



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Maridadi Flowers Limited v Kenya Electricity Transmission Co. Limited (Environment & Land Petition E005 of 2022) [2024] KEELC 5169 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 5169 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND PETITION E005 OF 2022

FM NJOROGE, J

JUNE 13, 2024

**(AN APPEAL FROM THE RULING AND ORDER OF THE CHIEF MAGISTRATE'S
COURT AT LIMURU (P.M. MUGURE, PM.) DELIVERED ON 17TH MAY 2023
IN CMCC NO. E428 OF 2022**

BETWEEN

MARIDADI FLOWERS LIMITED PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO. LIMITED RESPONDENT

JUDGMENT

1. The Petitioner, Maridadi Flowers Limited, filed this Petition dated 8/11/2022 alleging violation of its fundamental rights as enshrined in Articles 27 (1) & (2), 40 (2) & (3) and 47 of *the Constitution* of Kenya, 2010. The facts and events leading to the filing of the Petition revolve around a wayleave over the Petitioner's parcel of land identified as L.R No. 425/81 (Original LR No. 425/21/24) measuring approximately 82.09Ha situate in Naivasha Sub-county within Nakuru County ("the suit property"). The Petitioner alleged that despite consent being granted to the Respondent to create way leave through the suit property, the latter has declined and or failed to release the compensation amount to the Petitioner.
2. The Petitioner sought the following reliefs: -
 - i. A declaration that the rights enshrined in the bill of rights under Article 27 (1) and (2), 40 (2) and (3) and 47 of *the Constitution* of Kenya have been grossly violated and/or infringed by the Respondents utilizing and taking over portions of the Petitioners property for way leave of its project namely 400/220/132kv Olkaria-Lessos-Kisumu transmission line without prompt and just wayleave compensation in full for over 2 years.



- ii. An order for wayleave compensation in the sum of Kes 89, 945,500/-
- iii. Interest on ii above at commercial rates from 24/12/2020 until payment in full.
- iv. Costs of the Petition.
- v. Any other relief that the court may deem fit to grant in the circumstances of the Petition.

Petitioner's case

3. The Petition is supported by the affidavits sworn by the Plaintiff's Managing Director, Jacobus I.P Kneppers on 8/11/2022 and on 7/3/2023.
4. The Petitioner alleged that on diverse dates between the year 2020 and 2021, the Respondent sought and was granted consent way leave through the suit property to construct the 400/220/132kv Olkaria-Lessos-Kisumu transmission line ("the Project"); that the consent was subject to a way leave compensation of Kshs. 89,945,500/- as per the Respondent's offer dated 15/1/2021 and Petitioner's acceptance letter dated 23/6/2021. According to the Petitioner, the Respondent was however granted possession of the suit property on 24/12/2020 and it constructed and completed the project in January 2021 traversing about 12.27 acres of the suit property.
5. The Petitioner further claimed that as a result of the Respondent's failure, it first lodged a civil claim for compensation before the Energy and Petroleum Tribunal at Nairobi under Claim No. EPA/E018/2022 where the claim was struck out for want of jurisdiction vide a ruling dated 12/10/2022.

Respondent's case

6. In response to the Petition, the Respondent filed a Replying Affidavit sworn by Raymond Ogado on 11/1/2023 and a preliminary objection dated 20/3/2023. The preliminary objection was based on the following grounds: -
 1. The court lacks jurisdiction to hear and determine the suit as the same offends the provisions of sections 3(1), 10, 11 (e), (f), (i), (k), & (l), 23, 24, 36, 40, 42 and 224 (2) (e) of the [Energy Act](#), 2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations, 2012 as read together with Article 159 (2) (c) and 169 (1) (d) and (2) of [the Constitution](#) of Kenya, 2010 and section 9 (2) and (3) of the Fair Administrative Act, 2015.
 2. The court lacks jurisdiction to hear and determine the suit as held by the Court of Appeal on 3/2/2023 in Kisumu Civil Appeal No. 42 of 2021, Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee (NECC), NEMA, Siaya County, KPLC & Others [2023] eKLR.
7. The Respondent averred that the Petition is pre-mature since it has not refused to compensate the Petitioner. The Respondent blamed the Petitioner for failure to furnish the Respondent with requisite documents including a certificate of title to enable registration of the easement so as to actualize the compensation process.
8. According to the Respondent, proof of ownership of land is a prerequisite to compensation for any land affected by the project or any other project within its mandate. The Respondent alleged that the suit property herein is a subdivision of LR No. 425/12 which was registered in the name of Panda Development Co. Limited as per a publication by the National Land Commission dated 27/5/2015; that the Respondent's effort to ascertain ownership from the land registry proved futile



