



REPUBLIC OF KENYA



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Elfezouaty & another v Kenya Electricity Transmission Co. Limited (Environment & Land Petition E006 of 2022) [2024] KEELC 5600 (KLR) (31 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION E006 OF 2022**

FM NJOROGE, J

JULY 31, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 2(2), 10, 20(2), 21, 22(1), 27(1) (2), 40 (3) & (4), 47 AND 258 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF VIOLATION AND INFRINGEMENT OF THE RIGHTS TO PROPERTY, EQUAL TREATMENT & PROTECTION OF THE LAW & FAIR TRIAL

AND

IN THE MATTER OF COMPENSATION FOR WAYLEAVE IN RESPECT OF LR NO. 425/81 (ORIGINAL LR NO. 425/21/24) IN NAIVASHA MUNICIPALITY

BETWEEN

BETWEEN

IGAL RONI ELFEZOUATY 1ST PETITIONER

MAKAU NAFUU LIMITED 2ND PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO. LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Petitioners, Igal Roni Elfezouaty and Makau Nafuu Ltd, filed this Petition dated 24/10/2022 alleging violation of their fundamental rights as enshrined in Articles 27 (1) & (2), 40 (2) & (3) and 47 *Constitution of Kenya, 2010*.
2. The filing of the Petition arose from the events revolving around the creation of wayleave over the Petitioners' respective parcels of land identified as LR No 425/73 and LR No 425/80 situate in



Naivasha Sub-county within Nakuru County (the “first suit property” and the “second suit property” respectively). The Petitioners allege that despite consent being granted to the Respondent for way leave through the suit properties, the latter has declined and/or failed to release the compensation amount to the Petitioners.

3. 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 Petitioner’s property namely LR No 425/73 and LR No 425/80 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 of:
 - a. Kshs. 20, 565,144.60 for wayleave through the 1st petitioner’s land LR NO 425/23; and
 - b. of Kshs. 19, 695,253.76 for wayleave through the 1st petitioner’s land LR NO 425/23;
 - 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.

Petitioners’ case

4. The Petition is supported by the affidavit sworn by the 1st petitioner on 24/10/2022 on his own behalf and on the 2nd petitioner’s behalf. The Petitioners allege that they are the lawful owners in actual occupation and use of the suit properties. The 2nd petitioner purchased the second property (LR No 425/80) from the 1st petitioner on 19/12/2021 and it was transferred to it on 27/7/2021 whereupon it took immediate possession. It is averred that the transfer in respect of the suit property dated 27/7/2022 has been lodged and the 2nd petitioner now awaits the issuance of a title deed in its name.
5. It is averred that the two suit properties herein are subdivisions of LR No 425/21 which was prior to subdivision jointly registered to the 1st petitioner and one Pritam Singh Panesar (deceased).
6. By a deed of partition dated 7/5/2010 and registered on 3/9/2010 the deceased conveyed the two suit properties to the 1st petitioner who took immediate possession thereof and who later transferred the second suit property to the 2nd petitioner.
7. On 18/12/2020, the Respondent sought way leave to construct the 400/220/132kv Olkaria-Lessos-Kisumu transmission line (“the Project”) through the suit properties and offered to the 1st petitioner wayleave compensation of Kshs 20, 565,144.60 for the first suit property and Kshs. 18, 464,300.40 for the second suit property; the 1st petitioner accepted the offer and signed the letter of offer for wayleave compensation in respect of the 1st suit property, and on 24/12/2020 granted possession of the suit property to the respondent who took immediate possession, carried out the project works thereon and completed the same by January 2021. The respondent acknowledged the 1st petitioner’s acceptance on 29/12/2020. It is stated that the acceptance constituted a binding contract between the parties.



