



**Kigio Group Company Limited v Kenya Electricity Transmission  
Company Limited & 3 others (Environment & Land Petition  
E002 of 2024) [2024] KEELC 6929 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6929 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND PETITION E002 OF 2024**

**LN GACHERU, J**

**OCTOBER 17, 2024**

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 40, 47, 60 (1)  
(B), 64, 162 (2) AND 165 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF CONTRAVENTION, VIOLATION AND INFRINGEMENT  
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES  
40, 47, 60 (1) (B) AND 64 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF CONTRAVENTION OF STATUTORY PROVISIONS  
OF SECTION 144 AND 148 OF THE LAND ACT, NO. 6 OF 2012**

**IN THE MATTER OF CONTRAVENTION OF STATUTORY PROVISIONS  
IN THE LAND (ASSESSMENT OF JUST COMPENSATION RULES, 2017)**

**BETWEEN**

**KIGIO GROUP COMPANY LIMITED ..... PETITIONER**

**AND**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED .... 1<sup>ST</sup>  
RESPONDENT**

**SMEC INTERNATIONAL PRIVATE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**ADANI ENERGY SOLUTIONS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**



## RULING

1. There are two matters for determination herein; the 1<sup>st</sup> one is the Notice of Motion Application dated April 9, 2024, by the Petitioner/Applicant, wherein the Applicant has sought for Conservatory orders; The 2<sup>nd</sup> one is the Notice of Preliminary Objection dated 6<sup>th</sup> May 2024, by the 1<sup>st</sup> Respondent, wherein the objector avers that the suit herein and the Application are premature and fatally defective.
2. The Notice of Motion Application is brought under Order 40 Rules 1 (a), 2(1), 4(1) and (2); Order 51 Rule 1 of the Civil Procedure Rules, and Section 13(7) of the Environment and Land Act; Articles 23(3) (b) and (c), 159 (1), (2) (a) (b) (d) and (e) of the Constitution of Kenya 2010, wherein the Petitioner/ Applicant has sought for the following Orders:
  1. That pending the hearing and determination of this Application, the Honourable Court be pleased to issue a conservatory/preservatory order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by themselves their agents, employees, servants and/or any such person acting on their instruction in that regard from accessing, interfering, trespassing into making a wayleave, erecting any structures or digging any foundations, surveying, deploying personnel and/or conducting any activities whatever on the Petitioner's property known as Land Reference Number 10876/2, which has been subdivided into L.R. No. 10876/3 and 10876/4 – Thika or in any other manner interfering with the Petitioner's quiet possession and title thereof.
  2. That pending the hearing and determination of this Petition, the Honourable Court be pleased to issue a conservatory/preservatory order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents by themselves their agents, employees, servants and/or any such person acting on their instruction in that regard from interfering, trespassing, making a wayleave, erecting structures or digging any foundations, surveying, deploying personnel and /or conducting any activities whatever on the Petitioner's property known as Land Reference Number 10876/2 which has been subdivided into L.R. No. 10876/3 and 10876/4 – Thika or in any other manner interfering with the Petitioner's quiet possession and title thereof.
  3. In the alternative and without prejudice to prayer/order 2, above the Respondents to deposit a sum of Kshs.1,000,000,000/= into the Petitioner/ Applicant's bank account being the amount equivalent to the lowest offer made to the Petitioner/ Applicant by prospective buyers pending a joint valuation to be conducted within 14 days from the date of this Order by registered valuers appointed by the Petitioner and the Respondent at the cost of the Respondents.
  4. That the Inspector-General of Police through Sub-County Police Commander-Gatanga (Kirwara Police Station), be directed to supervise and enforce the adherence, observance and implementation of the order so granted by this Court.
  5. That costs of this Application be borne by the Respondents in any event."
3. This Notice of Motion Application is interlocutory to the Petition even dated, wherein the Petitioner has sought for various declarations, among them a declaration that the intended acquisition of the Petitioner's land parcel by the Respondents without adhering to the strict and Mandatory provisions of the Constitution, and the Land Act No 6 Of 2012, violates the Petitioner's Constitutional rights to ownership of Property as guaranteed under Article 40(3)(a) and (b), of the Constitution of Kenya, 2010.



4. The Application is premised on the grounds set on the face of the said Application and on the Supporting Affidavit of STANLEY NJENGA NDEGWA, sworn on 9<sup>th</sup> April, 2024, in his capacity as the Chairman of the Petitioner/Applicant.
5. These grounds are; the Petitioner/Applicant is the registered proprietor of Land Reference No 10876/2, which has been subdivided into L.R. No. 10876/3 and 10876/4 – Thika, and which land parcel the Petitioner/Applicant herein is at an advanced stage of disposing it off, in order to offset a bank loan and redeem a mortgage on its other property known as LR. No.4953/IV/45, and 46 Thika Municipality Block 9/96 and 558 (Thika Business District).
6. Further, that in view of the anticipated sale of the land parcel LR NO 10876/2, which is sub-divided into L.R. No. 10876/3 and 10876/4 – Thika, any Wayleave over the said Land would defeat the intended sale and adversely affect the value of the said land.
7. That the Petitioner/Applicant has already subdivided the said land parcel into 100 Acres parcels thereof, and should the Wayleave which the Respondents are seeking to create over the said land take effect, the Petitioner/Applicant will be exposed to claims of deception and selling unmerchtable goods from the purchasers of the mentioned land holding.
8. The Petitioner/Applicant averred that any interference with its L R NO.10876/2, which has been sub-divided into L.R. No. 10876/3 and 10876/4 – Thika, will result in the loss of its other property known as LR. No.4953/IV/45 & 46 Thika Municipality Block 9/96 & 558 (Thika Business District), valued at about Kshs. 1.4 billion.
9. Further, that the above mentioned parcel of land is currently being conserved by an Order of the Court of Appeal issued in *Kigio Group Company Limited vs Housing Finance Company Limited and Garam Investments (Civil Application No E140 of 2021)*.
10. It was the Petitioner/ Applicant's further contention that the proposed 400KV-Gilgil-Thika-Nairobi East-Konza Power Transmission Line, and which intends to create a Wayleave on its LR No. 10876/2, which is sub-divided into L.R. No. 10876/3 and 10876/4 – Thika is being constructed on a Public-Private-Partnership (PPP) basis; therefore, the profits accruing therefrom will not be for the public benefit.
11. In his Supporting Affidavit, STANLEY NJENGA NDEGWA, the Chairman of the Petitioner/ Applicant, deposed that on 12<sup>th</sup> August 2021, the 1<sup>st</sup> Respondent wrote to the Petitioner offering to purchase 25 Acres, from land parcel LR NO 10876/2, for the construction of a sub-station.
12. He further averred that the Petitioner/Applicant declined the said offer, on the advice of experts because selling 25 Acres, of the land in question would result in High Voltage lines feeding into and exiting the proposed Sub-station thereby, resulting in loss and damage to the rest of the land.
13. He also contended that on 13<sup>th</sup> October, 2021, the Applicant wrote to the 1<sup>st</sup> Respondent through its Advocates and declined the said offer to dispose of 25 Acres from its LR NO 10876/2, and also objected to creation of a Wayleave over the said parcel of land.
14. The deponent further contended that on 12<sup>th</sup> February 2024, its Directors were summoned by the Assistant County Commissioner – Gatanga, through the Chief Samuru Location to a meeting scheduled for 16<sup>th</sup> February 2024, to be conducted at Del-View Mall, Thika, for the purposes of sensitization of the Project-Affected Persons( PAP), in respect of the 400KV-Gilgil-Thika-Malaa Konza Power Transmission Line.