until sometime around December 2020 when the Respondent's officer met the Petitioner's directors on the suit property. The directors informed them of their claim to the suit property. Consequently, the Respondent issued a letter of offer dated 18/12/2020 for Kshs. 47, 837, 571. 60 to the Petitioner pending provision of a certificate of title and other requisite documents.

9. The Respondent alleged that the Petitioner rejected the offer prompting further negotiations between the two parties with a view of issuing an official letter of offer to the Petitioner upon furnishing the Respondent with a certificate of title to the suit property.
10. The Petition was canvassed by way of written submissions.

The Petitioner's submissions

11. Counsel for the Petitioner, Litoro & Omwebu Advocates, filed two sets of submissions, on 8/3/2023 and 25/5/2023. In the first set, counsel identified two issues, namely – whether the Petitioner's rights were violated; and whether the Petitioner should be compensated.
12. Quoting Article 40 (3) and (4) of *the Constitution*, counsel submitted that there was sufficient evidence as to ownership of the suit property by the Petitioner and that the Respondent has not provided any proof of any third parties claiming competing rights. He added that there was also sufficient proof that the Respondent offered and Petitioner accepted to grant the wayleave. Therefore, having utilized the suit property and failed to promptly compensate the Petitioner, the Respondent was in violation of the Petitioner's rights to property guaranteed under the aforementioned article as read with Section 111 and 148 of the *Land Act*. Counsel relied on *Modern Coast Builders & Contractors Limited V National Land Commission [2021] eKLR* and *Fish Processors (Two Thousand) Limited v National Land Commission [2017] eKLR*.
13. Counsel added that Article 40 is clear that before a government agency can deprive a person of their property, compensation must first be paid; thus, having shown that the project is complete and the agreed sum was Kshs. 89,945,500/- the Petitioner is entitled to prompt compensation of the same. Counsel cited *John Peter Mwangi Kagira v National Land Commission & another [2019] eKLR*.
14. In his second set of written submissions, counsel addressed the issue of jurisdiction raised by the Respondent. He quoted the definition of jurisdiction as was expressed in *Tabitha K Rutere v Kenyatta University [2018] eKLR*. He argued that the totality of Article 162 (2) (b) and (3) of *the Constitution* as read with Section 13 (1) of the *Environment and Land Court Act* No. 9 of 2011 (ELCA) is that the Environment and Land Court (ELC) is bestowed with the jurisdiction to deal with disputes relating to environment, land use and planning, boundary disputes and any form of land dispute. To buttress this point, counsel relied on *AKM V NNN [2019] eKLR*.
15. It was counsel's submission that Section 11 (1) of the *Energy Act* No. 1 of 2019 vests to the Energy and Petroleum Regulatory Authority, jurisdiction only to investigate and determine complaints or disputes related to licenses and licence conditions under the Act. He added that the Petitioner's claim herein does not fall within the interpretation of a licence or licence holder established under Section 2 of the *Energy Act*.
16. Counsel further submitted that Section 36 (3) of the *Energy Act* is not applicable to the dispute herein. He explained that while Section 2 of the said Act defined a Licensee, in this case to mean the Respondent, the Act fails to define a third party referred to under Section 36 (3) thereon. Counsel argued that the definition of a third party should thus be referred to in the Black's Law Dictionary to mean "a person not connected to a contract but who may be affected by its outcome." In the light of this definition, counsel submitted that none of the parties herein could be referred as a "third party"



