltage electricity lines connecting different parts of the Country to the National grid.

8. The Respondent avers that it does not compulsorily acquire property and followed the provisions of the Wayleaves Act, Land Acquisition Act, Registered Lands Act and *Energy Act* 2006(now repealed) in acquiring the right of way, and compensation was based on an Independent Valuer's report.

9. She deposed that land compensation for wayleave is only for the reparation for the limited loss of use of land and is normally set at 30% of the market value of the affected land area and that only Project Displaced Persons(P.D.Ps) are eligible for the full compensation package. Where a Petitioner had a

structure or crops/trees on the land, the land owner is issued with a structure valuation form to prove their claim and was fully paid for the same.

10. The project began in the year 2010 with an Environmental Impact Assessment License and was completed on 12th May 2016 there was a public consultation process beforehand. The Respondent followed the project's action plan as well as the Resettlement Policy Framework, and their rules and regulations regarding compensation which the Petitioners voluntarily committed to abide by.

11. She denied that the Respondent falsified documents and further, deposed that the date of the valuation report is the cut-off date and land owners are not allowed to conduct any further valuations after the cut-off date. She stated that all the Petitioners come from the Kivou area, Mwingi area where land was valued at an average of Kshs. 300,000/= per acre.

12. She highlighted that Petitioners No.54 and 86 in the Petitioners' Schedule B are not affected by the transmission line and that the eight (8) petitioners have the locus standi to sue on their behalf.

13. Regarding the fresh valuation, she deposed that it is an attempt to obtain more money from the Respondent six (6) years after the project cut-off when they were already duly compensated for the same. A Central Resettlement Committee was established to allow the affected people to voice their concerns and that the Petitioners did not raise any issues.

14. The Respondent challenged the Petition stating that it 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).

15. Further, she deposed that the compensation package is lawful and does not entail in any way the acquisition of the Petitioner's land and that the Respondent did not commit any fraud, intimidation or corruption to deny the Petitioner fair compensation.

Evidence at the trial

16. The trial proceeded through viva voce evidence on 4th October 2023 where PW 1 was Peter Kitaka Kimeu, an expert witness who testified that he is a valuer by profession who works with Clayton Valuers where he is a Director.

17. He knew the 1st Petitioner Julius Mwoni and other petitioners who presented their case with KETRACO over a wayleave that passed through their land. their complaints were under-compensation and/or partial compensation. They carried out the valuation of properties affected by wayleave to determine the value of land and they visited the grounds and inspected the Petitioner's properties. They found that some properties owners had their houses demolished but they were able to tell what kind of developments were demolished.

18. The Petitioners furnished him with documents given by KETRACO, especially for compensation for crops and trees. On compensation for the buildings, he relied on the information from the Petitioners. His job was to establish the value of land for purposes of reinstatement of the person in the position he was in before acquisition. In his reports, the key areas of valuation were the land and improvements. He produced the bundles of valuation reports in evidence.

19. Upon cross-examination, PW 1 was referred to Page 5 of exhibit 1A Mwingi/Matangombe/1362 – page 13 of the report. He confirmed that the value given is for the part affected by the way leave not the entire title. The methodology used is that land is valued using comparable sales. However, comparables are not part of the report because the witness claimed it is back office work. He stated that when doing the report a lot of work is done which is not contained in the report.

20. Pages 8 & 9 of exhibit 1A – On page 9. PW 1 confirmed that he used the methodology of the fair value definition and also used the valuation methodologies in arriving at the fair value for land, improvements etc.

21. PW 1 confirmed that he visited the property on 1st June 2019. This was after the wayleaves had been done and transmission lines constructed. He referred to Page 11 of the bundle of documents that the homestead was located 30 meters from the wayleave and the home required relocation on health and safety grounds due to electromagnetic waves that are not safe to humans but did not have a safety or health report attached.

22. For the trees that had been cut, PW 1 stated that they are a biological asset and are valued using valuation from the Ministry of Agriculture, Kenya Forestry & Research Station as gazetted by Kenya Forestry Service. He added a 15% statutory disturbance which is allowed under the Land Compensation Act but was not indicated in the report.

23. PW 1 stated that he was aware of the difference between a wayleave and the acquisition of a property. A wayleave does not transfer land to the person who has the wayleave but the land remains the property of the owner but should still be compensated.

24. Upon re-examination, PW 1 stated that the methodologies and values used such as fair value are guided by the law and are an ancient process and that the workings of the valuation are not usually attached to the valuation report. Referring to Page 13 of the Valuation report, he stated that he arrived at the figure indicating that Eunice needed Kshs. 1,261,500/= to relocate the buildings to a safer place. The criteria used is the amount required to re-instate the claimant to her former position.

