



**Kenya Electricity Transmission Company Limited v Malicha (Environment and Land Appeal E20 of 2021) [2023] KEELC 71 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 71 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E20 OF 2021  
FM NJOROGE, J  
JANUARY 19, 2023**

**BETWEEN  
KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ... APPELLANT  
AND  
ALI ABDULLAHI MALICHA ..... RESPONDENT**

**JUDGMENT**

**The Appeal**

1. This is an appeal from the judgment of the Senior Principal Magistrate's court Naivasha (Hon J Karanja) dated August 18, 2021 in which was issued as follows:
  - a. That monetary compensation of the value of the suit property as valued at Kshs 3,000,000/= on liability.
  - b. That special damages in the sum of Kshs 20,000/=;
  - c. That costs of the suit be borne by the appellant.
2. In the trial at the lower court the respondent had sued the appellant, claiming that the appellant notified him of the need to have a wayleave over his land for construction of an electricity transmission line which would considerably limit the respondent's use of the property or possible sale at a reasonable value, and offered as compensation a figure way below the current market price of the property which ignored the developments he had erected an on the property. The appellant then entered the suit land and erected electricity transmission system without further reference to the respondent and provided no documentation to the respondent to show that the proper wayleave acquisition procedures under the Land Act 2012 and the Land (Assessment of Just Compensation) Rules 2017 were complied with. The respondent claimed that the appellant's conduct was inconsistent with the provisions of the Constitution regarding its right to own property. He sought monetary compensation equivalent



to the suit property as may be valued by a qualified valuer and general and special damages from the appellant. Costs of the suit were also sought.

3. In its amended statement of defence, the appellant herein admitted the respondent's ownership of the suit property and that it was in the process of constructing electricity transmission infrastructure and that the cost of the wayleave was to be funded by the government of Kenya. The project was meant to stabilize electricity transmission to the Eastern and Western Kenya regions to stem power outages. It stated that the contract it entered into with the contractor erecting the infrastructure would cost Kshs 500,000/= per day for any delay occasioned by the appellant including stoppages relating to wayleave acquisitions. Sensitization of affected land owners was done in 2013 and the appellant was to negotiate with land owners for grant of rights of way over their land for the purpose of the power lines in return to compensation for limited loss of land use based on the value of land per acre as at the project cutoff date i.e. May 27, 2015, and the impact of the transmission line on the property. A re-routing of the power line to cater for aviation concerns brought the respondents' land under the transmission line route and the appellants' due diligence identified the respondent's affected land as parcel No Naivasha/OlJORAI Phase 2/815, and the respondent, among other affected land owners, were informed of the intention to acquire wayleave over their properties and they met with the appellants' representatives on November 19, 2019. The respondent did not at the time notify the appellant that the suit land was undergoing subdivision. Using the services of the National Land Commission to value the land the appellant arrived at a valuation of 1,200,000/= per acre for the respondent's land and issued to the respondent the letter of offer dated February 25, 2020 over the identified portion upon which the respondent disclosed that that land had been subdivided into three portions. Soon thereafter, the respondent filed the suit in the lower court without according the appellant time to conduct due diligence over the subdivisions. Later on, the appellant found a mutation form had been registered on February 14, 2020 to effect the subdivision. According to the appellant the total acreage of the land now held by the respondent after the subdivision reduced the compensation to Kshs 367,684.80. Only 38.75% of the respondent's property would be affected by the project and the respondent's land which is registered as of agricultural use, is still capable of hosting agrarian activities save planting of trees or crops exceeding 12 feet in height and construction of any structure. It is stated that the respondent refused to negotiate with the appellant.
4. Judgment was delivered on August 18, 2021 in which the lower court found that the respondent did not consent to the project which imposed huge limitations barring planting of trees and crops which at maturity exceed 12 feet in height and construction of any structure under the power lines. The court also found that the valuation report did not relate to the suit property and they were made in the years 2016 and 2019 and they were not a true representation of the current market value of the suit property. Further, the failure by the appellant to produce an offer letter consented to by the respondent was noted. The learned trial court found the diminution in value of the respondent's land to be at 100% and that he should be compensated based on the market value of the suit property which the court assessed at Kshs 3,000,000/=. The trial court also found that the respondent was entitled to general damages but awarded special damages of Kshs 20,000/= as costs of securing the valuation report.
5. Having set out the background to this appeal, I now turn to the grounds relied on in the memorandum of appeal. They are set forth as follows:
  1. The Learned Magistrate erred in law in failing to appreciate his jurisdiction under Section 148 (5) of the *Land Act* was limited to determining the amount of compensation or method of payment of compensation and not the creation or extent of the wayleave which was the preserve of the Land Acquisition Tribunal pursuant to Section 133C (6) of the *Land Act*.