8. On or about December 2020 when the respondent sought wayleave, the 1st petitioner had commenced the process of disposing of the second suit property to the 2nd petitioner and the latter had taken possession thereof. The 2nd petitioner however rejected the offer; while the 2nd petitioner was rejecting the offer by the respondent, it was claiming the second property “under the 1st petitioner”. However, the respondent sought and was granted possession and thereafter commenced negotiations with the 2nd petitioner. Meanwhile the project was commenced and completed. Later, on 25/2/2021 the respondent and the 2nd petitioner agreed on wayleave compensation in respect of the second suit property in the sum of Kshs 19,695,253.76.
9. Notwithstanding the foregoing, the respondent, having been granted possession, has completed the project and it is utilizing the suit properties but it has refused, neglected or failed to pay the wayleave compensation agreed on in respect of both suit properties and the petitioners claim to have suffered loss. The petitioners aver that the respondent was constitutionally and legally bound to ensure prompt and just wayleave compensation before commencement of the project on the two suit properties. They stated that the respondent’s actions violate their fundamental rights and freedoms, that no state organ should deprive a person of property unless the deprivation is for a public purpose and is carried out in accordance with the Constitution and the law. On those grounds, the petitioners lodged a civil claim for compensation before the Energy and Petroleum Tribunal at Nairobi in claim number EPA / E023/2022 but the same was struck out on 12/10/2022 on the ground of lack of jurisdiction. It is on that basis that the prayers in the present petition have been sought. The petitioners aver that this court has jurisdiction. The petitioners aver that the respondent has violated Article 27(1) and 27(2) in failing to comply with the provisions of Article 40 of the Constitution. It is also claimed that the respondent has violated the petitioners’ rights to fair administrative action guaranteed by Article 47. For the foregoing reasons the petitioners plead that they are entitled to compensation under Article 23(3).

Respondent’s case

10. In response to the Petition, the Respondent filed a Replying Affidavit sworn by Raymond Ogodo 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.
11. The Respondent averred that the Petition is pre-mature since it has not refused to compensate the Petitioner. The Respondent blamed the Petitioners for failure to furnish the Respondent with all the requisite documents including accepted letters of offer and certificate of title to enable registration of the easement so as to actualize the compensation process.
12. According to the Respondent who cited Section 26 of the Land Registration Act No 3 Of 2012, a certificate of title is the only absolute and conclusive proof of proprietorship of any parcel of land and transfer of an interest in land is only possible by a registered proprietor or his legal representative;



also, proof of ownership of land is a prerequisite to compensation for any land affected by the project or any other project within the Respondent's mandate. The respondent stated that it can not make payment without being furnished with a formal offer letter, surrender of the original certificates of title, execution of an easement agreement with the respondent, registration of easement on the title and provision of a post-registration certificate of official search issued by the Land Registrar. The respondent stated that an interest in land is only created and recognized by its registration against the title. It stated that the petitioners have not complied with the fore mentioned conditions and that they are therefore not due for compensation.

13. The Respondent further alleged that the suit properties herein are subdivisions of LR No. 425/12 which was registered in the name of Panda Development and Co. Limited as per a publication dated 27/5/2015 by the National Land Commission; that the Respondent's effort to ascertain ownership from the land registry to inform acquisition of wayleave proved futile.
14. Based on a claim of proprietorship of the suit properties by the petitioners, the respondent however issued letters of offer of wayleave compensation as described by the petitioners in their petition. However, the issuance thereof was done pending provision of certificates of title or title deeds to the suit properties as well as other relevant documents as would enable registration of easements and compensation therefor. The respondent stated that the requirements were stated at paragraph 5 of the respective letters of offer. The petitioners however neither conveyed their acceptance of the offers within 14 days as requested nor furnished the respondent with the requisite documents, and therefore the respondent has not violated their rights as alleged. The respondent states that the situation presents a risk to public funds if compensation is done without compliance with the preconditions it had set down and that the petition ought to be dismissed in view of the need to protect public funds.
15. The Petition was canvassed by way of written submissions. On 27/3/2023 this court ordered that the submissions on the preliminary objection be included in the submissions in the main petition as a preliminary issue and granted the petitioner the right to file submissions in reply thereto.

