



Maina & 19 others v Kirumi Kiamujari Water Project (Sued Through Its Registered Trustees/Officials) & another (Environment and Land Appeal E15 of 2021) [2024] KEELC 6236 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6236 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E15 OF 2021
CK YANO, J
SEPTEMBER 25, 2024**

BETWEEN

LOYD MUGAMBI MAINA & 19 OTHERS APPELLANT

AND

KIRUMI KIAMUJARI WATER PROJECT (SUED THROUGH ITS REGISTERED TRUSTEES/OFFICIALS) 1ST RESPONDENT

NGM COMPANY LIMITED 2ND RESPONDENT

(Being an Appeal against the Judgment of Honourable Njoki Kabara S.R.M delivered on 11/11/2021 in Chuka C.M ELC Case No. 52 of 2019)

JUDGMENT

Introduction

1. The Appellants filed suit in the subordinate court vide a plaint dated 18th September, 2019 and amended on 28th September, 2021 seeking for an order of permanent injunction to issue restraining the respondents, their agents, assigns, servants or any one acting on their behest from trespassing, entering, remaining, beaconing, pegging, breaking fences, laying a water transmission line and or harassing, or interfering with peaceful and uninterrupted occupation, enjoyment, usage and access by the Appellants, their workers, servants and agents in respect of L.R Nos Mwimbi/Murugi/6178, 94,305,4,56,3906,5710,2483,2481,3908,33,35,2482 and 2484 until all the relevant provisions of statute have been satisfactorily applied, that the OCS Chogoria Police Station be directed to ensure compliance of the orders issued by the court and costs and interest of the suit.
2. The Appellants pleaded that at all material times relevant to the suit, they were and still remain the registered and or the beneficial proprietors of various parcels of land within Mwimbi/Murugi in the following order, Loyd Mugambi Maina 6178, Murimi Mbae 94, Gitonga Murithi 305, Kenneth



Mboya Bernard 6179, John Gitonga M'Ithara 2352, Agnes Kanyua Michael 4, John Gitonga Nkabuni 56, M'Rithaa M'Raja 3906, Mwenda Gitonga 3906, Mbaabu Wilson 5710, Gitonga Mwiandi 5710, Eunice Kanini Mwiandi 5710, Gerrald Muriuki 2483, Benson Njeru Mwoga 2481, Julie Njeru 3908, Richard Ndubi Kajogi 33, AnnJoy Kangai M'Riria 35, Martin Mbabu Njeru 35, Fredrick Kaburu Mwoga 2482, Alexander Murithi Njeru 2484, Mawira Ndubi 33, Kariuki Murungi 33 and Doreen Kinya 6180.

3. The Appellants averred that they are not members of the 1st respondent and were not designated beneficiaries of an irrigation project being undertaken by the 1st respondent and which was expected to pass through the Appellants' parcels of land.
4. The Appellants further averred that in 2014, they were approached by the officials from the Ministry of Agriculture, Livestock and Fisheries (MOALF) who sought guarantees from the Appellants that they would render their consent for the passage of a water pipeline through their parcels of land once an intended project commenced. That they made tentative guarantees to the Ministry on condition that all the technical details of the expected project were disclosed to the Appellants for purposes of setting in motion the process of agreeing on the amount of compensation to be awarded to each of them and the subsequent execution of the way leave.
5. The Appellants pleaded that the 1st respondent applied for a water permit on 23rd November 2015 and an authorization was subsequently issued on 10th March 2017 allowing it to abstract water from South Mara River.
6. The Appellants averred that the 1st respondent commenced survey works for the laying of the pipeline and the excavations thereof prior to the completion of all the necessary procedural legal requirements as provided by the applicable law as agreed by the parties herein.
7. The Appellants pleaded that as a consequence of the breach of procedure by the 1st respondent, they engaged various stakeholders in a bid to resolve the issues relating to the width of the pipeline, the rate of compensation, maintenance of the pipeline, remedy in case of accidents to the pipeline and finally the way leave agreements with the 1st respondent and the content thereof.
8. The Appellants stated that the water Resources Authority, in its attempt to resolve the impasse between the parties, and after hearing both sides recommended that there be an amicable resolution of the issue of the way leave to allow for the continuation of the project.
9. The Appellants pleaded that in total contravention of the said recommendation and without any justifiable reason, the 1st respondent engaged the 2nd respondent to excavate the pipeline passage way and lay down the pipeline without the Appellants' consent and/or way leave, an act that will cause the Appellants great damage, inconvenience and hefty losses.
10. The Appellants further stated that the approach adopted by the 1st respondent in commencing its engagement with the appellants for purposes of implementing the project is legally flawed for failure to strictly adhere to the requirements of *the Constitution* and the applicable statute and hence unlawful.
11. The Appellants enumerated particulars of unlawfulness as completely failing to adhere to the procedure provided by Law for acquisition of a public right of way over private property, attempting to acquire portions of the Appellants' parcel of land without any compensation and violating the Appellants' Constitutional rights to ownership of property and right to an administrative action that is lawful, reasonable and procedurally fair.
12. The Appellants averred that the respondents' actions which are not in tandem with the Law are aimed at frustrating the Appellants and to further their illegal acts on the appellants' parcels of land.