- as they were both principal parties to the wayleave agreement. He relied on the case of Patrick Mwangi [*Muchuku v Kenya Electricity Transmission Co. Limited \[2023\] eKLR Petition No. E3 of 2022.*](#)
17. Counsel added that Section 36 (1) of the [*Energy Act*](#) also does not apply to the dispute herein since Section 175 of the same Act refers disputes touching on ownership, use of land and compensation to the relevant laws and in this case Section 148 of the [*Land Act*](#) which in turn refers to the Environment and Land Court. Counsel was guided by the decision of the Energy and Petroleum Tribunal in EPA/E023/2022 between Igal Roni Elfezouaty and Makao Nafuu v Kenya Electricity Transmission Company Limited and EPA/E018/2022 Maridadi Flowers Limited v Kenya Electricity Transmission Company Limited.
 18. Secondly, counsel addressed the issue whether the Petitioner is the Proprietor of the suit property. He urged the court to be guided by paragraph 3 of the Petitioner’s affidavit demonstrating the history of the suit property up to the current ownership. He submitted that there is sufficient proof of the Petitioner’s possession of the suit property and in the absence of any other evidence contrary the Respondent’s allegations remain just that.
 19. Lastly, counsel discussed whether the Petitioner’s rights have been violated. It was counsel’s submission that by depriving the Petitioner of prompt payment in full of the wayleave compensation, the Respondent has continued to violate the Petitioner’s rights under Article 40 (3) and (4) of [*the Constitution*](#). He stated that the Respondent’s inaction amounts to a constitutional matter as was expounded in the case of RC v KKR [2021] eKLR. To counsel, the Petitioner has a right to property, which right include the use and enjoyment of the suit property which the Respondent has violated by taking possession thereof. Counsel further relied on inter alia the case of David Gitau Thairu v County Government of Machakos & 2 others [2020] eKLR.
 20. According to counsel, the Petitioner was entitled to the reliefs sought in the Petition.

The Respondent’s submissions

21. On the onset, counsel referred the court to the principle of constitutional avoidance as was explained by the Supreme Court in Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR and in Aashwander v Tennessee Valley Authority 297 U.S 288, 347 [1936].
22. Counsel identified three issues for determination. Firstly, whether the court has jurisdiction. He submitted that the applicable standard was set out in the case of Owners of Motor Vessel “Lilian S” v Caltex Oil Kenya Ltd [1989] KLR 1 and in Samuel Kamau Macharia and another v Kenya Commercial Bank and 2 others, Application No. 2 of 2011 where the court stated that a court’s jurisdiction flows from either [*the Constitution*](#) or legislation or both.
23. He argued that pursuant to Section 9(2) of the Fair Administrative Actions Act, the Energy and Petroleum Regulatory Authority (the Authority) under Section 11(i) has original jurisdiction over the issues in this case and the Energy Tribunal appellate jurisdiction over decisions of the Authority, as conferred under Section 24 (1), 36 (4) and 40 of the [*Energy Act*](#). To counsel, under Section 37 (3) of the [*Energy Act*](#), the jurisdiction of this court could only be procedurally invoked on appeal of the decision of the Energy Tribunal. Counsel relied on the case of Abidha Nicholus v [*Kenya Power & Lighting Company Limited & 13 others Civil Appeal No. 42 of 2021.*](#)
24. The second issue was whether the Petitioner’s rights were violated. In relation to this, counsel submitted that one of the rules in constitutional petitions is that a party claiming a violation of rights must specifically plead, particularize and prove the said violation as was held in the renowned Anarita



- Karimi Njeru v Republic and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others. To counsel, the Petitioner having failed to provide ownership documents to the suit property and having failed to demonstrate that they occupy the suit property, there was no link between the Petitioner and the suit property therefor, a claim for violation of constitutional rights could not stand.
25. Lastly, counsel submitted that having failed to produce a certificate of title registered to its name, and in the spirit of Section 26 (1) of the *Land Registration Act*, the Respondent could not release any compensation to the Petitioner. In turn, the Petitioner could not claim any beneficial or legal rights over the suit property. His basis for this argument was that Section 119 (a) of the *Land Act* mandates that compensation shall only be made upon the exercise of due diligence which shall include final survey and determination of acreage, boundaries, ownership and value of a property.
 26. Counsel argued that one could not claim to be deprived of that which he does not have rights over. To buttress this point, counsel relied on the case of Veronica Njeri Waweru & 4 others v City Council of Nairobi & 2 others [2012] eKLR.
 27. To counsel, the compensation amount payable for easements over the suit property is Kshs. 47,837, 571.60 and will only be payable upon proof of ownership and effective registration of easement against the certificate of title.
 28. Given the above, I identify the following issues for determination: -
 - i. Whether this court is equipped with the requisite jurisdiction to determine the Petition;
 - ii. Whether the Petitioner's rights under Article 27 (1) and (2), 40 (2) and (3) and 47 of *the Constitution* of Kenya have been violated and/or infringed by the Respondents;
 - iii. Should the orders sought be granted?