25. PW2, Julius Ngui Mwoni, the 1st Petitioner stated to the Court that he is a farmer and that he represents all 86 of those affected by the Respondent's project. They claim that the Respondent came to their land and placed their transmission lines. They destroyed their trees, houses, land, and foodstuff growing on the land but paid them poorly. They did not pay all people and they paid different amounts. They complained when they were underpaid and were not given a valuation of loss. The Respondent showed up with the Chief, Askaris and they came with papers telling them that this was a Government project that they had to sign by force.

26. Upon cross-examination by Counsel for the Respondent, the 1st Petitioner stated that he has a title deed for his land, LR Mwingi/Mwingi/820 but does live on the land. He complained that though the houses are still in place, they were affected by the power line because they are within 30 meters of the power line and they have cracks now and his goats give birth prematurely.

27. The 1st Petitioner was referred to pages 411 and 412 of this record and confirmed that he was compensated and that he signed on page 412. He stated that he was not illiterate when he signed the letter. He could not remember when sensitization on the project started but he had previously talked to KETRACO, who told him that there was a line passing on his land.

28. PW 2 confirmed that he did not transfer the land to KETRACO but he did not know what a wayleave is and does not know if the petitioners' title was taken away by KETRACO. He had informed authorities that he was protesting the payment and even went to the District Commissioner though there was no letter of protest in the court file. They undertook an independent valuation and the report is in the bundles filed in court. PW 2 stated that the proof of the Petitioners' poverty is that they live on their shambas and don't work.

29. Before the signing of the agreements, PW 2 did not see any surveyors on his land, but they only came when they were cutting trees before compensation. They told him that they were Government Officers, that this was a Government project and they were to be compensated.

30. Referring to Bundle 2 page 413 the "property damage report item No. 1 – 14, PW 2 confirmed that those are recorded trees that were destroyed. He asked for payment but there is no document to show this and he did not know the value of the trees nor the method for valuing trees.

31. On re-examination, the 1st Petitioner stated that he is not currently staying on the structure because he built another structure on the same land, moving his home to another part of the land. He was tilling the land but is currently not tilling on the land and his old structures have cracks and they are falling. He did not protest because there was a Chief and Police and there was nowhere to protest. He could not report and/or get a fair hearing. He stated that he signed the other letter and property damage report because he was coerced. The police had guns and they told me to move from where he was and face North.

32. On behalf of the Petitioners, PW 2 stated that they did not conduct a valuation at the time because they did not have money. The petitioners are poor and had to sell some land to get the current valuer. We got the valuers later on and he confirmed that it was the correct amount we claim. Since the land was taken by KETRACO he had not benefited from the land and he denied being involved in any sensitization meetings.

33. The Respondent's case proceeded for hearing with DW1, Edel Sharon Loko, who testified that she is a Land Economist by profession employed by the Respondent. She confirmed that she dealt with the issues raised in this case. She relied on her replying affidavit sworn on 30.6.2022 as well as the annexures produced as exhibits.

34. The witness clarified that before a wayleave is created, KETRACO carries out a resettlement plan by engaging people on the ground where the line will pass through capturing details of households and people affected by the wayleave trace through Public participation. Sensitization is a continuous process through Public consultation carried out between October and December 2009 where there were 5 consultative public meetings in various places.

35. KETRACO acquires a right of way where they request the land owner to allow them to put up a mast (Pylon) where they put wires that transmit electricity. Wayleave is a right of way for limited use of land created by an easement and the property is not transferred to KETRACO and the Respondent pays for limited use of land. After the creation of Wayleave, the owner can farm food crops, graze animals, grow hay, and plant seedlings. She stated that what is not allowed are trees exceeding 12ft high or putting up a metallic structure for safety reasons. The witness stated that for the 132 KVA lines, structures and trees can be put up 30 meters from the pylons. From the pylon, it is 15 meters on either side.

36. She further explained that compensation is worked out as property within the wayleave trace. The categories are 3 (1) structures, (2) crops and trees (3) land. For crops and trees, the Respondent compensates for those destroyed during construction. For land, they pay 30% of market value as basic compensation but since land is not homogeneous, they differentiate due to the impact on the entire parcel, so everyone gets an equal amount. For high-value land, they apply a higher rate e.g. if Wayleave takes a large percentage of the land

37. DW 1 was referred to page 407 of the 2nd bundle, where the petitioner stated that the house had cracked. She replied that the cracks might have been because of age since transmissions do not cause cracks. As long as one lives outside of the wayleave trace, there is no harm.