15. That the Managing Director of the 1<sup>st</sup> Respondent one, Dr. John Mativo, through a letter dated 27<sup>th</sup> February 2024, responded to its letter dated 12<sup>th</sup> February 2024, and directed the Petitioner/Applicant to present its objection to acquisition of Wayleave on its LR NO.10876/2, to an undisclosed proponent/contractor of the project.
16. He further averred that the Petitioner/Applicant was again summoned on 2<sup>nd</sup> March 2024, by the Assistant County Commissioner to a meeting which took place at Gathambara Primary School, situated in the vicinity of its land holdings wherein, the Petitioner/ Applicant's objections to the creation of a Wayleave on its LR NO 10876/2, were not captured by the Respondents' agents.
17. That Petitioner/ Applicant was summoned to another meeting for Project-Affected-Persons that took place on 8<sup>th</sup> March 2024, at ACK Memorial Church-Thika, wherein its Director Charles Kariuki Ndung'u, demanded and received several documents from the Respondents which showed that the 1<sup>st</sup> Respondent was the proponent of the proposed Power transmission line, despite the 1<sup>st</sup> Respondent's denial of that fact through its letter dated 27<sup>th</sup> February, 2024.
18. He contended that Murang'a County was not covered by the Environmental Social Impact Assessment Survey dated 14<sup>th</sup> February 2017, and the proposed 400KV-Gilgil-Thika-Malaa Konza, Power Transmission Line, was supposed to traverse through Nakuru, Nyandarua, Kiambu and Machakos, Counties.

#### **THE 1<sup>st</sup>& 2<sup>nd</sup> RESPONDENTS' RESPONSE**

19. The 1st Respondent opposed the instant Notice of Motion Application through a Notice of Preliminary Objection dated 6th May, 2024, brought under Section 11 of the *Civil Procedure Act*, Section 3(1), 10, 11, (e, f, I, k, and l), 23, 24, 36, 40, 42 and 224 (2) (e) of the *Energy Act*, 2019, as read together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations, 2012.
20. The 1<sup>st</sup> Respondent also opposed the Notice of Motion through a Replying Affidavit of Eng. Anthony Musyoka, sworn on 19<sup>th</sup> June 2024, who averred that he is the General Manager Project Development Services, at the 1<sup>st</sup> Respondent. It was his further averments that the 1<sup>st</sup> Respondent is a State Corporation duly incorporated in Kenya, under the *Companies Act*.
21. He also averred that the 1<sup>st</sup> Respondent is mandated to build electricity transmission lines and operates Kenya National Electricity Transmission Grid, pursuant to Session Paper No 4 of 2004, on Energy.
22. Further, that the 1<sup>st</sup> Respondent is mandated with improving the quality and reliability of electricity supply throughout the country, transmission of electricity to areas that are currently not supplied from national grind, evacuation of power from planned generation plants, providing links with neighbouring countries in order to facilitate power exchange and develop electricity trade in the region among other mandates.
23. He deposed that the Public Private Partnership Act (PPP), which received Presidential assent came into operation on 7<sup>th</sup> December 2021, and it provides for participation of the private sector in financing, construction, development, operation or maintenance of infrastructure or development projects through public private partnership, and to streamline the regulatory framework for public private partnership.
24. He also averred that one such project being implemented by the 1<sup>st</sup> Respondent in accordance with its lawful mandate by adopting the Public Private Partnership framework is the 400kv Gilgil-Thika-Nairibi- East Konza Transmission line project.



25. It was his contention that the 1<sup>st</sup> Respondent intends to enter into a project agreement with the 2<sup>nd</sup> Respondent as the private party, which will be responsible for undertaking all aspects of the project on behalf of the contracting authority.
26. He contended that the 2<sup>nd</sup> Respondent scope of work before entering into contract with the 1<sup>st</sup> Respondent includes undertaking a feasibility study in order to determine the legal, regulatory, economic and commercial viability of project, which includes Environmental, Social, Survey and Resettlement studies.
27. Further that the feasibility studies undertaken by the 2<sup>nd</sup> Respondent is done to the exclusion of the 1<sup>st</sup> Respondent and all the latter is tasked to do is to receive the reports, vet them and submit them to Directorate of Public Private Partnerships for approval.
28. It was his contention that the Environmental and Social Impact Assessment Report dated 14<sup>th</sup> February 2017, was prepared before the PPP Act 2021, came into force, and as such, it has been overtaken by events and changes in the law, and is thus inapplicable for this project that is being implemented under a public private partnership framework.
29. He alleged that it was the duty of the 2<sup>nd</sup> Respondent to conduct and prepare reports on technical, financial, legal and economic feasibility studies, a public private partnership suitability assessment or value for money assessment, Environmental and Social Impact Assessment (ESIA), and Resettlement Action Plan Studies for the Project.
30. Further, he alleged that he was under a contractual obligation that once executed to undertake analysis on the anticipated damages, proposed compensation packages, and creating detailed geographical, temporal and functional scope for the project including necessary rights of way land, acquisition and/or human resettlement plans where applicable.
31. It was his believe that the 3<sup>rd</sup> Respondent has been contracted by the 2<sup>nd</sup> Respondent to assist it in undertaking the feasibility studies to ascertain the viability of the project.
32. He contended that at this stage, the 1<sup>st</sup> Respondent has not yet entered into a project agreement with either the 2<sup>nd</sup> or 3<sup>rd</sup> Respondents. That any such project agreement will have to be approved by the Public Private Partnership Committee, which is responsible for approving negotiated contract terms, overseeing the implementation of Public Private Partnerships contract and approving feasibility studies among other functions.
33. The deponent also contended that without the approval of the Public Private Partnership Committee, the project would never be implemented and what the Petitioner/Applicant seeks to do is to stop a project that is at its feasibility studies stage.
34. It was his further assertion that he has been advised by his advocate that though the Petitioner/Applicant has sought for various orders and reliefs against the Respondents, and specifically accusing the 1<sup>st</sup> Respondent of violating Articles 10(2), 40(3) and 47 of *the Constitution* 2010, it failed to set out the reasonable degree of precision the manner in which the 1<sup>st</sup> Respondent infringed its rights.
35. It was further deposed that the Applicant has not demonstrated that it has a prima facie case with probability of success, and that it will suffer irreparable loss that cannot adequately be compensated by an award of damages.
36. That the Applicant has jumped the gun by bringing this Petition and Application, yet the *Land Act* provides for payment of compensation where a wayleave has been acquired.