ANALYSIS AND DETERMINATION

Issue (i)

29. The legal position on matters jurisdiction, as per the Supreme Court in Samuel Macharia & Anor v. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, is that a Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
30. I am also minded that jurisdiction of a court goes to the very heart of a matter, without which a court has to down its tools. This was settled in the renowned case of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd(supra).
31. In this case the Petitioner's grievance is that despite entering into an agreement to utilize the suit property for the project, the Respondent has declined to release the agreed compensation amount to the Petitioner. The Respondent contested the jurisdiction of this court, stating that the forum with original jurisdiction in matters relating to compensation for wayleave vests upon the Authority and that this court only has jurisdiction at the second Appellate level after the Energy Tribunal. In other words, the Respondent's argument was that the Petitioner did not exhaust the dispute resolution mechanism provided under Sections 3(1), 10, 11 (e), (f), (i), (k), & (l), 23, 24, 36, 40, 42 and 224 (2) (e) of the *Energy Act*, 2019 together with regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations, 2012.



32. The jurisdiction of this court stems from Article 162(2) of *the Constitution* as well as Section 13 of the *Environment and Land Court Act*. *The Constitution* at Article 162(2) (b) states that: -
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to —
 - (b) the environment and the use and occupation of, and title to, land.’
33. Section 13 of the *Environment and Land Court Act* 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.
34. Section 13 (2) further stipulates that in exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
35. Sub-section 4 thereon further provides: -
- “In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.”
36. Turning to the *Energy Act*, Section 3 (1) thereon reads: -
- “If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters—
- (a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy;
 - (b) the exploration, production, transportation, distribution, and supply of any other form of energy; and
 - (c) all works and apparatus for any or all of these purposes.”
37. Section 10 of the *Energy Act* provides for the functions of the Authority while Section 11 provides for the powers of the Authority. Relevant to the Respondent’s argument herein is Section 11 (i) which provides that the Authority shall have power to investigate and determine complaints or disputes between parties over any matter relating to licenses and licence conditions under this Act. Section 23 provides for decisions of the Authority while Section 24 provides for timelines to file appeals against the decisions of the Authority and Section 40 provides that such appeals be made to the Energy Tribunal. Section 36 further provides for the jurisdiction of the Energy Tribunal. Section 224 (2) (e) of the



Energy Act on repeals and savings provides that notwithstanding the provisions of Subsection (1) any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act.

38. One of the subsidiary legislations saved by Section 224 above is the Energy (Complaints and Dispute Resolution) Regulations 2012. Regulation 2 thereon stipulates that the Regulations shall apply to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct, practice or operation of any party of any matter regulated under the Act. Section 3 goes ahead to describe a complaint to include a dissatisfaction with the service rendered by, or a practice of, any person carrying out any undertaking pursuant to a licence, permit or registration issued or granted by the Commission, under the Act. Regulation 4 adds that the areas of complaint and dispute include-

“...billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.”

39. Regulations 7 and 9 refer to disputes referred to the Commission in the event that the complaint or dispute is not resolved to the satisfaction of a party, under the Act.

40. The Petitioner’s complaint against the Respondent is in respect to way leaves and easements or rights of way in relation to the generation, transmission, distribution, supply and use of electrical energy. However, what I find distinct is that unlike the case herein, there was no any kind of agreement between the complainant and the respondent in the *Abidha Nicholus v KPLC & 13 Others* [supra]. Either, the complainant in that case was not seeking payment of way leave compensation as is the case herein.

41. Further, Section 175 of the Energy Act provides as follows: -

“If any difficulty or question arises as to the amount, entitlement to compensation or person entitled to compensation payable under this Act, the determination shall be made in accordance with the provisions of the relevant written law.”

