



REPUBLIC OF KENYA



**Mugambi & 4 others v Kenya Electricity Transmission Company Limited (KETRACO)
(Civil Appeal 185 of 2018) [2025] KECA 125 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 125 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 185 OF 2018
W KARANJA, J MOHAMMED & LK KIMARU, JJA
FEBRUARY 7, 2025**

BETWEEN

**EPHANTUS MUGAMBI 1ST APPELLANT
STANLEY TWERANDU KIRIMI 2ND APPELLANT
M'MUGAMBI M'MARETE 3RD APPELLANT
JOSEPH KIARA MUGAMBI 4TH APPELLANT
CHARLES KIRIMI MBUI 5TH APPELLANT**

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED
(KETRACO) RESPONDENT**

(An appeal from the judgment of the Environment and Land Court of Kenya at Meru (L. N. Mbugua J.) dated 14th February, 2018 in Miscellaneous Application No. 43 of 2016 (O.S))

JUDGMENT

Background

1. The appeal is in respect of compensation for acquisition of easement/right of way for electricity transmission line by Kenya Electricity Transmission Company Limited (KETRACO) (the respondent) over parcel of land number NTIRIMITI/SETTLEMENT SCHEME/288 measuring 42 Hectares registered in the name of Ephantus Mugambi, Stanley Twerandu Kirimi, M'Mugambi M'Marete, Joseph Kiara Mugambi and Charles Kirimi Mbui (the appellants). The purpose of the acquisition of the said land was construction of 400KV transmission line. The respondent offered to pay 30% of the market value of the affected land which to them translated to Kshs. 687,844.62. The affected area measures 2.866 Acres. The appellants declined the amount of compensation offered by



the respondent and termed the same as unreasonable taking into account the development prospects they have for the said land.

PARA 2.

The appellants are aggrieved by the finding of the Environment and Land Court (ELC) granting the respondent a right of way over land parcel number NTIRIMITI/SETTLEMENT SCHEME/288 for purpose of putting up a transmission line and ordering that the appellant be compensated a sum of Kshs.687,844 for the said acquisition despite their opposition.

3. By a notice of appeal lodged on 23rd February, 2018 and a Memorandum of Appeal lodged on 24th October, 2018, the appellant prays that the appeal be allowed and the award of the ELC be set aside and a better and reasonable award be made to the appellants in terms of their valuation Report and equity.
4. The appellants, being the registered owners of parcel of land number NTIRIMITI/SETTLEMENT SCHEME/288 measuring about 42 Hectares (103.78 Acres), were notified of the respondent's intention to acquire right of way for the purpose of putting up the Suswa-Isinya transmission line. The two parties were in agreement that the affected size of land measure 2.866 Acres. The pertinent issue then was the valuation of the said affected area for purposes of compensating the appellants. The respondent offered Kshs. 687,844 as the fair and adequate compensation translating to 30% of the value of the affected area which figure was adapted by the ELC. On the other hand, the appellants engaged their private valuer who valued the affected area at Kshs.8,600,000 in June 2016, at the rate of Kshs.3,000,000 per acre for land fronting the tarmac road.
5. The ELC rejected the valuation report by the appellants and adopted one presented by the respondent prepared by Gimco Limited over parcel no. Ntirimiti Settlement Scheme/882 Subuiga Area, Meru County conducted in November 2013 that valued one acre of land at Kshs. 800,000.
6. The appellants have raised the grounds of appeal that the ELC erred:-
 - i. in failing to find that the application before it by the respondent was defective and should have been dismissed or struck out;
 - ii. in acting on and supporting an application which was bad in law and which disclosed no cause of action;
 - iii. in refusing to give any weight to the appellants' case, documents or the Valuation Report;
 - iv. in allowing itself to be influenced by the issue of public interest disregarding the fact that the individual citizen had an interest to be protected by the court; that
 - v. the judgment of the ELC is against the weight of the material placed before it; and that
 - vi. the judgment of the ELC is bad in law as it did not sufficiently consider the pleadings, documents and the material filed by the appellants and only gave attention to the respondent.
7. The appellants sought orders that the appeal be allowed and the award of the ELC be set aside and a better and reasonable award be made to the appellants in terms of their valuation report and equity; and that costs be provided for.

Submissions by Counsel

8. During the hearing of the appeal, learned counsel Mr. Mwendwa appeared for the appellants while Mr. Patrick Wachira appeared for the respondent. Counsel had filed written submissions on which they both sought to rely.