13. The 1st respondent filed a statement of defence dated 24th August 2020 wherein they denied the Appellants' claim. The 1st respondent contended that the Appellants did not and have not notified the 1st respondent of the cancellation of the way leave which was done on 6th May 2019 and put the Appellants' to strict proof. The 1st respondent further contended that it was entitled to continue with its objectives. The 1st Respondent stated that it had not contravened any recommendations, the law or the agreements between the parties.
14. In her judgment delivered on 11th November 2021 the learned trial magistrate found that the 20 Appellants had failed to prove ownership of the suit parcels of land and as such had also failed to prove their claim on a balance of probability as against the 1st and 2nd respondents. Consequently, the trial court dismissed the appellants' suit with costs to the 1st respondent.
15. Being aggrieved by the said judgment, the appellants filed this appeal and raised the following grounds:-
 1. That the learned trial magistrate erred in law and fact in misconstruing the Appellants' claim.
 2. That the learned trial Magistrate erred in Law and in fact in, on the court's own motion creating a dispute on ownership of the suit properties whereas the same was not raised or canvassed by the parties.
 3. That learned trial magistrate erred in law and fact in failing to realize that the Respondent had by conduct and deed acknowledged that the Appellants had proprietary interest on the parcel of land the subject of the proceedings before the Lower Court by virtue of their occupation thereon.
 4. That the learned trial Magistrate erred in Law and fact in completely failing to address issues that are extremely pertinent to the dispute before the trial court.
 5. THAT the learned trial Magistrate erred in Law in inexplicably failing to make a determination on the effect and import of the provision of sections 143 to 149 of the Land Act No.6 of 2012 to the issues at variance between the parties.
 6. THAT the learned trial Magistrate erred in Law and fact in invoking a defence that was neither raised nor urged by the respondent.
 7. That the learned trial Magistrate erred in law in failing to appreciate that the act of occupation of land is a paramount factor for consideration in the creation of a public right of way besides and beyond the proof of ownership of such land.
 8. That the learned trial Magistrate erred in Law in failing to consider the Appellant's submissions and judicial authorities provided in support thereto.
 9. That the learned trial Magistrate erred in Law in applying Section 26 of the Land Registration Act No. 3 of 2012 to the suit before the Lower Court to determine the issues at variance between the parties.
 10. That the learned trial Magistrate erred in law and fact in misdirecting herself on both the evidence and law.
 11. That the entire judgement is against the weight of the evidence.
16. The appellants pray that the judgment and decree of the lower court be set aside and the judgment be made in favour of the Appellants as prayed in the plaint, that the order for payment of costs be set aside and costs of the Appeal to be borne by the respondents.