The Petitioner's Submissions

16. Counsel for the Petitioner, Litoro & Omwebu Advocates, filed two sets of submissions, on 3/3/2023 and 22/5/2023. In the first set, counsel identified two issues, namely: - whether the Petitioners' rights were violated; and whether the Petitioner should be compensated.
17. Citing Article 40 (3) and (4) of *the Constitution*, counsel submitted that it is not in doubt that the petitioners "have always had possession of the suit property" hence the respondent's presentation of the offer to them; that the parties engaged each other and entered into agreement and the respondent's actions are therefore in violation of the Constitutional provisions with regard to prompt payment under Article 40(1), (3) and (4) yet the respondent has not provided proof of any third parties claiming any competing rights; that 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*. The petitioners rely on the case of Modern Coast Builders and Contractors Ltd Vs National Land Commission 2021 eKLR for the proposition that the respondent's conduct of taking possession, commencement of the project, and failing to pay compensation violated *the Constitution*. The petitioners scoff at the respondent's claim that its efforts to locate land records regarding ownership at the land registry were fruitless; they state that there is no evidence to support that allegation and therefore no good ground for failing to pay the wayleave compensation. They instead allege that it is the respondent who, despite having no doubts that the petitioners are the occupants of the suit properties, neglected to effect the registration of the easement against the suit titles. They further rely on Fish



- Processors (Two Thousand) Limited V National Land Commission 2017 eKLR for the proposition that the delay in payment is oppressive and a breach of their rights.
18. Regarding the second issue the petitioners' Counsel cited the case of John Peter Mwangi Kagira v National Land Commission & another [2019] eKLR for the proposition that before a government agency can deprive a person of their property, compensation must first be paid and maintained that they ought to be compensated. They state that the sums payable in such compensation are as pleaded in the prayers in the main petition and the Petitioner is entitled to prompt compensation of the same.
 19. The issue of jurisdiction raised by the Respondent was addressed in the petitioners' second set of written submissions. 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 the case of AKM V NNN [2019] eKLR.
 20. It was counsel's submission that Section 11 (I) 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.
 21. 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, as in the Black's Law Dictionary to mean "a person not connected to a contract but who may be affected by its outcome." In light of this definition, counsel submitted that none of the parties herein could be referred to 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 where the court observed that the definition of "third party" does not envisage the petitioner or the respondent.
 22. 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, in this case, Section 148 of the Land Act which in turn refers to the Environment and Land Court Act. Counsel was guided by the decision of the Energy and Petroleum Tribunal in EPA/E023/2022 between Igal Roni Elfezouaty and Makau Nafuu v Kenya Electricity Transmission Company Limited and EPA/E018/2022 Maridadi Flowers Limited v Kenya Electricity Transmission Company Limited. He submitted that in those cases the Tribunal held that it did not have the requisite jurisdiction to hear and determine the matter which bore similarity to the present dispute. He blamed the respondent for approbating and reprobating at the same time in that in the Tribunal in EPA/E023/2022 (supra) and EPA/E018/2022 (supra) it had submitted that the ELC and not the tribunal is clothed with the appropriate jurisdiction to handle such issues. He refuted the submission that the petitioners had invoked the jurisdiction of this court unprocedurally, stating that the Abidha Nicholas case is clearly distinguishable as the issues therein were totally different from those herein; he stated that as per the holding in R vs Kenya Revenue Authority Ex Parte Stanley Mombo Amuti 2018 eKLR, each case depends on its own facts and the court in the Abidha Nicholas case did not have to delve into the provisions of Sections 11(i), and 36(3) of the Energy Act as read with Section 175 and Section 2 of the same Act. He urged this court to adopt the holding in Patrick Mwangi Muchuku (supra) that it has jurisdiction in a matter such as this.