37. He also deposed that the Petitioner/ Applicant ought to have invoked the Disputes Resolution Mechanism envisaged under the Energy Act, 2019, before bringing this Petition and Application to court, and thus the same is premature.
38. In the Notice of Preliminary Objection dated 6<sup>th</sup> May 2024, the 1<sup>st</sup> Respondent sought for the Petition and the Application to be struck out on the following grounds;
1. That the Petitioner/Applicant has not exhausted the Disputes Resolution Mechanisms set out under the Energy Act, 2019, as read together with the Energy (Complaints and Disputes Resolution) Regulations 2012, and the Environment Management and Coordination Act, 1999 (EMCA).
  2. That the Petition and Application do not satisfy the doctrine of ripeness, hence, the Petitioner is not entitled to the Order sought in the Petition and Application both dated 9<sup>th</sup> April, 2024.
  3. That pursuant to Section 9(2) of the Fair Administrative Action Act, 2015, this Honourable Court shall not review an administrative action or decision of the 1<sup>st</sup> Respondent unless the mechanisms including internal mechanisms for appeal and all remedies available under the Energy Act, 2019, the energy (Complaints and Disputes Resolution) Regulations, 2012 and Environment Management and Coordination Act, 1999 are first exhausted.
  4. That the Petition and Application offend the doctrine of exhaustion and constitutional avoidance and are thus an abuse of the process of this Honourable Court and should be dismissed with costs.
39. The 2<sup>nd</sup> Respondent opposed the Application through the Replying Affidavit of Munesu Innocent Dizamuhupe, the Functional Manager- Power & Energy, who averred that he has noted that the Petitioner/ Applicant has not made any specific claim or allegation against the 2<sup>nd</sup> Respondent, but rather generalized complaints against the Respondents for alleged breaches of the Petitioner's rights to property and right to fair administrative action.
40. He further averred that he has been advised by their counsel on record that the Petition and the Application do not disclose any cause of action. That they are premature, incompetent and unlawful as they challenges the 1<sup>st</sup> Respondent's public right of way, which should first have been filed before the National Land Commission, as provided by section 146(1) of the Land Act.
41. He also deposed that the Petitioner/Applicant has disregarded the doctrine of exhaustion, which requires that a party first exhaust all legally available Dispute Resolution Mechanisms, provided by the Law before moving to court.
42. Further, he denied that the 2<sup>nd</sup> Respondent is involved in any wrong doing, illegality, irregularity, secrecy, insufficiency and unconstitutionality in any whatever way as the Petitioner/Applicant failed to specifically state the allegations against the 2<sup>nd</sup> Respondent, which it should respond to.
43. The deponent further averred that indeed the 2<sup>nd</sup> Respondent entered into a consultancy contract with the 3<sup>rd</sup> Respondent, on 17<sup>th</sup> December 2023. That the scope of work for 2<sup>nd</sup> Respondent was to conduct technical, financial, legal and economic feasibility studies, a private -public partnership suitability assessment or value for money assessment.
44. Further, that the said scope of work included among other things preparation of feasibility, ESIA, and RAP Reports, analysis of anticipated damages, and proposed compensation packages and creating detailed geographical, temporal and functional scope for the project including any necessary rights of way or land acquisition or human resettlement plan where applicable.



45. It was his contention that the 2<sup>nd</sup> Respondent completed its scope of work in April 2024, as mandated under the consultancy contract. That the 400kv Gilgil-Thika- Mala-Konza transmission line goes through 5 counties of Nakuru, Nyandarua, Kiambu, Muranga, & Machakos, and therefore the Applicant's allegations that Muranga County was not in the ESIA report was not correct. That the 2<sup>nd</sup> Respondent was not aware of ESIA for the Project dated 14<sup>th</sup> Feb 2017.
46. He also deposed that upon executing the consultancy contract, the 2<sup>nd</sup> Respondent promptly began the public awareness and participation exercises, within the five mentioned counties.
47. He also contended that their counsel on record has advised them that a wayleave cannot be created by force or without consent of the owners of land, and the clear statutory provisions of law must guide the process.
48. He also contended that the 2<sup>nd</sup> Respondent has completed all the ESIA & RAP studies and has submitted a general draft Reports to 3<sup>rd</sup> Respondent, as per the consultancy Contract, and the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are currently reviewing the draft Reports.
49. He further contended that NEMA has not yet approved the ESIA Reports, and therefore Environmental Impact Assessment(EIA), licence has not been issued, as the 2<sup>nd</sup> Respondent is still waiting for feedback from 1<sup>st</sup> and 3<sup>rd</sup> Respondents, before submitting the final reports to NEMA, for their approval.
50. The deponent further deposed that since the processes of approval have not been completed, then this Petition and Application herein are premature and the Petitioner's/Applicant's concerns are unfounded. He urged the court to dismiss the instant Application.
51. On 26<sup>th</sup> June 2024, the Court directed that the instant Notice of Motion Application, and the 1<sup>st</sup> Respondent's a Notice of Preliminary Objection be canvassed together through written submissions.
52. The parties complied with the above directions and filed their respective written submissions, which the court summarizes as below;

### **THE PETITIONER/APPLICANT'S SUBMISSIONS**

53. The Petitioner/ Applicant filed its written submissions dated 1<sup>st</sup> July 2024, through the Law Firm of KARURU MWAURA & CO ADVOCATES, and submitted that the 1<sup>st</sup> Respondent has misconstrued the provisions of the Disputes Resolution Mechanisms established under the [Energy Act, 2019](#).
54. It further submitted that the dispute between itself and the 1<sup>st</sup> Respondent is incapable of being resolved through the [Energy Act, 2019](#), there being no formal agreement executed between the parties. Further that the Petitioner/ Applicant has not yet become the subject of the [Energy Act, 2019](#), as there is no relationship between itself and the Respondents as yet, and the Petitioner/Applicant is not desirous of getting into such a relationship.
55. The Petitioner/Applicant further submitted that the Respondents do not stand to suffer in the event that this Court grants an injunction as sought by the Petitioner. However, if the Respondents are allowed to construct the 400KV-Gilgil-Thika-Malaa Konza Power Transmission Line, through its parcel of land, it will be impossible to uproot the said Power line if at the end of the suit, the Court finds in favour of the Petitioner/Applicant.