17. Pursuant to directions given by the court, the parties agreed to canvass the appeal by way of written submissions. The appellants filed their submissions dated 22nd July, 2024 through the firm of Basilio Gitonga, Murithi & Associates Advocates while as the 1st respondent filed their submissions dated 19th April 2024 through the firm of Muthomi Gitari LLP.

The Appellants' Submissions

18. It was submitted on behalf of the appellants that the claim before the lower court revolved around the grant of way leaves to the respondents for the laying down of a water pipeline across various parcels of land. That the trial court summarily determined the suit on the strength of Section 26 (1) of the [Land Registration Act](#) that relates to proof of ownership of land upon issuance of a title deed to a registered proprietor. The appellants submitted that trial magistrate concluded that the appellants had not proved ownership of the subject parcels of land to be entitled to the reliefs sought in the amended plaint.
19. It is the Appellants' submission that the learned trial magistrate fell into grave error in failing to fully appreciate the extent of the Appellants' claim and comprehensively consider the evidence adduced by both sides at trial. Further that the trial court failed to apply the legal regime governing the application and grant of way leaves instead narrowing the issues for determination to that of proof of ownership of land. The appellants counsel submitted that the procedure for the creation of Public rights of way are clearly spelt out in sections 143 to 149 of the [Land Act](#) No.6 of 2012. The Appellants counsel cited the provisions of section 143 of the [Land Act](#) and submitted that it is clear from the said section that a public right of way is distinguished as either a way leave or a communal right of way depending on the entity making the application. That it is further clear that whether it is a wayleave or communal right of way an application to that effect has to be made to the National Land Commission that then proceeds with the process as laid out in Section 146(1) of the Act.
20. The Appellants submitted that the procedure provided by statute was never put into place by the Respondents in their pursuit of the public right of way for the benefit of its members. That that fact was admitted by Heldard Muriuki(DW1) in cross examination.
21. Regarding the issue of proof of ownership of land, the appellants referred to the Respondent's pleadings and evidence plus the applicable law to demonstrate that the trial court made a significant error in invoking Section 26 (1) of the [Land Registration Act](#). That firstly the Appellants approached the trial court as the registered and/or beneficial proprietors of the suit properties. The appellants submitted that the [Land Act](#) does not for purposes of creation of a public right of way make it mandatory that the applicant of such right has to engage the registered owner of the land. That it is in recognition by the legislature of the varied forms of land ownership in Kenya that are not limited to possession of title deeds only. The Appellants' cited section 143 (3) of the [Land Act](#), and submitted that it is instructive to note that any such public right of way is also binding to those occupying land under customary law. That it is even binding upon trespassers. That it automatically follows that any intention to create such a public right of way must involve all persons in occupation of the subject parcel of land actual ownership notwithstanding. The Appellants also cited section 144 (4) (a) and 148 (1) of the [Land Act](#).
22. It is the Appellants' submission that the totality of the foregoing is that the learned trial magistrate never made any attempt to refer to the primary statute that is relevant to the issue in dispute between the parties, opting rather to isolate the issue of ownership of the parcels of land as the determinant factor. That secondly, the 1st respondent has variously admitted that the intended water pipeline was to be laid along parcels of land associated with the appellants.