23. Secondly, counsel addressed the issue whether the Petitioners are the Proprietors of the suit properties. He urged that by paragraph 7 of the Petitioner's affidavit the petitioners had demonstrated the history of the suit properties up to the current ownership. He submitted that there is sufficient proof of the Petitioners' possession of the suit property and in the absence of any other evidence contrary the Respondent's allegations remain unproved.
24. Lastly, counsel discussed whether the Petitioners' rights have been violated. It was counsel's submission that by depriving the Petitioners of prompt payment in full of the wayleave compensation, the Respondent has violated, continues to violate the Petitioners' 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 Petitioners have a right to property, which right includes the use and enjoyment of the suit property which the Respondent has violated by taking possession thereof. Counsel further relied on the case of David Gitau Thairu v County Government of Machakos & 2 others [2020] eKLR, Trusted Society of Human Rights Alliance v AG & 2 others Civil Appeal No. 290 of 2012 [2012] eKLR, Baron Mathenge Munyoki v Dedan Mbangula Kithusi [2022] eKLR, and Christabel Akinyi Onyango v Kenya Airports Authority [2014] eKLR.
25. Counsel submitted that the Petitioner was entitled to the reliefs sought in the Petition.

The Respondent's submissions

26. At 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 Ashwander v Tennessee Valley Authority 297 U.S 288, 347 [1936].
27. Counsel identified three issues for determination. Firstly, whether this 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.
28. He stated that pursuant to Section 24 (1) anybody who is dissatisfied with the decision of the Authority should appeal to the Energy Tribunal; that Sections 36(4) and 40 of the *Energy Act* grants the Tribunal appellate jurisdiction from the acts of the Authority; that under Section 37 (3) of the *Energy Act* appeals lie to the High Court; that under Section 13(4) of the ELC Act this court has jurisdiction to hear appeals from the Energy Tribunal touching on wayleave compensation. He concluded by stating that both the energy tribunal and this court have jurisdiction over this matter and that the pertinent question is which is the proper procedure for invoking the two jurisdictions. He stated that under Section 9(2) the petitioners should have first sought redress from the EPRA, and in the event they were dissatisfied by the decision of the authority, then appealed to the EPT and finally appealed to this court in the event the decision of the EPT left them dissatisfied. He cited the case of Abidha Nicholus in support of the said proposition. He further stated that under Section 3(1) (a) of the *Energy Act*, in the event of a conflict between the Act and any other statute with reference to matters transmission of electricity and construction of a transmission line, the *Energy Act* should prevail. He submitted that the petitioners' claim at the Energy and Petroleum Tribunal was dismissed because the petitioners had not first gone to the EPRA to ventilate their claim. He further faulted the petitioners for having filed this petition instead of an appeal within 30 days against the EPT decision.
29. The second issue was whether the Petitioners' 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 *Anarita Karimi Njeru v Republic and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*. To counsel, the Petitioners having failed to provide ownership of the suit property or their occupation thereof, there was no link between the Petitioners and the suit properties and therefore, a valid claim for infringement of their constitutional rights could not stand. He further pointed out that the petitioners had at paragraph 10 of their supplementary affidavit invited this court to take judicial notice of the fact of digitization of land records which they alleged had delayed the registration of the transfers in their favour. He stated that by that statement the petitioners had admitted that the suit properties had not yet been registered in their favour.

30. Lastly, counsel submitted that the petitioners claim purchasers' interest; that having failed to produce certificates of title registered to their names and in the spirit of Section 26 (1) of the *Land Registration Act*, the Respondent could not release any compensation to the Petitioners. In turn, the Petitioners 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. 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. 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.
31. In view of the foregoing, this court has identified the following issues for determination: -
 - i. Whether this court has the requisite jurisdiction to determine the Petition;
 - ii. Whether the Petitioners' 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. What Orders should issue?