56. In the alternative the Petitioner/Applicant submitted that the 1<sup>st</sup> Respondent should pay the full purchase price of its land parcel number 10876/2, before entry into the said land in order to forestall any loss to the Petitioner/ Applicant herein
57. Further, the Applicant submitted that it has a prima facie case with a probability of success, as the construction of Powerline Transmission Sub-station on Applicant's land will cause it to lose value, and frustrate the intended sale of the said parcel of land. Reliance was sought in the decision of the Court in the case of *Giella V Cassman Brown* (1973) EA 358.
58. In respect to the Notice of Preliminary Objection, the Petitioner/ Applicant submitted that the said Objection is unmerited because this Court needs to ascertain whether or not it should have exhausted the Disputes Resolution Mechanisms set out under the *Energy Act*, 2019, as read together with the Energy (Complaints and Disputes Resolution) Regulations, 2012, and the Environment Management and Coordination Act, 1999 (EMCA).
59. Further, the Petitioner/Applicant submitted that there is no dispute capable of being resolved by the *Energy Act*, 2019, as there is no foundation or formal engagement between the parties herein.
60. Reliance was placed in the case of *Gerick Kenya Limited V National Environment Management Authority* [2015] Eklr, where the Court held;

“In the above cited case the High Court (Hon. S.Okong'o J) disallowed the Preliminary Objection raised by the Respondent and followed the decision in *Mukisa Biscuit Co. Ltd – vs- West End Distributors Ltd*(1972) E.A 697, in which Sir Charles Newbold P. stated that “ A Preliminary Objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion”

In the matter before the court, the issue as to whether or not the Applicant should have first exhausted the alternative dispute resolution mechanisms under the *Energy Act*, 2019 or under Environment and Coordination Act 1999, (ECA) can only be canvassed at a full hearing. These matters need to be ascertained.”

## THE 1<sup>ST</sup> RESPONDENT'S SUBMISSIONS

61. The 1<sup>st</sup> Respondent filed written submissions dated 15<sup>th</sup> July 2024, through the Law Firm of KIPKENDA & CO ADVOCATES. Two issues were identified for determination as follows:
  - a. Whether the Petitioner/Applicant has exhausted all disputes resolution mechanisms available before invoking the Jurisdiction of this Court.
  - b. Whether the Petition and the Application meet the doctrine of ripeness to warrant granting the Orders sought.”
62. Reliance was placed on the decision of the Court in the case of *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696, on the issue of the constitutive elements of a Preliminary Objection, where the court held;

“...a ‘Preliminary Objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of



limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

63. It was also submitted that the Petitioner/Applicant’s claim relates to the 1<sup>st</sup> Respondent’s mandate to acquire wayleaves, easements or rights of way in relation to transmission and use of electricity energy. The 1<sup>st</sup> Respondent submitted that the current dispute should first be resolved using the mechanisms established under Section 37(3) of the [Energy Act](#), 2019.
64. The 1<sup>st</sup> Respondent further submitted that the Tribunal established under Section 37(3), of the [Energy Act](#) 2019, is capable of granting the following remedies namely: injunctions, penalties, damages and specific performance. Further, the said provision provides for an Appeal to the High Court if one is dissatisfied with the decision of the Tribunal pursuant to Section 37(3) of the [Energy Act](#), 2019.
65. It was submitted that this Court has no Jurisdiction to entertain the Applicant’s claim as it has been brought prematurely. Reliance was sought in the decision of the Court in the case of Phoenix of E.A. Assurance Limited vs S.M. Thiga t/a Newspaper Service [2019] eKLR; and, Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
66. Further reliance was sought in the holding of the Court in the cases of Kisumu Civil Appeal No. 42 of 2021, Abidha Nicholus vs A-G & 7 Others; National Environmental Complaints Committee (NECC) NEMA, SIAYA County, PKLC & others [2023] eKLR; and in Vitalis Ouma Osan vs KPLC Ltd [2021] eKLR., where the court struck out suits which were pre-maturely instituted in the court of last resort contrary to the laid down procedures.
67. On the question of the doctrine of ripeness, the 1<sup>st</sup> Respondent submitted that the acquisition of Wayleaves is governed by Article 40 of [the Constitution](#), as read together with Sections 143, 144, 146, 148 and 149 of the [Land Act](#) No. 6 of 2012. Further, that at present there is no order published in the Kenya Gazette creating a public right of way in respect of the Petitioner/ Applicant’s parcel of land.
68. The 1<sup>st</sup> Respondent argued that an injunction is a judicial remedy by which a person is ordered to do or refrain from doing a particular act. Reliance was sought in Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 24 at Paragraphs 801 and 804. Further reliance was sought in the decision of the Court in the cases of [George Njoroge Gichia vs Consolidated Bank of Kenya Limited \(Civil Case No. 556 of 2007\)](#); Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125; and, in Lydia Muthoni Nabea V Benson Kiriinya & Others [2008] eKLR., where the court held;  

“.....the court is not called upon at this stage to make any definite findings of either points of law or facts..... It is a case in which, on the material available to a court, it can be concluded that the applicant’s right appears to have been infringed by the respondent as to require the latter to explain or rebut the allegation”.
69. It was further submitted that the issues raised in Petitioner/Applicant’s Application are generalities that reflect conjecture and speculation, therefore, they cannot form the basis of a constitutional claim. Reliance was sought in the case of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR; and, in Caroline Wanjiru Karugu vs Nyeri County Secretary & 5 others [2021] eKLR.
70. It was submitted that the Applicant/Petitioner’s claim is based on mere apprehension of violation of rights, and none of it has crystalized so far.