23. The Appellants submitted that the 1st respondent has in its pleading admitted issuing notices to the appellants for purposes of rendering their consent to the laying of the pipes. Further, that the 1st respondent did not controvert the issues pleaded by the appellants in their amended plaint by way of an amended defence and hence their proprietary interest in the suit properties cannot be gainsaid. It is therefore the Appellants' submission that the trial court fell into error in elevating the issue of proof of ownership as provided by section 26 (1) of the [Land Registration Act](#) as the primary issue whereas the 1st respondent had not pleaded such an issue and had actually admitted that the appellants were entitled to compensation albeit for crops and trees only.
24. The Appellants submitted that the entire judgment of the trial court is for setting aside as the trial court deliberately failed to address itself on the pertinent issues at variance between the parties. That the said issues include the respondents in conjunction with the Ministry of Water and Irrigation intended to lay a pipeline for the passage of water through private properties, that the occupiers of those parcels of land were consulted with a view to executing way leave agreements, that it is disputed whether the agreements were executed or not, the appellants were willing to render their consent if compensation was to extend to land utilized for the water way while the respondent was willing to compensate for crops and trees only, that it was not disputed that the way leave agreement lacked material particulars, that it is not in dispute that the way leave agreement only involved six (6) of the twenty (20) appellants and it is not disputed that the respondent did not involve the National Land Commission.
25. The Appellants further submitted that the trial court formulated its own dispute far removed from what was presented before it for adjudication and determination and thereby arriving at an erroneous decision.
26. It is the Appellants' submission that the respondents' submission on the Appellants' prayer for permanent injunction is completely misplaced. That the respondent's reliance on the principles enunciated in the case of *Giella v Cassman Brown* have no bearing on the claim for a permanent injunction but rather an interlocutory injunction. That the Appellants' prayer for a permanent injunction is clearly on condition that the procedure of acquisition of a public right of way as provided in section 144 to 149 of the [Land Act](#) is adhered to prior to the installation of the water pipes. That the Appellants are otherwise not for stalling to perpetuity the installation of the water pipeline. The Appellants relied on the case of *Peter Mwangi Kabua vs Rural Electrification Authority (2018)eKLR*.

1st Respondent's Submissions

27. The 1st respondent gave a brief background of the matter and identified two issues for determination, namely whether the Appellants proved their case beyond a balance of probabilities and whether the Appellants are entitled to the prayers sought in their memorandum of Appeal dated 18th November 2021.
28. The 1st respondent's counsel submitted that this being a first appeal, the observations and guiding principles in the case of *Selle v Associated Motor Boat Co (1968) EA 123* will offer the much needed guidance on the jurisdiction of the court. The 1st respondent submitted that it is not in dispute that the first hurdle which ought to be passed by the appellants remained to be on proof of ownership of the suit land on a balance of probabilities. That the Appellants failed to adduce any evidence to show that they are the actual owners of the land. The 1st respondent cited Section 107 (1) of the [Evidence Act](#) and relied on the cases of *Re H (minors) sexual abuse; standard of proof* {1996} AC 563 and 505 for the *Home Department v Rehman* {2003} 1 AC 153 wherein the House of Lords laid down a series of guiding principles on standard of proof. It is the 1st respondent's submissions that from that, the legislative interest is for the Courts to construe and interpret the notion of burden of proof in a trial



- discourse and in that particular context to do justice to the parties. That in the sense of the of the case before the trial magistrate, it was the appellants who bore the evidential burden to lead evidence against the respondents to show that the appellants are owners of land where the water pipes were being laid without their consent. that on the other hand, once the appellants discharged the burden of a prima facie case, the respondents were to be under a duty to offer tactical evidence to rebut or controvert the elements of the appellant's case. That the Appellants failed in discharging their evidential burden and as such their case was rightfully dismissed by the trial court.
29. The 1st Respondent submitted that a Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by a party in order for the rights of the Plaintiff to be protected. That this Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Act, 2010, if it feels the right of a Party has been infringed, violated and/or threatened as the Court cannot just sit, wait and watch under those given circumstances.
 30. The 1st respondent submitted that the principles of injunctive relief have been clearly enunciated in the cases of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018]eKLR and Nguruman Limited v Jan Bonde Nielsen & 2 others, CA no. 77 of 2012; [2014]eKLR
 31. Regarding the first condition, the 1st respondent submitted that a permanent injunction fully determines the rights of the parties before the court and is thus a decree of the court which injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered.
 32. It is the 1st respondent's submission that the Appellants denied having ever been involved during the negotiations and approvals of the water project and neither did they consent to the acquisition of their property by the 1st Respondent. That this averment therefore introduced the question of ownership of the said properties. The 1st respondent submitted that the Appellants failed to prove that they are the registered owners of the subject properties by providing any Certificate of Titles and/or Official Search Certificates of the subject properties hence the trial Court was at a loss in determining the specific properties out of the 14 parcels of land that belonged to the respective twenty (20) appellants and resultantly, the Learned Magistrate found that the Appellants' claim had no basis and dismissed their suit.
 33. The 1st respondent also pointed out that a prima facie case was described in the case of Mrao ltd v First American Bank of Kenya Ltd & 2 others [2003] klr 125. The 1st respondent also pointed out that there are several authorities where the issue of ownership were dealt with by the courts before making its determination on claims relating to section 143 – 149 of the Land Act No. 6 of 2012. The 1st respondent relied on the case of M'Tuamwari v Kenya Power and Lighting Company (Environment & Land Case E023 of 2021) [2023] KEELC 21498 (KLR) (8 November 2023) (Judgment).
 34. The 1st respondent submitted that the Appellants had the evidential burden to prove on ownership of the suit properties as provided in Section 107 of the Evidence Act, and in the absence of such evidence, certainly their claim fails.
 35. With regard to the second condition, the 1st respondent submitted that the Appellants failed to prove any substantial losses that they would incur if the prayers they sought in their pleadings were not granted by the Honourable Court. The 1st respondent relied on the case of Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR which cited with approval Halsbury's Laws of England, Third Edition Volume 21, Paragraph 739, Page 352 on the definition of the term "irreparable harm".