Analysis and Determination

32. Regarding the first issue, In *Samuel Macharia & Anor v. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court held 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.
33. 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)*.
34. The Petitioners' grievance is that notwithstanding having entered into an agreement with the respondent to utilize the suit property for the project, the Respondent has declined to release the agreed compensation amount to the Petitioners. 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 courts only has jurisdiction at the second Appellate level after the Energy Tribunal. In other words, the Respondent's argument was that the Petitioners 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.



35. 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.”
36. 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.
37. 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.
38. 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.”
39. Turning to the *Energy Act*, Section 3 (1) therein reads as follows: -
- “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.”
40. 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 the Act. Section 23 provides for decisions of the Authority and Section 24 provides for timelines to file appeals against the decisions of the Authority; 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 the Act shall, as long it is not inconsistent with the Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of the Act and shall, for all purposes, be deemed to have been made under the Act.

41. 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-

“(a) 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.”

42. In a recent related case, that is, Nakuru ELC Petition No. E005 of 2022 -Maridadi Flowers Limited Vs Kenya Electricity Transmission Co. Limited which this court finds to have facts which are on all fours with the present suit, this court had sufficient opportunity to analyze the respondent’s arguments therein which are similar to those set out herein above. Indeed, as it now occurs to this court which fact had not come to light there before, the suit properties in this case must be adjacent to the suit property in the Maridadi case (supra) (L.R No. 425/81 (Original LR No. 425/21/24) and the same fate of non-payment that befell the petitioner in that suit is the same that the petitioners herein have met, thus prompting them to approach this court for a remedy. The same claims as have been made herein were made by Maridadi Flowers Limited, the petitioner therein and the same defences raised in that case by the present respondent are the same defences raised herein. I need not reiterate herein the full analysis I made in that case concerning the legal provisions and the legal decision of Abidha Nicholus relied on by the respondent. What suffices to state herein is that in that case this court held as follows:

“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.

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.”

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.

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.

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.”

43. Consequently, applying the reasoning in that case to the present suit, I find that this court is possessed of the requisite jurisdiction to hear and determine this matter and the respondent’s objection on the ground of jurisdiction is hereby dismissed.
44. The second issue that has arisen in the present case is whether there has been a violation of the constitutional rights of the petitioners by the respondent.
45. In a constitutional petition, a petitioner ought to demonstrate with 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 Petitioners’ claim against the Respondent is 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—
- (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.”

49. In the present case, as in the Maridadi Case (supra), the Respondent admits to have sought the Petitioners’ consent to enter the suit property for purposes of implementing the project. Compensation was to be paid to the petitioners by the respondent for creation of wayleave over their land. This petition is about whether or not the rights guaranteed under Article 40 (3) have been infringed by the Respondent with regard to the petitioners.



50. The Respondent has explained why the compensation sum has not been paid. To the Respondent, the reason for delayed payment is that the Petitioners have not fully complied with the conditions set out in the letter of offer including providing 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 the petitioners attached a deed of partition dated 7/5/2010. It is titled "deed of partition" of land reference numbers 425/60, 425/61, 425/62, 425/63, 425/65, 425/66, 425/67, 425/68, 425/69, 425/70, 425/71, 425/72 Naivasha and land reference numbers 425/59, 425/64, 425/73, 425/74, 425/75, 425/80 and 425/81. In the body of that deed are complex details that involve a transaction between Pritam Singh Panesar and the 1st petitioner on the one hand and a firm named as Karati Limited on the other. That Panesar is now said to be deceased and can not tell any tales. There is also a deed of conveyance dated 17/4/2020 from the 1st petitioner to himself, of LR NO 425/73, and a sale agreement dated 19/12/2021 between the 1st petitioner and the 2nd petitioner in respect of LR No 425/80, and also a transfer for the said parcel, dated 27/7/2022. There is no copy of title attached to the petition. It is needless describe the details of the foregoing documents for the purposes of the present suit and the issue under discussion because they clearly do not amount to proof of title to the suit property on the part of the petitioners.
52. 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 and Company Limited (sic). 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. It however exhibited an excerpt of a People Daily advertisement dated 27/3/2015 issued by National Land Commission (NLC) which advertised that property LR NO 425/12. The advertisement is directly related to the same project mentioned in this suit. It notified all 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 or was indeed compensated. 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 parcel originated from.
53. In this case, just as in *Maridadi Flowers Limited* (supra) 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 petitioners' constitutional rights guaranteed under Article 40 (3)? This court reiterates, as it was stated in *Maridadi Flowers Limited* (supra), that matters public finance are sensitive and indeed any loss of public funds is to be loathed. Accountability is a constitutional principle under Article 201 which provides that public money shall be used in a prudent and responsible way. It is improper for any court to issue a judgment that appears to overlook any constitutional principle especially one so glaring. 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. The allegation by the respondent and, significantly, which has not been properly rebutted by the petitioners, is that its efforts to ascertain ownership of the suit properties 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. However, notwithstanding all the implications of the respondent's allegations, the petitioners stuck to their position that even the respondent is aware that they "have been in occupation", they are the registered owners of the suit properties notwithstanding lack of titles in their names. 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. I find this to be a very strong statement indeed. The very fact that the persons claiming compensation lack verifiable title is quite alarming,