42. The Respondent’s explanation as to failure to release the compensation amount to the Petitioner, is that there was no proof of ownership of the suit property. There is also an imminent dispute as to the amount of compensation. The nature of the parties’ grievance, in my view, would fall within the ambit of Section 175 of the Energy Act, the import of which is that any dispute touching on ownership, use of land, and compensation shall be referred to the relevant laws, in this case, the Land Laws.

43. Section 148 of the Land Act provides for compensation in respect of public right of way. The relevant sub-sections provide: -

1. 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. ...
 - (5) 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.

44. The Court referred to in Section 148 (5) above is the Environment and Land Court. In the foregoing, I find no merit in the preliminary objection raised by the Respondent. The jurisdiction of this court established under Article 162 (2) of *the Constitution* and Section 13 of the Environment and *Land Act*, includes the requisite jurisdiction to hear and determine the dispute herein.

Issue ii

45. It is a well settled principle and it was not disputed herein, that a Petitioner in such a constitutional petition ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation (See Anarita Karimi Njeru v Republic [1979] KLR 154 and *Trusted Society of Human Rights Alliance v Attorney General and Others Petition No.229 of 2012*).

46. The Petitioner's claim against the Respondent was premised under Article 27 (1) and (2); Article 40 (2) and (3) and Article 47 of *the Constitution*. Article 27 guarantees the right to equality and freedom from discrimination as follows: -

- (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

47. Article 40 provides for the right to protection of property. Sub-article (2) and (3) provide: -

- “(2) Parliament shall not enact a law that permits the State or any person—
- (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) 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; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”

48. Article 47 provides for the right to fair administrative action. It reads as follows: -

“



- “(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
- SUBPARA (a)
- provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
- SUBPARA (b)
- promote efficient administration.”

49. In the present case, the Respondent admits to have sought the Petitioner’s consent to enter the suit property for purposes of actualizing the project. It is also evident that there is compensation to be paid to the petitioner by the respondent for creation of wayleave over its land. This is not a petition regarding how much that sum should be. It is rather about whether the rights guaranteed under Article 40 (3) have been infringed by the Respondent.
50. As the Respondent has explained why the compensation sum has not been paid, it is appropriate to examine the merits of that explanation. The respondent claims that the reason for delayed payment is that the Petitioner did not provide any proof of ownership of the land so as to process the same.
51. A perusal of the documents annexed to the Petition, particularly, the letter and email dated 3/02/2022 addressed to the Respondent’s acting general manager, shows that a copy of the suit property’s registered conveyance of the suit property in favour of the Petitioner was forwarded to the Respondent. The petitioner’s land is LR Number 425/81 situate in Naivasha. They indicate that the Original Number that bore it is LR 425/21/24.
52. The only authority for the petitioner’s assertion is the conveyance dated 17/3/2015 vide which they appear to have purchased the property from one Igal Roni Elfezouaty. However, the Respondent alleged that the suit property is a product of sub-division of L.R 425/12 registered in the name of Panda Development Limited. The Respondent did not however demonstrate or produce any evidence to prove their allegation that the suit land is a subdivision of LR NO 425/12. The respondent however exhibited an excerpt of a People Daily advertisement dated 27/3/2015 issued by National Land Commission which advertised that property. The advertisement is still in respect of the same project mentioned in this suit. It notified the affected landowners that the project would affect their land and invited representations to be made to the chairman of the NLC. No further information is given by the respondent as to whether the owner of that land parcel approached the NLC for compensation.
53. The NLC is not party to these proceedings. It is not clear where the respondent’s idea that the petitioner’s land was a subdivision of another one originated from. The further allegation by the respondent, which has not been rebutted by the petitioner, is that its efforts to ascertain ownership of the suit property from the land registry to inform the wayleave acquisition proved futile, that the petitioner has not provided it with a certificate of title and that a post registration certificate of official search is necessary in order to inform the compensation process. The respondent states that without these documents and proofs there is grave risk to public funds if the petitioner is compensated without



proof of registration in its name. A very strong statement indeed. However, notwithstanding all the implications of the respondent's allegations, the petitioner stuck to its position that it is the registered owner.