36. The 1st respondent submitted that they obtained way Leave Agreements from the Appellants in the year 2014 (and which were produced before the Court) for purposes of commencing a water project that would benefit the citizens who resided on the lower side of Maara Sub-county to get piped water for drinking and irrigation use. That the Appellants occupied and resided on the upper side and have adequate piped water supply for their own usage.
37. The 1st respondent submitted further that during the hearing, the Appellants testified that the 1st Respondent had approached them for survey work and they consented to the laying of the water pipes and that their main issue was not getting adequately compensated from the said acquisition of their property. It is the 1st respondent submission that any losses that the Appellants would incur arising from the digging and laying of water pipes would be assessed and adequately compensated by way of damages. That in any case, the Ministry of Agriculture through its officials had conducted two (2) valuation reports with the knowledge of the Appellants but the Appellants were not satisfied, and they still did not feel the need to engage their own private valuer so as to renegotiate on the terms of compensation.
38. The 1st respondent submitted that it would be fanatical for the Appellants to implore the Court to be guided by provisions of section 143 to 149 of the Land Act on application of way leaves before determining the rightful owner of the suit properties and the proper parties that were to consent to the acquisition of the land.
39. The 1st respondent beseeched the Court to uphold the decision of the Lower Court in its entirety and dismiss the appeal with the costs to the 1st respondent.

Determination

40. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law.
41. From the grounds in the memorandum of appeal filed by the appellants, it is clear that the issues arising for determination in the present appeal are as follows:
 - i. Whether the trial Magistrate misconstrued the Appellant's claim by delving into the issue of ownership of the subject parcels of land.
 - ii. Whether the appellants were entitled to the reliefs, sought in the amended plaint.
 - iii. Whether the appeal is merited.
 - iv. Who ought to pay the costs of the instant appeal
42. In their amended plaint dated 28th September, 2021 the appellants pleaded that at all material times to the suit they were and still remain the registered and/or the beneficial proprietors of various parcels or portions of lands within Mwimbi/Murugi. The Appellants averred that they were not members of the 1st respondent and are not designated beneficiaries of an irrigation project being undertaken by the 1st respondent and which was expected to pass through the appellants parcels of land.
43. The Appellants further pleaded that in the year 2014 they were approached by officials from the Ministry of Agriculture, Livestock and Fisheries who sought guarantees from the Appellants that they would render their consent for passage of a water pipeline through their parcels of land once an intended project commenced. The appellant averred that they made tentative guarantees to the