9. The submissions raised by counsel for the appellants in support of the appeal are that the respondent's application (O.S) was premised on Article 40(3) of the Constitution and Sections 139, 149 and 150 of the Lands Act which provisions give certain rights but do not provide for a procedure to claim the said rights. That the respondent ought to have filed a constitutional reference to enforce any rights it contends that it has under Article 40(3) of the Constitution. Regarding Sections 139, 149 and 150 of the Land Act, counsel submitted that the respondent ought to have filed a civil suit. As regards Order 34 of the Civil Procedure Rules, 2010, counsel submitted that the same gives effect to Section 58 of the Civil Procedure Act and deals with interpleader proceedings.
10. Counsel further submitted that there was nothing on record to show that the affidavits in support of the O.S were sworn by an authorized officer of the respondent as required under Order 4 Rule 1(4) of the Civil Procedure Rules. Counsel submitted that in the circumstances, the O.S filed by the respondent was bad in law and ought to be struck out.
11. Counsel further submitted that in the alternative to the above, the ELC ought to have considered the compensation offered by the respondent for the compulsory acquisition of part of their land and ensure that the same was reasonable. Counsel further submitted that their 2.866 acres of land which will be affected by the respondent's project is a prime area as it borders the Isiolo-Meru-Nanyuki main road and it is at the heart of tourist destination. That the compensation offered by the respondent and as adopted by the trial court is too low noting that the respondent expressly stated that no structures should be built near or beneath the affected area thus making the affected area of no use to the appellants.
12. Counsel further submitted that the valuation report presented by the respondent and adopted by the ELC was prepared in 2013 and was therefore not a current one. The trial court ignored that the current one as conducted by NI-LIGHT CONSULTANTS LIMITED in 2016. The appellants termed the respondent's action as attempt to deny them fair compensation contrary to Section 111(1) of the Land Act and Article 40(3) of the Constitution. That the power transmission line will greatly affect the use of their parcel of land and the respondent has not offered reasonable compensation.
13. The respondent on the other hand opposed the appeal and raised a preliminary point, that the record of appeal was filed out of time and without leave of the Court in contravention of Rule 84 of the Court of Appeal Rules. Counsel submitted that the impugned decision was made on 14th February, 2018 and the record of appeal should have been filed within 60 days of lodging the notice of appeal, which the appellants had failed to do. That the appellants had not sought for a certified copy of the proceedings and judgment; that counsel for the appellants had written a letter bespeaking proceedings but had not served the letter bespeaking the proceedings on the respondent. That under the proviso to Rule 84(2) of the Court of Appeal Rules (this Court's Rules), the time for preparation of proceedings is excluded where the letter applying for proceeding was filed within 30 days from the date of the decision and served upon the respondent.
14. Counsel submitted that the respondent applied for proceedings via a letter dated 29th March, 2018 but filed and paid for on 24th May, 2018, which was 100 days after the date of the decision (14th February, 2018). Counsel further submitted that the effect of Rule 85(1) and (2) of this Court's Rules is that a record filed out of time is deemed as withdrawn. Counsel further submitted that the appellant had not sought an extension of time under Rule 4 of this Court's Rules to be allowed to lodge the appeal out of time. Counsel relied on the decisions of this Court in Tharaka Nithi County Government & another vs Gaichu & 129 others (Civil Appeal no. 107 of 2021 (2022) KECA 585 (KCA) (8 July 2022 (Ruling).
15. Counsel further raised an objection to the appeal on the ground that no certified copy of decree had been annexed to the record hence it is incompetent pursuant to Rule 89(1)(h) of this Court's Rules.



Further, that the record of appeal has some missing documents and it is therefore incomplete. Further, that the appellants moved the trial court under section 149 of the *Land Act*, 2012. Counsel relied on the decision of the Supreme Court in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR.

16. Counsel further submitted that the amount of compensation offered to the appellants was fair and reasonable for the appellants' limited loss of use of their land. That a reading of the affidavits in reply filed by the appellants shows that they were not against the project but their contention was on the reasonability of the compensation. Counsel submitted that the instant appeal is aimed at an enhanced figure from that adopted by the trial court. Counsel submitted that as per the impugned judgment and orders of the ELC the respondent went on and completed the project and still hold the payment, which was declined by the appellants.
17. Counsel further submitted that the subject area of land was acquired for public interest as provided under Article 40(3)(b) of *the Constitution* of Kenya, 2010 and relied on the case of *Sylvia Wambui Kuria vs KETRACO* (2016) eKLR which held that public interest outweighs private rights. That their valuation of the land was done in 2013 valuing the land at Kshs.800,000 per acre while that of the appellant was done in 2016 during pendency of the suit valuing the same land at Kshs.3,000,000 per acre. That the rationale behind 30% compensation policy is that the respondent was not acquiring the affected area of land. Ownership was still retained by the registered owner; the compensation is only for the grant of right of way. Counsel asserted that as shown in their pleadings, the respondent was willing to pay the compensation as determined by the court and the trial court was persuaded by the figure that they offered. That the 30% policy was applied to all persons whose land was affected by the project. That the trial court exercised its discretion judicially in affirming the figure offered by the respondent. Counsel urged this Court to dismiss the appeal and uphold the decision of the ELC.
18. It is notable that counsel for the appellants did not file subsequent submissions in response to the issues raised regarding the competency of the appeal. In his oral highlights, counsel for the appellants conceded that the record of appeal was filed out of time but attributed the reason for the delay to challenges at the Court Registry. Counsel urged this Court to invoke Article 159 (2) (b) of *the Constitution* and allow the appeal with costs.
19. In the circumstances, counsel for the appellants did not respond to the issues regarding the competence of the appeal as raised by counsel for the respondent.