71. Further, that the Petitioner/ Applicant's demand for Kshs.1 billion being compensation for the acquisition of its land for the creation of wayleave demonstrates that any injury which the Petitioner/ Applicant is likely to suffer can be adequately compensation by an award of damages.
72. Ultimately, the 1<sup>st</sup> Respondent submitted that the cause of action in the alleged intended trespass has not accrued yet, and the jurisdiction of this court cannot be invoked for what has not yet occurred, and therefore the suit herein is premature and unripe, and thus the Applicant has failed to satisfy the criteria for grant of interlocutory injunction.

## THE 2<sup>ND</sup> RESPONDENT'S SUBMISSIONS

73. The 2<sup>nd</sup> Defendant filed its written submissions on 19<sup>th</sup> July 2024, through the Law Firm of COULSON HARNEY LLP, wherein it submitted on both the Notice of Preliminary Objection and the Notice of Motion Application.
74. On the Notice of Preliminary Objection, reliance was placed on the holding of the Court in the cases of Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR and Dismas Wambola vs Cabinet Secretary Treasury & 5 Others [2017] eKLR , in regard to the necessary ingredients of a Preliminary Objection, where the court held;

“ Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
75. It was further submitted that because the 1<sup>st</sup> Respondent has not commenced the process of creating a wayleave over the Applicant's land, the Court lacks jurisdiction to hear and determine the instant Petition and Application under the doctrines of ripeness and exhaustion.
76. On the question doctrine of ripeness, the 2<sup>nd</sup> Respondent submitted that the role of the Court is to pronounce itself on live disputes between parties, and not on abstract questions of law. Reliance was placed in the decision of the Court in the case of Ainsbury vs Millington [1987] 1 ALL ER 929 (HLR); Law Society of Kenya vs Attorney-General & Another, National Commission for Human Rights & Another (Interested Parties) [2020] eKLR; and, Republic vs National Employment Authority & 3 others Ex-parte Middle East Consultancy Services Limited (2018) eKLR.
77. On the doctrine of exhaustion, the 2<sup>nd</sup> Respondent submitted that should this Court determine that the Petitioner/ Applicant's claim has disclosed a dispute capable of being resolved, the Court is divested of jurisdiction due to the doctrine of exhaustion.
78. The 2<sup>nd</sup> Respondent argued that where there exists a clear procedure for the redress of any grievance as per the Constitution or legislation, such procedure must be strictly followed before an applicant can approach the Court. Reliance was sought in the holding of the Court in the cases of William Odhiambo Ramogi & 3 Others vs Attorney-General & 4 Others [2020] eKLR; and, Geoffrey Muthiga Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others [2015] eKLR.
79. It was further submitted that this Court lacks jurisdiction to hear and determine the instant Application as the 1<sup>st</sup> Respondent has not yet created a Wayleave over the suit property, but is only carrying out feasibility studies, and the same fact was admitted by the Petitioner/Applicant. Reliance was sought in the holding of the Court in Supreme Court Application No. 2 of 2011: Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR; and, John Masakali vs Speaker County of Bungoma & 4 others [2015] eKLR, where it was held that courts



derive their jurisdiction from the Constitution or Statutes and therefore, they must be slow to arrogate jurisdiction upon themselves.

80. Further, the 2<sup>nd</sup> Respondent submitted that parties are bound to stick to the dispute resolution procedure available in law. Reliance was placed in the decision of the Court in the case of Amy Kagendo Mate vs Prime Bank Credit Reference Bureau Africa Limited [2013] eKLR.
81. The 2<sup>nd</sup> Respondent set out the process of acquiring a wayleave as per the provisions of Sections 143 to 149 of the Land Act, 2012, and submitted that the Petitioner/Applicant's claim is premature because the Petitioner/Applicant will have an opportunity to present its grievances to the National Land Commission and the Cabinet Secretary in respect of the creation of a wayleave on the suit land.
82. On whether the instant Application satisfies the test for the grant of a conservatory Order, it was submitted that the said Application is speculative, and that the Applicant has failed to present a prima facie case with a probability of success. Reliance was placed on the holding of the Court in the cases of Board of Management of Uhuru Secondary School vs City County Director of Education & 2 Others (2015) eKLR; Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR; and, Platinum Distillers Limited V Kenya Revenue Authority [2019] eKLR.
83. Further, the 2<sup>nd</sup> Respondent submitted that the Applicant has not satisfied the ingredients for grant of conservatory orders as set out in various decided cases. Reliance was placed in the case of Centre for Rights, Education and Awareness(CREAW) & 7 Others vs Attorney General; Nairobi HCC PET NO 6 OF 2011(2011) Eklr, where the court held;

“It is important to point out that the arguments that were advanced by counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will not therefore delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

84. It was also submitted that the Petitioner/ Applicant will not suffer any prejudice or irreparable harm, which cannot be compensated by an award of damages, as it has not demonstrated what harm it would suffer if the orders sought are not granted, since no Wayleave has been created so far. Further, that the balance of convenience tilt in favor of the Respondents whose work is in the public interest, and since no dispute has crystalized, it would be against public interest for the court to issue orders in vain.

#### **THE APPLICANT/PETITIONER'S FURTHER SUBMISSIONS**

85. The Petitioner/ Applicant filed further submissions dated 26<sup>th</sup> July 2024, in rejoinder to the Respondents' submissions and submitted that it is within the mandate of this Court to entertain the present dispute which relates to the 1<sup>st</sup> Respondent's attempt to create a wayleave on the Petitioner/ Applicant's property, without first dispensing delivering and prompt payment of just compensation as provided for under Article 40 (3) (b) (i) of the Constitution.
86. On the submissions that the Applicant has met the conditions for grant of Conservatory orders, reliance was placed in the holding of the Court in the cases of Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others [2014] eKLR; and County Assembly of Machakos V Governor Machakos County & 4 Others [2018] eKLR.



87. Further, the Applicant relied on the reasoning of the Court in the case of *Nguruman Limited V Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court held;

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. “

88. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not Enter Appearance in the suit, nor file any response in opposition or support of any side herein, and therefore, this court will determine the two matters without their input.

89. The court has considered the Pleadings herein and the instant Notice of Motion Application and the Notice of Preliminary Objection, and frames the issues for determination as; -

- i. Whether the 1<sup>st</sup> Respondent’s Notice of Preliminary Objection dated 6<sup>th</sup> May 2024, is merited?
- ii. Whether the Petitioners/Applicants Notice of Motion Application dated 9<sup>th</sup> April 2024, is Merited?
- iii. Who shall bear the costs of this Application?