especially where the respondent is required to be accountable for any funds released to persons claiming compensation. It is even more so where the second petitioner asserts that he is claiming under the 1st petitioner and the 1st petitioner asserts that he purchased the suit properties involved in this suit from one Panesar, and that that Panesar is now deceased and his heirs are not party to this suit, yet no title has issued to the claimants herein. There is no way to tell how the process of obtaining title will end and this court agrees that in matters compensation, this unique state of affairs calls for caution on the respondent's part. Without proof of ownership, compensation is utterly impossible. When the claimants herein state that they are the registered owners, that claim should be given weight. However, all registered land 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 whose authenticity those bodies can confirm with the land register. A certificate of official search sealed by the Land Registrar is taken as evidence of what is contained in the land register as at the date of that certificate.

54. 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 it is trite that any interest acquired in land is defeasible unless the same is registered hence the need to register the easement against the petitioners' titles to forestall any future claim for compensation by any person; 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.
55. 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, to avert any injustice to it, it can only be condemned for constitutional infringements on the rights of a subject upon a very scrupulous scrutiny. In this court's view it was incumbent on the petitioners to seek and provide the titles to the suit properties, being the current documents that would satisfy the respondent that the suit land belonged to them, or was still registered in their respective names but they never did so. Where the petitioners have nothing to conceal, it can not be understood why they would not comply with such a small but crucial step.
56. Demand by the respondent of the petitioners' 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 that compensation be paid. The concern here is that in the context of the present case, 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.
57. I have noted that the petitioners rely on conveyances to claim title to the suit land and I note that reliance on such documents presents a risk for the respondent, for example, in the event other subsequent conveyances transferring the land to other self-professed owners surface after compensation has been paid to the petitioners. 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 suit properties turn out post-compensation not to



have been owned by the petitioners after all, if the respondent complied with constitutional strictures exacting diligence, prudence and accountability. The obvious answer to that question would be “no”. I think the respondent’s concerns must be understood in that light. At this juncture it can not be known if the petitioners personally faced any constraints at the land registry that may have hindered or delayed their obtainance of title, but I am certain that there are avenues for redress if that occurred. It is crucial that it should be possible to hold the petitioners accountable perchance any other person emerges later on, claiming ownership of the suit lands post-compensation.

58. The Respondent’s basis for declining or delaying compensation is therefore neither unreasonable or in violation of the petitioners’ 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].
59. Lastly, it must be noted that the cost of conducting an official search or otherwise establishing ownership in order to demonstrate that the suit lands belong to the petitioners is quite negligible compared with the delay and expense that has ensued as the petitioners pursued the present case, and on that basis the petitioners must be condemned to costs.
60. The upshot of the foregoing is that the petition dated 24/10/2022 lacks merit and it is hereby dismissed with costs to the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31ST DAY OF JULY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