38. DW 1 was also referred to on Page 89, where the acreage was 0.98 acres while 2.01 acres was paid less while 0.98 was paid more. She replied that this was due to the difference in impact and the valuation of the land on the land on page 68, the land acreage total of land is 44 acres, valuation is Kshs. 350,000/ = per acre. She denied any corruption in the compensation.

39. She stated that the Petitioner, Mr Mwoni was compensated for trees contrary to what he said and highlighted the Respondent's affidavit on page 109 crops compensation form. The document indicates the serial number, and the CDR Number is the document showing damage, the name of the land owner and the amount paid. Mwoni was paid as per page 114 where he was paid Kkshs. 60,330/=

40. DW 1 was referred to a valuation report attached to the petitioners' addendum to the supplementary list by Clayton Valuers who stated that they did not contact KETRACO when making the report from her knowledge. She also stated that she did not see an engineer's estimate, quantity surveyor's estimate of valuation or any comparatives in terms of building materials that could have been used. She noted that the valuer adopted the valuation used by KETRACO but did not apply the 30% formula. She denied that KETRACO owes the petitioners any amount. She also stated that the Chief did not force people, the purpose of the Chief's signature is to confirm that the person signing is the correct person to avoid disputes.

41. Upon cross-examination by counsel for the Petitioners, DW 1 stated that she was not present when sensitization was done in 2010. She was not there during the assessment of damage or negotiation for some of the petitioners. There was another valuer from whom she took over.

42. DW 1 was referred to the re-settlement Plan dated March 2010 and noted that it is not signed by Norken International Ltd or KPLC. The plan was to guide KETRACO and to carry out a census and a general view of the person and area. She noted that on Page 18 of the replying affidavit, the Resettlement Policy Framework guides compensation, which is generally 30% but can be 30% - 50% depending on inconvenience. This is the same as the impact of the transmission line on the subject land.

43. The witness stated that the methodology used for confirmation was for land there was a valuation but she noted that they had not attached the valuation of crops and that the rates for compensation are not written. She confirmed that the 1st petitioner was paid on page 114 of the replying affidavit Ksh. 60,330/= for crops and trees were paid using Kenya Forest Service rates.

44. On Public participation and sensitization, DW 1 stated that it was carried out and the petitioners were involved, though there were no minutes but referred to the is the Resettlement Action Plan.

Petitioners' Written Submissions

45. Counsel for the Petitioners and the Respondent filed written submissions and highlighted the same. Counsel 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 of 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 for purposes of erecting electricity transmission lines in a project known as Kindaruma-Mwingi-Garissa 132KV Transmission line forced the petitioners to enter into unconscionable letters or contracts for purposes of compensation, while some of them were not compensated. The Petitioners have therefore filed this Petition to seek to vitiate the compensation agreements between them and the respondent.

46. Regarding the constitutional threshold of the Petition, the petitioners submit that they have identified Articles 27,40,47 and 50 of *the Constitution* as having been violated by the respondent. They cited

various cases both Anarita Karimi and Mumo Matemu case on the importance of setting out the constitutional provisions that a Petitioner alleges to have infringed.

47. On the matter of locus standi, counsel for the Petitioner cited Article 22 of *the Constitution* on the right of any person to institute court proceedings claiming a right or fundamental freedom has been denied, violated or infringed 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.

48. In respect of commercial or financial interests of the petitioners, counsel 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 because they have given their consent and authority to be represented and 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.

49. On the issue of whether the compensation agreements are voidable or void, it was submitted that the agreements entered into were against public policy on account of illegality and were not prompt payment in full and of just compensation.

50. Counsel quoted from 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 has admitted to following a completely different process and moved directly by purporting to appoint a valuer, based on which they issued the agreements.

51. Given this, the Petitioners submitted that the actions of the Respondent were 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 among other where the courts held that since the *Land Act* has an elaborate procedure to be followed in creating a wayleave. He concluded that the Respondent's entry and occupation of the suit properties was illegal and unconstitutional.

52. 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. On this matter, they relied on the case of Tennyson Nyinge Chilyalya & 60 Others Kenya Electricity Transmission Company Ltd (2020)eKLR.

53. The Petitioners also submitted that there was a lack of public participation and the Resettlement Action cannot be said to show the amount of 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 others(suing on behalf of Busia Sugarcane Importers Association) vs Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries and Co-operatives & 7 others (2021)eKLR among others finding that a public participation program must show intentional inclusivity and diversity.