Determination

20. We have considered the record, the written submissions, the authorities cited and the law. This is a first appeal. In *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and *Peters vs. Sunday Post Limited* [1985] EA 424 in the latter case, the Court held as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion...”

21. Before delving into the substantive appeal, we will consider the issues raised by counsel for the respondent regarding the competence of the appeal as this may determine the matter without going into the merits of the appeal.
22. Rule 84(1) of this Court's Rules provides as follows:



84.

- (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged -
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;
 - c. the prescribed fee; and
 - d. security for the costs of the appeal: Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule
- (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

23. From the record, counsel for the appellants conceded that the record of appeal was not lodged within 60 days after the notice of appeal was filed on 23rd February, 2018. The letter bespeaking proceedings dated 20th March 2018 was filed on 24th May, 2018. This was about 100 days following the delivery of the impugned judgment. Further, the letter bespeaking proceedings was not copied to the respondent or its counsel.

24. The proviso to Rule 84(2) of this Court’s Rules provides as follows:

“(2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless the appellant’s application for such copy was in writing and a copy of the application was served upon the respondent.”

25. In the circumstances, for the appellants to rely on Rule 84(2) they must have copied the letter bespeaking proceedings to counsel for the appellants. This was not done. Further, counsel for the appellants did not apply for extension of time within which to file the record of appeal under Rule 4 of this Court’s Rules.

26. Rule 4 of this Court’s Rules provides as follows:

“The Court may on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”

27. The Supreme Court of Kenya in *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 Others* (supra) pronounced itself as follows:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution* where an appeal is incompetent. An incompetent



appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

28. In *Tharaka Nithi County Government & Another v Gaichu & 129 Others* (supra) this Court stated as follows:

“This Court has time without number emphasized the importance of compliance with the rules of Court. In *Joyce Bochere Nyamweya v. Jemima Nyaboke Nyamweya & Another* [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 82 and failure to comply with the same renders an appeal defective.

This Court in *Mae Properties Limited vs. Joseph Kibe & Another* [2017] eKLR, reiterated its position as follows:-

We have said on numerous occasions that the rules of court exist for the purpose of orderly administration of justice before this court. The timelines for the doing of certain things and takings of certain steps are indispensable to the proper adjudication of the appeals that come before us. The rules are expressed in clear and unambiguous terms and they command obedience...”

The respondents failed to comply with rule 82 of the rules and consequently rules 83 and 84 come into play. The instant application to strike out the record was made within 30 days of service of the record, which was on 3rd November 2020. From the foregoing, it is inescapably clear that the application dated 21st November, 2020 is with merit. It is allowed with the result that Civil Appeal No. 107 of 2021 is deemed as withdrawn with costs to the applicants.”

28. In *Mugambi v Electricity Transmission Company Ltd (KETRACO) (Civil Appeal 205 of 2018)* [2023] KECA 1048 (KLR) (24 August 2023) (Judgment) this Court stated as follows:

“Once the appellant found himself in the circumstances of delay he ought to have applied under Rule 4 of the Rules for extension of time to lodge the appeal out of time...No such application was made to this Court. As was stated in *Mae Properties Limited –v- Joseph Kibe & Another* (supra), the notice of appeal in this matter died a natural death after the expiry of 60 days, now that time was not extended by the operation of the proviso to Rule 84(1) of the Rules, and because no request for the extension of time to file the appeal out of time was made and allowed under Rule 4 of the Rules.

The consequence of this non-compliance with these mandatory provisions of the Rules is contained in Rule 85(1) and (2) of the Rules as follows:-

- (1) If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time, that party shall be deemed to have withdrawn the notice of appeal and the Court may, on its own motion or on application by any other party, make such order.
- (2) The party in default under sub-rule (1) shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

28. By parity of reasoning, we determine that the appellants having failed to institute the appeal within the stipulated time: -

- i. the notice of appeal filed by the appellants on 23rd February, 2018 is deemed as withdrawn; and



- ii. the record of appeal filed out of time without leave of the Court is hereby struck out.
- iii. the appellants shall pay to the respondent the costs of the instant appeal.

29. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF FEBRUARY, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

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