**i). Whether the 1<sup>st</sup> Respondent’s Notice of Preliminary Objection merited?**

90. Since the Preliminary objection herein touches on the jurisdiction of this court, and is capable of disposing the matter preliminarily, then the court will first determine the said Notice of Preliminary Objection before delving into the issues raised in the Notice of Motion Application.

91. The definition of Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors* [1969] EA 696, where the Court defined a “Preliminary Objection” in these terms:

“[A] preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. . .”

92. Further, in the case of *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014*; and in *Aviation & Allied Workers Union Kenya vs. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014*, the Court declared as follows:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record. It is quite clear that a preliminary objection should be founded upon a settled and crisp point



of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

93. The Court in *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 others Civil Application No. 36 of 2014*, reasoned as follows:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

94. The Court will first determine whether what has been raised herein constitute a preliminary objection capable of disposing of this matter at the preliminary stage, and without ascertaining facts.

95. As observed earlier the 1<sup>st</sup> Respondent has alleged that this court lacks jurisdiction to hear and determines this matter, since the Petitioner/Applicant failed to exhaust the available disputes resolution mechanisms before coming to this court.

96. The issue of Jurisdiction is a question of law, and without jurisdiction, a court has no option but to down its tools. See the case of Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR, where the Court held that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no Jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction.”

97. Having challenged the jurisdiction of this case, and given that if the court is to find and hold that it has no jurisdiction, then the said holding will have disposed of the suit preliminarily, then this court finds that the Notice of Preliminary Objection as raised by the 1<sup>st</sup> Respondent meets the criteria of what amounts to a Preliminary Objection as defined in the Mukisa Biscuits case(supra).

98. Having found the Preliminary Objection herein is capable of disposing the matter preliminarily, and is a pure point of law, the next issue, would be whether the said Preliminary Objection is merited.

99. In this Notice of Preliminary Objection, the 1<sup>st</sup> Respondent has argued and submitted that the Petitioner/Applicant’s Petition and Application have not satisfied the requirements of the doctrines of ripeness and exhaustion of all disputes resolution mechanisms, because a Wayleave has not yet been created over the Petitioner/ Applicant’s parcel of land. It argued that it is only undertaking feasibility studies, through the 2<sup>nd</sup> Respondent, and therefore the suit herein is premature.

100. The above position is also supported by the 2<sup>nd</sup> Respondent herein, who confirmed that it has only undertaken feasibility studies, and the project has not even been approved by NEMA and Chief Government Valuer. The Applicant/Petitioner on the other hand, asserted that this Court has mandate to determine questions touching on the right to property pursuant to the provisions of Article 40 of *the Constitution*.



101. The doctrine of “Exhaustion” is defined in Black’s Law Dictionary 10th Edition as follows:

“The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be hardened by cases in which judicial relief is unnecessary.”

102. Further, Section 9 of the *Fair Administrative Action Act* provides for the doctrine of “Exhaustion” as follows:

- “(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- 2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- 3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- 4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
- 5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

103. In the case of *Odhiambo & Another vs National Police Service & 3 others; CIC General Insurance Limited & 6 others (Interested Parties) (Petition E006 of 2023) [2023] KEHC 719 (KLR) (Constitutional and Human Rights) (9 February 2023) (Ruling)*, the Court proclaimed as follows:

“On analysis of the Petition and submissions made, I do not find any special circumstances that would have this Court deal with issues reserved for the Public Procurement Regulatory Authority and the Public Procurement Regulatory Board.”

104. From the averments and submissions of the parties, it is evident that the 1<sup>st</sup> Respondent has not yet created a Wayleave over the Petitioner/ Applicant’s parcel of land. By the 1<sup>st</sup> Respondent’s own admission, the process of constructing the 400KV-Gilgil-Thika-Malaa Konza Power Transmission Line, is currently at the feasibility studies stage. The 1<sup>st</sup> Respondent was insistent that once a Wayleave is created over the Applicant/Petitioner’s land, the latter, pursuant to the provisions of Section 144 up to 149 of the *Energy Act*, 2019, will have an opportunity to object to the same.

105. However, it is evident that the 1<sup>st</sup> Respondent is desirous of creating the above Power transmission line over the Petitioner/Applicant’s parcel of land. The 1<sup>st</sup> Respondent had expressed desire to purchase 25 acres out of the Petitioner/Applicant’s Parcel of land, and when the Petitioner/Applicant declined to



- sell the said portion of land to 1<sup>st</sup> Respondent and insisted that for it not to miss on the value its land, the 1<sup>st</sup> Respondent should purchase the whole 200 acres, then 1<sup>st</sup> Respondent went mute.
106. Further, it is evident that the 2<sup>nd</sup> Respondent engaged on a feasibility study and public participation over the issue of construction of the said transmission power lines over the Petitioner/Applicant's parcel of land, before the Petitioner and 1<sup>st</sup> Respondent could agree on whether the said transmission line should pass through the said land, or not.
107. Without any agreement between the Petitioner and 1<sup>st</sup> Respondent on whether the transmission power lines should pass over and through the Petitioner's parcel of land, then there is no relationship between the 1<sup>st</sup> Respondent and the Petitioner herein. Without any legal relationship between the Petitioner/Applicant and 1<sup>st</sup> Respondent, can the provisions of the Energy Act 2019, be applied herein?
108. The 1<sup>st</sup> Respondent has submitted that the Petitioner/ Applicant has not exhausted the Alternative Disputes Resolution Mechanisms, under the Energy Act, 2019, and therefore the issues herein cannot be ventilated by this court. However, the Petitioner/Applicant submitted that its claim is for protection of its rights to property as provided by Article 40 of the Constitution, and that such issues are only dealt by the courts and not tribunal established under the Energy Act.
109. The Court has perused the pleadings, annexures thereto and rival written submissions of the parties in respect of the Applicant's Application and the 1<sup>st</sup> Respondent's Notice of Preliminary Objection, and it is evident that the Petitioner/ Applicant and the 1<sup>st</sup> & 2<sup>nd</sup> Respondents are all in agreement that a Wayleave has not yet been created over the suit land. If the Wayleave has not yet been created yet, can the Energy Act 2019 apply? If the 1<sup>st</sup> Respondent has not acquired the Applicant's parcel of land or created a Wayleave over it, is there a dispute between the two that can be dealt with under the Energy Act 2019? This court finds that there is none, and therefore the Alternative Disputes Resolution Mechanisms under the Energy Act 2019, cannot be the first port of call.
110. Having found that the Petitioner/Applicant herein is not bound by the Energy Act 2019, to refer its grievances to the Tribunal as provided by Section 37 of the said Act, and the Energy (Complaints and Disputes Resolution) Regulations 2012, this court finds that the Petitioner/Applicant did not fail to exhaust all the available disputes resolution mechanisms since its claim is over violation of right to property, which is a constitutional issue, which can only be resolved by courts, and not the tribunal under the Energy Act, 2019.
111. On the doctrine of ripeness of the claim, the Court holds and finds that there is no legal requirement imposed upon the Petitioner/ Applicant to await the establishment of a Wayleave on its parcel of land before it can approach the Court seeking the remedies sought in the instant Petition and Application. See the case of Benard Murage v. Finserve Africa Ltd & 3 Others (2015) eKLR, wherein it was held that;
- “a party does not have to wait until a right or fundamental freedom has been violated or for a violation of the Constitution to occur before approaching the court. He has a right to do so if there is a threat of violation or contravention of the Constitution”.
112. Therefore, this court finds and holds that pending the creation of the wayleave on the Petitioner/ Applicant's parcel of land by the 1<sup>st</sup> Respondent, which would bring into operation the provisions of Energy Act, 2019, as read together with the Energy (Complaints and Disputes Resolution) Regulations, 2012 and the Environment Management and Coordination Act, 1999 (EMCA), that this Court is vested with the mandate to determine questions touching on the Petitioner/Applicant's right to property as per Article 40 of the Constitution.