54. The Petitioners submitted 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.

55. The Petitioners further submit there was unconscientious use of power and on account of the inequality of the parties and thus the agreements are voidable and relied on the case of CIS v Director Crawford International School and 3 others (2020) eKLR

56. 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. They stated that the agreements amount to unconscionable contracts since they were entered into without any lawful and proper valuation reports, without taking into account the value for trees and crops as they quoted from the cases of LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investments Und Enwicklungsgellschft('Deg')& others(2011)eKLR where the Court of Appeal gave the elements necessary to hold that a contract is unconscionable and the cases of Sharok Kher Mohamed Ali & Another vs Southern Credit Banking Corporation Limited(2008)eKLR and the case of Madhupaper International Ltd & another v. Kenya Commercial Bank Ltd & 2 others(2003)eKLR.

57. Further, the Petitioners submitted that the procedure used in arriving at the agreements was illegal and unconscionable and that one of the factors to determine whether a contract is unconscionable is the circumstances and procedure and cited the case of Euromec International Limited v Shandog Taikai Power Engineering Company Limited (2021)KEHC(KLR).

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

59. They claim a violation of Article 47 of *the Constitution* and submit that they were not heard before the Respondent arrived at its impugned decision. Among the cases relied on was the case of Capital Markets Authority v Jeremiah Kiereini & another (2014) eKLR where the Court of Appeal found that the right to fair administrative action cannot be limited on account of the concept of public interest.

60. Counsel for the Petitioners went on to categorize the Petitioners into those who were never compensated at all, those whose documents were falsified to reflect that they had been paid a higher sum than what was actually paid as compensation and those who were not fully compensated owing to an undervaluation of their properties.

61. 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.

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

63. Regarding undervaluation, the Petitioners' submission is that the respondent came up with its compensation policy which provides for compensation at 30% of the value of the affected land. They urged the court to determine that the trace value is the value for compensation given by their valuer that the portions affected by the way leave were not capable of being utilized and relied on the Tennyson Nyinge Chilyalya and Lpeton Lengidi cases.

64. The Petitioners also relied on Hon. Angote J's decision in the case of Kenya Power and Lighting Company Limited v Gimalu Health Estate Limited (2020)eKLR. They also relied on the Court of Appeal's holding in the case of Kenya Power and Lighting Company Limited v Philip AM Kimondiu (2018) eKLR where the court determined that the measure of damages for a right of way or a wayleave

is the value by which the land value diminished and in a case where the claimant has been deprived of his land, the measure of damages is the value of his interest in the land.

65. The Petitioners therefore submit that they ought to be compensated at 100% of the value of the affected land as indicated in Schedule B of the Amended Petition.

66. 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 per petitioner and the case of June Seventeenth Enterprises Ltd (Suing on its behalf & on behalf of & in the interest of 223 other persons being former inhabitants of KPA Maasai Village Embakasi within Nairobi) v Kenya Airports Authority & 4 others [2014] eKLR where general damages was awarded at Ksh.150,000 for violation of constitutional rights, which sum the petitioners propose.

67. The counsels highlighted their submissions on 27th July 2023 and counsel for the Petitioners Mr. Mutua submitted on the doctrine of exhaustion that the suit herein was filed in 2017 while the *Energy Act* was enacted in 2019, therefore there was no opportunity at the time to exercise the mechanism therein and further, that it does not apply to this case because the Act does not deal with compensation after the compulsory acquisition, which was previously governed by the Land Acquisition Act(Repealed) and now is only found in the *Land Act*.

68. Regarding the principle of constitutional avoidance, counsel for the Petitioners submitted that the issues herein could not have been raised in an ordinary suit since there were constitutional violations.

The Respondent's submissions

69. Counsel for the Respondent submitted two issues for determination; Whether the petition is properly before this court and whether the petitioners are entitled to the prayers sought.

70. They submit that under the doctrine of avoidance, contract claims ought to have been instituted through a normal civil suit as nothing in the petition warrants filing a Constitutional Petition. They relied on the Supreme Court's definition in the case of Communications Commission of Kenya & 5 others vs Royal Media Services Ltd & 5 others(2014)eKLR and the Court of Appeal Case of Gabriel Mutava & 2 others -vs- Managing Director Kenya Ports Authority & another(2016)eKLR.

71. The Respondent stated that the doctrine of constitutional avoidance deprives this court of jurisdiction as they relied on the holding in the cases of Ibrahim Wakhanyanga and 2 others v. Chief Magistrate's Court Kakamega & 2 others ELC PetNo.E004 of 2021 and the case of Southlake Panorama Limited v Kenya Electricity Transmission Company Limited and 3 others(2021)eKLR.

72. Further, it is the Respondent's submission that this Petition does not meet the threshold of constitutional petitions as was set down in the case of Anarita Karimi Njeru vs Republic(1976-1980)KLR 1272 and Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others Civil Appeal No.290 of 2012 where the courts held that the constitutional provisions said to be infringed in a petition be set out with a reasonable degree of precision, which the Respondent submits that the Petitioners have failed to do.