said ministry but on condition that all technical details of the expected project were disclosed to the appellants for purposes of setting in motion the process of agreeing on the amount of compensation to be awarded to each of the appellants and the subsequent execution of the way leaves. That thereafter, the 1st respondent applied for a water permit on 23.11.2015 and authorization was subsequently issued on 10.03.2017 allowing it to abstract water from South Maara River. The appellants averred that the 1st respondent however commenced survey works for the laying of the pipeline and the excavation thereof prior to the completion of all the necessary procedural legal requirements as provided by the applicable law as agreed by the parties. The appellants stated that as a result of the breach of the procedure by the 1st respondent, they engaged various stakeholders in a bid to resolve the issue relating to the width of the pipeline, the rate of compensation, maintenance of the pipeline and the way leave agreements with the 1st respondent and the content thereof. That the Water Resource Authority in its attempt to resolve the impasses between the parties, and after hearing both sides, recommended that there be an amicable resolution of the issue of the way leaves to allow for the confirmation of the project. The appellants stated that in total contravention of the said recommendations and without any insatiable reasons, the 1st respondent engaged the 2nd respondent to excavate the pipeline passage way and lay down the pipes without the appellants' consent and/or way leave, an act the appellants stated will cause them great damage, inconvenience and hefty losses. The appellants contended that the approach adopted by the 1st respondent in commencing its engagement with the appellants for purpose of implementing the project was legally flawed for failure to strictly adhere to the requirements of the constitution and the applicable statute and therefore unlawful.

44. The 1st respondent on its part pleaded that the appellants had not notified it of the cancellation of the way leave which was done on 6th May,2019 and therefore the 1st respondent was entitled to continue with its objectives.
45. In this case, it was the appellants' contention that they are in occupation of the parcels of land listed in the plaint. They further contended that the 1st respondent herein did not seek way leave from them and that the National Land Commission and the County Government had never involved them in anything pertaining the project. The appellants wanted the project stopped for their parcel of land to be valued and for them to be compensated. It appears therefore that the main issue was for the appellants to be adequately compensated.
46. In the impugned judgment, the learned trial magistrate identified two issues for determination namely, whether the appellants have proved ownership of the parcels of land the subject matter in the suit and whether the appellants were entitled to the orders sought in the amended plaint. The trial court found that the appellants had not proved ownership of the said land and therefore were not entitled to the prayers sought. As already stated the main prayer sought by the appellants in the said amended plaint was an order of permanent injunction until all the relevant provisions of the statute have been "satisfactorily" applied.
47. I have looked at the provisions of section 143 of the Land Act which provides as follows:
 1. 143(1) Subject to and in accordance with this section and section 146, the commission may create a right of way which shall be known as public right of way.
 2. A public right of way may be:-
 - a. A right of way created for the benefits of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organizations, authorities and bodies to carry out their functions, referred to in this Act as a way leave; or