113. During the current stage of the process (feasibility studies stage) being undertaken by the 1<sup>st</sup> Respondent together with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents the Court cannot fathom any lawful limitation on its powers pursuant to Article 40 of *the Constitution*. Therefore, the Court finds that the doctrines of ripeness and exhaustion are not applicable at its conjuncture for the above reasons.
114. Accordingly, the 1<sup>st</sup> Respondent's Notice of Preliminary Objection dated 6<sup>th</sup> May 2024, is found not merited and is hereby dismissed entirely with costs to the Petitioner/ Applicant.

**ii) Whether the Petitioner/ Applicant's Notice of Motion Application dated 9<sup>th</sup> April 2024, is merited?**

115. The Petitioner/ Applicant has sought for Conservatory orders to restrain the Respondents from any dealings on its parcels of land, LR NO.10876/2-( 10876/3 & 10876/4), or in any manner interfering with the Petitioner/ Applicant's quiet possession thereof, pending the determination of this Petition.
116. It is evident that a Conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter. See the case of Invesco Assurance Co Ltd v MW (Minor suing thro' next friend and mother (HW) [2016] eKLR.
117. In the Supreme Court in Civil Application No 5 of 2014; Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR, the Court discussed, the nature of conservatory orders as follows: -
- “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant's case for orders of stay.”
118. Further, the nature of Conservatory orders, was discussed in the case of Judicial Service Commission vs Speaker of the National Assembly & another [2013] eKLR, where the court held as follows: -
- “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
119. Therefore, Conservatory orders are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. Given the interlocutory nature of conservatory orders, it is clear that there is need for a court to exercise caution when dealing with any request for conservatory orders, as matters which are the preserve of the main Petition ought not to be dealt with finality at the interlocutory stage.
120. This position was held by the court in the case of Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others (2011) eKLR, where the court held: -
- “The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility



to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side.”

121. Therefore, the Court dealing with an application for Conservatory orders must maintain the delicate balance of ensuring that it does not delve into issues which are in for consideration in the main Petition, and also ensuring preservation of the subject matter pending the hearing and determination of the main Petition.
122. The guiding principles while considering an application for in Conservatory orders are well settled: In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* case (supra) the Supreme Court held:
- “Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”
123. In the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR, the court set out the principles to be considered for grant of Conservatory orders as: -
- i) The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
  - (ii) The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
  - (iii) Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
  - (iv) Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
124. Further, in the case *Wilson Kaberia Nkunja vs The Magistrate and Judges Vetting Board & others* Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR, the Court held as follows; -
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
  - b. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
  - c. The public interest must be considered before grant of a conservatory order.
125. However, the above principles are not exhaustive, and depending on the nature of the matter under consideration, other parameters may be included such as the effect of the orders on the determination



of the case, whether there is eminent danger to infringement of fundamental rights and freedoms under the

Bill of Rights, the applicability of the doctrine of presumption of constitutionality, and legality of statutes, whether the applicant is guilty of laches, the doctrine of proportionality, among many others.

126. Having set out the nature and principles to be considered in an application for conservatory orders, the court finds the applicable principles herein are;

- i. Whether the Petitioner/ Applicant has established a prima facie case.
- ii. Whether the Petitioner/ Applicant will suffer irreparable loss which cannot be compensated by an award of damages.
- iii. Public interest.

127. Has the Petitioner/Applicant established a prima facie case, with probability of success? A prima facie case was defined in *Mrao v First American Bank of Kenya Limited & 2 others* (2003) KLR 125 to mean: -

“In a civil application includes but is not confined to a genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

128. Further, in the case of *David Ndi & others v Attorney General & others* [2021] eKLR, the Court held as follows: -

“The first issue for determination in matters of this nature, is whether a prima facie case has been established and a prima facie case, it has been held, is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, it has to be shown that a case which discloses arguable issues has been raised and, in this case, arguable constitutional issues.”

129. The Court of Appeal in Nairobi Civil Appeal No 44 of 2014 *Naftali Ruthi Kinyua vs Patrick Thuita Gachure & another* (2015) eKLR, while dealing with what a prima facie case, referred to Lord Diplock in *American Cyanamid v Ethicon Limited* [1975] AC 396, where the judge stated thus: -

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”

130. While considering whether the Applicant is entitled or not entitled to conservatory orders, and in determining whether it has disclosed a prima-facie case, the court will look at the whole Petition, then weigh it on the basis of the available evidence, though on a preliminarily basis, the pleadings, the factual basis, the respective parties’ positions and submissions, the remedies sought and the law, and whether the constitutional rights have been violated and/or infringed, or is threatened or the whether *the Constitution* and relevant statutory laws have been contravened, or is threatened with contravention.