54. The crucial question that this court must ask itself is: is the Respondent's basis whatsoever for declining or delaying compensation as unreasonable and in violation of the petitioner's constitutional rights guaranteed under Article 40 (3)?
55. Matters public finance are sensitive and indeed any loss of public funds is to be loathed. Accountability is a constitutional principle under constitution and Article 201 provides that public money shall be used in a prudent and responsible way. The sum involved in this case is colossal and it is understandable when the respondent takes time to ensure that the correct person is being compensated. Without proof of ownership compensation is utterly impossible.
56. All land registered in this country ought to evoke an official search to demonstrate who the owner is. Public bodies rely on the owners to conduct the searches and bring them duly sealed certificates of search. A certificate of official search sealed by the Land Registrar is taken as the evidence of what is contained in the land register as at the date of that certificate.
57. The importance of the provision of the correct certificate of official search in compensation matters should not be underestimated for it determines whether it is the rightful owner or a fraudster who is compensated. In its submissions the respondent has stated that any interest acquired in land only becomes indefeasible upon effective registration of the same hence the need to register the easement against the petitioner's title to forestall any future claim for compensation; that effecting compensation puts the respondent's interest at risk where a registered proprietor can successfully claim compensation which would lead to double compensation. It cites the provisions of Section 119(a) of the *Land Act* No 6 Of 2012 where payment of compensation is made subject to exercise of due diligence including final survey and the determination of acreage, boundaries, ownership and value. In this case there is so far no evidence that any other person has laid claim to the compensation on the basis of ownership of the said land. It is the opinion of this court that where a respondent pleads that the cause before court arose out of its noble attempts to comply with constitutional principles, it can only be condemned for constitutional infringements on the rights of a subject upon a very scrupulous scrutiny to avert any injustice to it. In this court's view it was incumbent on the petitioner to seek and provide the one current document that would satisfy the respondent that the suit land belonged to it, or was still registered in its name but it never did so. Where the petitioner has nothing to conceal, it can not be understood why it would not comply with such a small but crucial step.
58. Demand by the respondent of the petitioner's compliance with procedures put in place to safeguard loss of public funds can not be regarded as unconstitutional as they seek to serve a constitutional principle of fiscal prudence and accountability. It is only where such procedures are not only onerous and impossible but also unreasonable that this court would overrule them in favour of a more direct resolution of the matter through its orders. The concern here is that the court may by compelling a skipping of one of the steps supposed to be followed by the parties compel payment of money that may not have been otherwise paid, or payment to persons who do not deserve such payment and in that way the court orders may be liable to abuse.
59. I have noted that the petitioner relies on a GLA conveyance to claim title to the suit land and I note that reliance on such a lone document presents a risk for the respondent, for example, in the event another subsequent conveyance transferring the land to another owner and surfaces after compensation has been paid to the petitioner. Besides, if the respondent has had problems as it states in effectively tracing the records of the suit land at the land registry, then the question arises as to whether any reasonable



man would later on, in the event the land turns out post-compensation not to have been owned by the petitioner after all, if the respondent complied with constitutional strictures exacting diligence, prudence and accountability. The obvious answer to that question would be “no”. The respondent’s concerns must be understood in that light. At this juncture it can not be known if the petitioner faced similar constraints at the land registry, but I am certain that there are avenues for redress if it did. It is crucial that it should be possible to hold either the petitioner or accountable perchance any other person claiming ownership of the land post-compensation.

60. The Respondent’s basis for declining or delaying compensation is therefore neither unreasonable or in violation of the petitioner’s constitutional rights guaranteed under Article 40 (3). In relation to Articles 27 and 47, I have found that the Petitioner failed to meet the test set out in the Anarita Karimi case [supra] and Trusted Society of Human Rights Alliance v Attorney General and Others [supra].
61. Lastly, I must state that the cost of conducting an official search or otherwise establishing ownership in order to demonstrate that the land is the petitioner’s is quite negligible compared with the delay and expense that has ensued as the petitioner pursued the present case, and on that basis the petitioner must be condemned to costs.
62. The upshot of the foregoing is that the petition dated 8/11/2022 lacks merit and it is hereby dismissed with costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 13TH DAY OF JUNE 2024

MWANGI NJOROGE

JUDGE, ELC, MALINDI