73. On the 2nd issue, Counsel submitted that the Petitioners are not entitled to the reliefs sought as the Respondents did not acquire proprietary rights over the Petitioners' parcels of land through compulsory acquisition, there was no cancellation of title or taking possession of the land but only creation of easements. They relied on Section 121(2) & 3 of the *Land Act* 2012.

74. Counsel further submitted that there is no basis for nullification of the Agreements since none of the claims of coercion or duress were proven. They also submitted that the allegation of fraud, coercion, intimidation, duress, threats and corruption as alleged must be strictly proved and this was not done.

75. On denial of the opportunity to seek independent advice, the Respondent submitted that this duty lay squarely on the affected party and the Petitioners have not shown any restriction imposed by the Respondent on their right to seek independent advice. Counsel further highlighted that the Respondent undertook a thorough public consultation process between October and December 2009 in which they took the views of all persons likely to be affected by the project.

76. It is the Respondent's further submission that there is no basis for an award of Ksh. 94,072,295 or general damages since the Petitioners are in the wrong forum and have failed to prove their case.

77. Commenting on the Valuation reports filed by the Petitioners prepared by Clayton Valuers Limited, counsel submitted that the claim is based on an error of a fundamental fact and is purely speculative since the valuation are based on 100% loss of use of land and presumes that the land was acquired as opposed to the creation of an easement. The Respondent also submits that the Petitioners' Valuer Mr. Kimeli did not give the comparables used and could not state with clarity where the figures on improvements were derived from.

78. On the prayer for the conduct of a fresh valuation, the Respondent submits that the Petitioners have not made a case for this because it would amount to rewriting the agreement between the Petitioners and they cited the cases of National Bank Kenya Limited vs Pipeplastic Samsolit (K) Limited & Another (2002)2EA 503, Benjamin Kariamburi Mwangi & 2 others c. Kenya Electricity Transmission Company and Another (2022)eKLR and David Ramogi and 4 others v Cabinet Secretary, Ministry of Energy and Petroleum and 7 others(2018)eKLR.

79. Counsel for the Respondent, Mr. Lutta Advocate also highlighted his submissions in response, submitting that the Amended Petition does not contain violations of Sections 144, 146 and 148 of the *Land Act* and the same was not pleaded.

80. Counsel submitted that their annexures A and B, the resettlement action plan showed that there were public barazas, hence there was public participation.

81. On the allegations of duress, and force, counsel for the Respondent submitted that there was no evidence of this since the parties were involved discussions were held and the agreements were signed.

82. Further, counsel for the Respondent submitted that this is not a Petition but it is a compensation claim and should have filed an individual claim. They also submit that nothing was falsified and there is evidence of payments, acceptances, thumbprints and cheques.

83. Regarding the issue of the *Energy Act*, counsel relied on the authority of Southlake Panorama Limited v Kenya Electricity Transmission Company Limited and 3 others (2021)eKLR which he states settles that the Court of Appeal settled the matter.

84. Counsel for the Respondent insisted that this is a contractual matter and that the court is devoid of jurisdiction to entertain the suit by virtue of constitutional avoidance and does not meet the threshold for Constitutional Petitions given in the Anarita Karimi case.

85. He also submitted that the Petitioners are attempting to rewrite their contracts and that the Respondent did not acquire proprietary interests in the land. They relied on the authority of Benjamin Kariamburi Mwangi & 2 others c. Kenya Electricity Transmission Company and Another (2022) eKLR where a similar matter was dismissed.

86. In response thereof, counsel for the Petitioners Mr. Mutua submitted that once a constitutional article is cited and it is shown how the violation occurred as in this case, they have fulfilled the requirements in the Anarita Karimi Case, and he also stated that this is a representative suit and all the issues have been addressed by the appearing parties, thus the Petition meets the threshold.

Analysis and Determination

87. The court has considered the pleadings filed in this petition, the evidence adduced at the trial and submissions made by Counsel for all the parties, and the issues drawn by the parties, the court finds that the following issues arise for determination;

    i. Whether the Petitioner's claim is pleaded with precision.

    ii. Whether the (8) petitioners have locus standi to bring the suit on behalf of the other petitioners;

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

    iv. Whether the petition offends the doctrine of exhaustion;

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

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

    vii. Whether the Petitioners' Constitutional Rights were violated;

    viii. Whether the petitioners are entitled to the reliefs sought

i. Whether the Petitioner's claim is pleaded with precision.