- b. A right of way created for the benefit of the public referred to in section 145 of this Act as a communal right of way.
 3. A public right of way shall attach to and run with the servient land in respect of which it has been created and shall be binding on all owners from time to time of the servient land, any manner they are occupying the land, whether under a land or derivative right thereof, or under customary law or a successor in title to any such owner or as a trespasser.
 4. A wayleave shall authorize persons in the employment or who are acting as agents or contractors for any of the organizations, authorities and bodies to enter on the servient land for the purpose of executing works, building and maintain installations and structure and in setting such works, installations and structures on the servient land and to pass and re-pass along that wayleave in connection with purposes of those organizations, authorities or bodies.
 5. A communal right of way created for the benefit of the public shall entitle the public to pass and re-pass that right of way and in areas designated for that purpose to undertake recreational activities or other prescribed activity of the kind permitted in that designated area.
48. Section 144 of the said Act relates to application for wayleave. The same provides that the applicant (for the creation of a way leave) is required to serve notice on among others, “all persons occupying land over which the proposed wayleave is to be created, including persons occupying land in accordance with customary pastoral rights.” It is clear from the above provision that an application for the creation of a wayleave shall be served on all persons occupying land over which the proposed way leave is to be created including the persons occupying the land in accordance with customary rights. In addition, my understanding of section 143(3) of the said Act is that even the rights of a trespasser are recognized when it comes to issues of public right of way and wayleaves. Consequently, I am in agreement with the appellants’ submissions that the learned trial magistrate fell into error in dismissing the appellants’ suit on account that the appellants had not proved ownership of the subject parcels of land to be entitled to the reliefs sought in the amended plaint.
49. In this case, the appellants approached the trial court as the registered and/or beneficial proprietors of the said parcels of land. In my view, having demonstrated their interest in the land the appellants were within their right to approach the court for relief. Moreover, the issue of ownership was never raised by the parties in their pleadings. Indeed, the 1st respondent in their statement of defence and specifically paragraph 7 and 8 pleaded that they duly executed agreements between them and the appellants. This confirms that there was no dispute over the ownership of the appellants’ parcel of land.
50. The next issue for consideration is whether the appellants were entitled to the prayers sought in the amended plaint. As already stated, the main prayer was an order for a permanent injunction restraining the respondents from undertaking the project until all the relevant provisions of the statute have been satisfactorily applied.
51. Loyd Mugambi Maina (PW1), the 1st appellant herein testified on behalf of the appellants. Although he stated that he did not sign the wayleave form, he admitted that some nine people did. I presume the nine people he was referring to are some of the appellants. The appellants’ witness testified that they want due process to be followed and for their livelihoods to be looked at. That there were crops, trees, terraces, fences and even houses on their land. He stated that the width of the pipes which were to be laid on the pipeline would consume about one acre of everyone’s land. That the appellants therefore wanted the same valued and they be compensated. When he was cross-examined, PW1 stated that they only gave consent for the water pipes to pass through their parcels of land. He further stated that their main issue was compensation of the land. That valuation was done twice by the ministry of



- Agriculture, though the witness was not present. That he did agree with the valuation reports by the Ministry of Agriculture, though the appellants had not brought their own reports from their private valuers. From the foregoing, it is clear to me that the main issue by the appellants before the trial court was compensation.
52. Compensation in respect of public right of way is provided for under section 148 of the [Land Act](#). The same provides as follows:-
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.
 2. Compensation relating to a wayleave or communal right of way shall not be to a public body unless there is demonstrable interference of the use of the land by that public body.
 3. Damage caused as a result of the creation of a wayleave shall include any preliminary work undertaken in connection with surveying or determining the route of that wayleave, and whether the trees, crops or building so damaged were included in the route of the wayleave as delineated in the order of the said Cabinet Secretary.
 4. The duty to pay compensation payable under this section shall be with the state Department, County Government, Public Authority or corporate body that applied for the public right of way and that duty shall be complied with promptly.
 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 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 compensation and the court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.
53. I have perused the pleadings filed by the appellants before the lower court. in the amended plaint the main prayer sought by the appellants was an order for permanent injunction. I have not seen any prayer for compensation. It is therefore clear to me that the appellants are yet to exercise their right as provided for in section 148(5) of the [Land Act](#) above. The remedy sought was made prematurely and in a vacuum as there was no claim for compensation that was pending.
54. It is my view that the order of permanent injunction sought by the appellants was intended to permanently stop the project instead of the same lasting until the appellants are duly compensated. Having failed to invoke the provisions of section 148(5) of the [Land Act](#), it is my view that the appellants were not entitled to the order of permanent injunction. Moreover, this would not have been in public interest since the project in question admittedly benefited other members of the public who were not parties to the case, even as interested parties. Those third parties would have been condemned unheard. Further, the appellants would not suffer any prejudice if the order of permanent injunction was not granted since they could still pursue their claim for compensation as provided under the law.
55. In the end, I find that this appeal has no merit and I hereby dismiss it. In view of the court's findings that the trial court fell into error in dismissing the appellants suit on account that the appellants had not proved ownership of the subject parcels of land, and considering that this court has also agreed with the trial court that the appellants are not entitled to the prayer sought in the amended plaint, that is injunction, albeit for different reasons, this court directs that parties bear their own costs of this appeal.



56. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF SEPTEMBER, 2024

In the presence of:

Court Assistant: Moses

Mr. Muriithi for Appellant

Mr. Muthomi Gitari for Respondent

C. K. YANO,

JUDGE