131. In its Petition, the Petitioner/ Applicant has averred that the Respondents have violated its constitutional rights to property by proceeding with the process of constructing electricity Power transmissions lines, without first agreeing with the Petitioner on the mode of acquisition and



- compensation. The Petitioner/ Applicant alleged that the said action of creating a wayleave on its parcel of land violates the provisions of Article 40, 60(1)(b) and 64 of *the Constitution*.
132. While seeking the conservatory orders, the Petitioner/ Applicant averred that it has intentions of selling its parcels of land to offset a loan held at Housing Finance Company Ltd, and that with the Power transmission lines passing through its land, then that would scare the would-be buyers, and thus the Applicant's other properties at Thika Business Centre, would be sold by HFC (K) Bank to offset the loan.
133. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not denied that they are preparing to construct the Power transmissions lines over the Applicant's parcel of land. All that the Respondents have alleged is that they have the intention, which intention has not been actualized as they are in the process of carrying feasibility studies.
134. From the available evidence, it is evident that the Petitioner/ Applicant owns land parcel No LR NO. 10876/2, now divided into parcels Nos.10876/3 and 10876/4, which parcels of land are the center of the dispute herein. There is also no doubt that the Petitioner/ Applicant has intention of selling this parcels of land in two portion of 100acres each. Further, there is evidence that the Petitioner/ Applicant has received several offers for purchase of the suit properties.
135. Further, it is evident that the Petitioners/ Applicant's other parcels of land in Thika Municipality Block 9/96 and 558, are on the verge of being sold to realize a loan owed to HFCK LTD, wherein the said properties in Thika Municipalities had been charged.
136. The Petitioner/Applicant averred that it intends to sell the suit properties to offset the said loan. The Applicant further averred that the Respondents intends to construct power transmission lines over its parcel of land, and the said action will diminish the value of the suit property and/or scare off the would be buyers. That the said construction is intended to be done before, the Respondents have fully acquired wayleave over the Petitioner/Applicant's parcel of land and/or compensated it. It was their allegations that the said construction violates its right to property.
137. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have admitted that the construction of the 400kv Gilgil - Thika-Malaa-Konza Transmission Line is underway, and that the 2<sup>nd</sup> Respondent was contracted by the 3<sup>rd</sup> Respondent to undertake Feasibility studies with the intention of acquiring wayleave over the suit land. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not deny that the Petitioner/Applicant was summoned over the said wayleave by the Assistant County Commissioner-of Gatanga Sub County, and that there were prior communication between the Petitioner/Applicant and 1<sup>st</sup> Respondent, who had expressed intention of purchasing 25 acres out of the suit land.
138. With the above accusation by the Petitioner/Applicant and the denial by the Respondents, it is evident that the issue of the wayleave has not been fully settled, and this main issues in controversy need to be settled, in the main suit. However, if the suit property is not preserved, there is a danger of construction of the electricity Power transmission lines, and or Sub-station, without the consent of the Petitioner/ Applicant, thus maybe violating its rights to property.
139. Therefore, this court finds and holds that the Applicant has established a prima facie case with a probability of success. See the case of Habib Bank Ag Zurich V. Eugene Marion Yakub, CA No. 43 of 1982, where the Court stated;

“Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”



See also the case of National Bank of Kenya V. Duncan Owour Shakali & Another, CA No. 9 of 1997, where the court stated that;

“.....A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

140. On the issue of whether the Petitioner/Applicant will suffer irreparable loss which cannot be compensated by an award of damages, it was not controverted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that the Petitioner/Applicant is battling the issue of sale by public Auction of its parcels of land in Thika Municipality, which sale has temporarily been stayed by the Court of Appeal.
141. Further, that the Petitioner intends to sell the suit property to settle the mortgage loan owed to HFCK, to salvage the above parcel of land and it is evident that the construction of the power transmission lines might devalue the land, keep off and/or scare away the would be buyers. If that happens, then the Petitioner/Applicant will lose its other parcels of land in Thika Municipality, and that loss might not be compensated by an award of damages.
142. The Court will make reference in the case of Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, where it was held as follows:

“...that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”

Also the case of Banis Africa Ventures Limited v National Land Commission [2021] eKLR, the Court reasoned as follows:

“From the applicant’s pleadings and annexures, it is evident that the applicant is the registered owner of the suit parcels of land and they entered into agreements with the respondent for compensation of specific amounts which have not been paid as per the agreement. The applicant was to surrender substantial parcels of land and if the respondent is not stopped by way of a temporary injunction then the applicant is likely to suffer irreparable harm.

... The applicant averred that the respondent has taken possession of the suit property and started marking posts in order to commence the intended construction of the bypass After the completion of the construction the applicant will not have an opportunity to ventilate its grievance. I find that the applicant will suffer irreparable harm.”

143. On the issue of public interest, the Respondents have averred that acquisition of the wayleave will benefit the general public as the improvement of power transmission will benefit the general public at large. However, the Petitioner/Applicant right to property is guaranteed under *the Constitution*, and for the Respondents to undertake the exercise of constructing the power transmission lines over the Petitioner/ Applicant’s parcel of land, then the Respondents ought to follow the laid down procedures and adhere to the provisions of *the Constitution*.
144. At this juncture, this court cannot hold that the said provisions have been adhered to or not, as tangible evidence needs to be called and adduced in the main trial. However, the suit property needs to be preserved. See the case of Mwangi v County Council of Nairobi (Formerly City Council of Nairobi)



& 2 others (Environment & Land Case 980 of 2015) [2023] KEELC 84 (KLR) (18 January 2023) (Ruling), the Court held as follows:

“The nature of the dispute is one which cannot be adjudicated over at this interlocutory stage. The general principle is such that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in trial.”

145. Being guided as above, and bearing in mind that the Petitioner/Applicant is the registered owner of the suit properties, the court finds and holds that before the Petition herein is heard and determined, then the suit properties need to be preserved, and they can only be preserved by grant of conservatory orders. This court finds and holds that the Applicant herein is deserving of the conservatory orders as sought.
146. Having now carefully considered the instant Notice of Motion Application and the Notice of Preliminary Objection, the court finds and holds that the Notice of Preliminary Objection dated 6<sup>th</sup> May 2024, is not merited and the same is dismissed entirely with costs to the Petitioner/Applicant.
147. However, the court finds and holds that the Petitioner/Applicant has established the ingredients for grant of Conservatory orders. Consequently, the court allows prayers No 3 & 5 of the instant Notice of Motion Application with costs to the Petitioner/ Applicant.
148. Further, the parties are directed to prepare the main Petition for hearing expeditiously so that the issues in controversy can be resolved at once.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**L. GACHERU**

**JUDGE**

17/10/2024.

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

Mr Karuru Mwaura for Petitioner/Applicant

N/A for the 1<sup>st</sup> Respondent

N/A for the 3<sup>rd</sup> Respondent

N/A for the 4<sup>th</sup> Respondent

**L. GACHERU**

**JUDGE**

**17/10/2024**