88. The Respondent's 1st objection to this Petition is that the petition does not meet the threshold for a Constitutional Petition that a party that alleges a violation of rights must plead with reasonable precision how there has been such a violation as held in the case of Anarita Karimi Njeru v Republic [1979] eKLR where the High Court held:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

89. Counsel for the Respondent relied on the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (Supra) in submitting that the petition is defective for breaching the requirement for particularization and specificity. The Respondent claims that for this reason, it has suffered prejudice and inability to respond to the allegations made. The respondent further submitted that there is a remedy in civil law that remedy should be pursued instead of filing a constitutional petition.

90. The Supreme Court confirmed the importance of complying with the stated principle by stating in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR as follows:

> "...Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated, infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."

91. The petitioner's Counsel responded to this challenge to the petition and stated that the petition meets the threshold for a petition and that they have specifically pleaded constitutional violations of Articles 27, 40, 47 and 50 of *the Constitution* and the manner in which the violations were committed have been particularized and they cannot be said to have failed the drafting test.

92. Counsel for the Petitioners followed guidance from the case of Stella Rose Anyango Vs Attorney General & Others (Supra) in finding that the petition had clearly stated the actions believed to be wrong and unconstitutional and provisions of *the constitution* which the petitioner believes to have been violated. The petitioners in that case had provided for "who", "what" and "why"

93. In the Amended Petition, The Petitioners have set out in paragraph 5 that their claim is in respect of violation of their right to property under Article 40, right to fair administrative action under Article 47 and right to equal protection by the law under both Articles 27 and 50 of *the Constitution* of Kenya 2010. The Petitioners have also laid out the actions by the Respondent which they consider were wrong and unconstitutional as well as the provisions of *the Constitution* which they believe were violated. In the court's view, the petitioners herein have demonstrated what their complaint is, against whom the complaints are made and the provisions of *the constitution* they allege have been violated.

94. The Court of Appeal in the case of Mohamed Fugicha v Methodist church in Kenya (suing through its registered trustees) & 3 others [2016] eKLR confirmed that the primary purpose of pleadings is to communicate the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer. The court stated that:

> "We are quite clear in our minds that whereas the Hon. the Chief Justice in making the Rules did set out what a petition ought to contain, it cannot have been his intention, and nor could it be, in the face of express constitutional pronouncement, to invest those rules with a stone cast rigidity they cannot possibly possess. It seems to us unacceptable in principle that a creeping formalism should be allowed to claw back and constrict the door to access to justice flung open by *the Constitution* when it removed the strictures of standing and formality that formerly held sway. We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer. Within that general rubric of notification to court and respondent, *the Constitution*, if it says anything at all on this subject, clearly does not lionize form over substance.

> Thus, while ANARITA and other cases decided before *the Constitution* of 2010 were decided correctly in their context with their insistence on specificity, the constitutional text now doubtless presents an epochal shift that would preserve informal pleadings that would otherwise have been struck out in former times. We are satisfied that there was no doubt at all as to what Fugicha's complaints were, against whom they were, and the provision of *the Constitution* he alleged had been violated or contravened."

In this case, the court is satisfied that the pleadings as drawn are clear and the Respondent is able to tell the case they are to respond to.

ii) Whether the (8) petitioners have locus standi to bring the suit on behalf of the other petitioners;

97. The Respondent in the replying affidavit challenged the petition on the ground that the eight 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 and authority to sue on their behalf.

98. Articles 22 and 258 of *the Constitution* of Kenya give every person the right to enforce rights under the Bill of Rights and *the Constitution* by instituting court proceedings. Under Article 22 the person claims that a right or fundamental freedom in the Bill of Rights has been denied, violated infringed, or threatened. The article states that;

> (2) In addition to a person acting in their own interest, court proceedings under clause (1) 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
>
> (d) an association acting in the interest of one or more of its members.

99. The procedure for instituting a constitutional petition is guided by the provisions of Article 23 of *the Constitution* and under Article 22(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 based on 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.

100. 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.

101. 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.

102. 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

103. In the present case, the heading of the Petition lists the 8 Petitioners and goes on to add " suing on behalf of 86 others as per the attached list marked schedule B Residents of Mwingi Sub-County). In the body of the petition, the Petitioners describe themselves as "proprietors of various parcels of land situate in Mwingi Subcounty of Kitui County while the respondent erected electricity transmission line known as Kindaruma-Mwingi-Garissa 132 KV Transmission line which line traversed the petitioner's parcels of land"

104. 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 eight Petitioners rightfully and legally represent the parties listed as envisaged under Article 22 (b) of *the Constitution*.

105. 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 with respect to 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.

iii) Whether the petition offends the doctrine of Constitutional avoidance;

106. Counsel for the Respondent submitted that the Court is divested of jurisdiction based on the doctrine of Constitutional avoidance for the reason that the petitioners are seeking to nullify the contracts entered into between them and the Respondent on account of duress occasioned by alleged inequality of bargaining power. It was submitted that the claim herein is one under contract which claim ought to have been instituted through a normal civil suit as opposed to a Constitutional petition.

107. 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."

108. 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."

109. Reading through the petition herein the Petitioners challenge the compensation awarded by the Respondent for failure to meet the criteria 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.

110. 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. 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.

111. 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 the manner in which the compensation was arrived at and the agreement for the compensation was made. In other words, was the compensation "full and just"? 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. 94,071,295/-.

112. 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.

113. 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 compensation and the same be paid for by the Respondent. They also seek an order for compensation for the total sum of Kshs. 94,071,295/-

114. 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"

115. 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)"

116. Determination of whether or not there is full and just compensation for acquisition of land for purposes of a wayleve or public right of way is provided 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."

117. Sub-section 5 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."

118. Further, Section 150 of the *Land Act* 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"

119. From the foregoing, it is clear that the *Land Act* implements the provisions of Article 40 of *the Constitution* 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.

120. 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 a determination of the amount and method of payment of compensation.

121. The Court has considered the timelines for the various activities in the process of compensation in this case from the making of the schedule of valuations of the Petitioners' properties by one Casty Mbae which schedule is dated 13th March 2014, the agreements for compensation for limited loss of use of properties which have various dates between the year 2014 and 2015 and the sample Agreements for grant of easements dated between 2015 and 2017. Further, the court has considered payments made between 2014 and 2015. During this entire period, the *Land Act* No. 6 of 2012 was already in place from its date of commencement on 2nd May 2012.

122. During the said entire period the process for lodging a complaint in case a party was dissatisfied with the awards made was available to the Petitioners under the above-mentioned provisions of the law. In the Courts' view 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 the 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 the 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 the environment and land.

123. The Court is persuaded from the above provisions of the law that there existed under the *Land Act* No. 6 of 2012 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.

124. The Court has also noted that another alternative means of settling the Petitioners' grievances existed 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."

125. 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.

126. 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;

127. 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;

128. 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.

129. 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—

130. 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.

131. 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.

132. From the foregoing provisions, the Petitioners had a choice of the forum through which 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. Further, 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.

133. It is also noted that 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 hence tainted with illegality. The Petitioners claim 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, compensation details were falsified while others had their properties undervalued and underpaid. It is noted that the above arguments and the legal authorities cited in support of the complaints are mainly challenges to the contracts. The said authorities arise from mainly filed as 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.

134. 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.

135. In the present case, the Petitioner's 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 as a

constitutional issue. This is, therefore, not a proper question falling for determination by this court sitting as a constitutional court.

136. 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."

137. 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.

iv) Whether the petition offends the doctrine of exhaustion;

138. Article 159 (2) (c) of *the Constitution* of Kenya provides for alternative forms of dispute resolution mechanisms and 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);

139. 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."

140. 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."

141. The Court has discussed in detail the alternative forms of dispute resolution mechanisms which existed and have been provided for to deal with disputes like the one in this petition. They include mechanisms provided for under the repealed *Energy Act* 2006 as well as under the *Land Act* 2012. They also included internal grievances Redress Mechanisms contained in the Resettlement Action Plan (RAP) all discussed extensively elsewhere in this judgement.

142. In the present case, the court is satisfied that an offer for compensation was made to the Petitioners by the Respondent and the same was accepted by the signing of the letters of offer and receiving of payment for the limited loss of use of land and damage to crops/trees and structures where applicable. In the court's assessment of the evidence adduced, the Petitioner's grievances had been noted in the Resettlement Action Plan being concerns over compensation and valuation of property, compensation procedures and legal redress procedures, undervaluation of structures, land, crops as well as complete neglect to value natural trees used for beekeeping. These issues 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. 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."

144. Following the above Supreme Court of Kenya legal precedent, the court has scrutinized the petition and the evidence adduced and 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 i), iii), iv), and v) relate to the quantum of compensation as they seek a declaration that the agreements to pay compensation on account of the way leave 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. 94,071,295/- 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.

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

147. In what the Court considers to be a claim made to make the petition have a constitutional angle, the petitioners challenged the Respondent for not having followed the procedure laid down in law for the 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. The Court has considered the Petitioners' claim as pleaded in the Amended Petition and which has been summarized elsewhere in this judgement. 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. They pleaded that the amounts awarded were extremely low and consents/agreements obtained 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.

153. 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*.

154. From the above matters pleaded in the Petition, the court is not persuaded that issues raised in Sections 144, 145 and 146 of the *Land Act* were 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. Challenge to the process under the above-mentioned Sections would have required the Respondent to show inter alia that they commenced the process of acquisition of wayleaves 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.

155. 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.

156. 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."

157. 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."

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

159. Further, the Court is of the opinion that the challenge raised by the Petitioners on public participation and right is in respect of the period prior to the valuation of the Petitioners' properties and offer for compensation and in the court's view as found herein the said challenges were not specifically pleaded.

160. Even though the Court has found that the Petition is not properly filed as a constitutional petition and that it violates the doctrine of avoidance and the exhaustion theory, the Court will consider the other grounds relied on in the petition.

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

161. 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, services 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.

162. 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.

163. 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.

164. It was stated by the said Edel Loko the witness for the Respondent, that the Petitioners hail from the Kivou area in Mwingi where land was valued at an average of Kshs. 300,000/=. 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 said schedule contained the property number (LR) property owner, sub-location, location, coordinates, size of the whole land, land affected, percentage of land, value per acre and total trace value. 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.

165. Further, the Respondent produced in court a crop compensation schedule dated 12th March 2014. The Petitioners provided sample structure valuation forms and property damage forms for the crops/trees which were issued by the Respondent. However, it is noted that the forms provided by the Petitioners did not have the amount the structures and crops were valued at.

166. The Respondent's witness testified that they used the Kenya Forestry service rates and Agriculture crop valuation schedule to value the individual amounts the land owners were entitled for crops/trees. However, the said rates were 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.

167. From the foregoing observations, it is the court's view that the schedule of valuations made of the Petitioners. properties did not include the valuation reports themselves and thus fell short by failing to give relevant information.

168. On the other hand, the Petitioners produced in court valuation reports by Clayton Valuers Ltd. It is noted that the reports generally follow the same format and the following are noted. The valuation was carried out on various dates in 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.

169. The valuer confirmed that he used the market value in assessing the properties. The report gives 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."

170. When cross-examined during the hearing, the valuer stated that land is valued using comparable sales but he confirmed 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 noted

in the valuation report. In the court's view it was important that any figures given be supported and in the end, the report herein consists of amounts that are unsupported and arrived at five years after the initial valuation by the Respondents.

171. 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".

172. 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.

173. Further, on cross-examination the valuer informed the court concerning the values given to the trees and crops, he used the Kenya Forestry Service and Ministry of Agriculture rates. However, the said rates were not produced in Court. Further, in some instances, the valuation for the land affected was the same as the value of the trees.

174. 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 compared to the values given by the Respondent's valuer.

175. The Court has considered the two sets of values given to the Petitioner parcels of land and the crop, trees and structures damaged. The court is satisfied that notwithstanding the shortcomings in the Respondent's schedule of valuations when the offer for compensation was made to the Petitioners 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. In the court's assessment of the evidence adduced, the grievances that had been noted in the Resettlement Action Plan being concerns over compensation and valuation of property, compensation procedures and legal redress procedures, undervaluation of structures, land, crops as well as complete neglect to value natural trees used for beekeeping, were the same ones raised in this petition. The evidence before the court seems to point to the issues having been resolved to the satisfaction of the parties since the Petitioners signed the agreements for compensation.

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

176. 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 commence compensation."

177. The said letters also contained a part titled "ACCEPTANCE OF OFFER" which required the name, ID NO. and signature of the land owner. Among those exhibited by the Petitioners are such letters that were signed by Julius Ngui Mwoni -1st Petitioner, Muthuvi Munuve, Benjamin Mutia Mung'ei, Kimwele Maluki, Joseph Kitheka Valingo, Mutemi Musee and many others whose letters of offer contained the same terms and were signed by the land owners.

178. 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."

179. 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.

180. The Petitioners' grievances had been noted from the time of the Respondents Resettlement Action Plan in the year 2010 and the Petitioners had an opportunity to have the said grievances addressed by the time of the letters of offer and the property damage reports 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.

181. The Petitioners' witness number 2 told the court that the area chief and askaris forced them to sign documents and they stamped them claiming that this was a government project and the President was expected to commission the 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 on different days. 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.

182. The Petitioners claim that the said 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. The Petitioners also claim to be poor and ignorant of the legal process of wayleave acquisition. The Respondents deny these allegations.

186. The court has considered the Petitioners' 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.

187. 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.

188. 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.

189. 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 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.

190. 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 when they voluntarily entered into the agreements and there was no intimidation, coercion or undue influence.

191. 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 cannot 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."

viii. Whether the Petitioners' Constitutional Rights were violated

192. 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.

193. 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.

viii) Whether the petitioners are entitled to the reliefs sought

194. 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.

19577. 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

Ms Moga holding together with Lutta for the Respondent

N/A for the Petitioners