2. The Learned Magistrate erred in law and in fact in disregarding evidence that only 0.77 acres (38%) of the respondent's property was affected by the wayleave and that the Respondent could undertake other forms of development on the suit property and arrived at the wrong decision that the Respondent was entitled to compensation for 100% loss of the suit property. The said decision rendered by the learned Magistrate went completely against the evidence and facts placed before him.
3. The Learned Magistrate erred in misinterpreting and/or misconstruing the evidence and thereby arrived at the wrong finding that the Respondent was prevented from constructing any form of structure on the property.
4. The learned Magistrate erred in law in awarding the Respondent compensation based on the value of 2 acres as opposed to 0.77 acres affected by the wayleave. This finding by the learned Magistrate disregarded the nature of a wayleave which is a right of way and instead applied the incorrect standard of compulsory acquisition.
5. The learned Magistrate erred in finding that the Appellant did not obtain consent to erection of the transmission line through the Respondent's property and awarding the Respondent 100% compensation on account of the purported lack of consent. The learned Magistrate failed to consider that the issue before him was not on account of consent but dispute as to the sum the Respondent was to be compensated. The Respondent having attended meetings and engaged the Applicant on the quantum hence constructively consented to the wayleave and even sought an offer from the Appellant but disagreed on the quantum.
6. The effect of the finding by the Learned Magistrate was to double compensate the Respondent by awarding him the full value of the suit property and yet he retained ownership thereof. This amounts to unjust enrichment. The decision of the learned Magistrate is also wrong for failing to take into account the fact that the Respondent retained ownership of the land, which was a highly relevant factor.
7. By his decision the learned Magistrate failed to appreciate or sufficiently appreciate the nature of a wayleave and easement as an overriding interest over land and thus arrived at the wrong finding.
8. The Learned Magistrate erred both in law and fact in finding that the Appellant did not follow the legal procedure on the creation of wayleave even though the Appellant adduced overwhelming evidence to the contrary.
9. The Learned Magistrate erred both in law and fact in disregarding the valuation report by the National Land Commission dated August 20, 2019 despite the fact that the same was prepared at the relevant time when the wayleave was created and instead giving undue weight to the valuation report dated June 3, 2020 which was prepared about a year after the wayleave was created.
10. The Learned Magistrate misdirected himself in disregarding evidence of valuation adjacent properties and thereby arrived at the wrong decision.
11. The Learned Magistrate disregarded the fact that based on the same valuation used by the Appellant, the Respondent's neighbors including the Vendor of the suit parcel had accepted the offer for compensation on the wayleave based on similar terms to the Respondent.
12. The Learned Magistrate erred both in law and fact by disregarding the evidence adduced by the Appellant in the trial.



13. The Learned Magistrate erred in law in awarding Special Damages despite the fact the same were not specifically pleaded or proved.
14. The Learned Magistrate erred in law and misdirected himself by lowering the burden and standard of proof in so far as the Appellant's claims were concerned and thereby arrived at a wrong decision.
15. The Learned Magistrate erred in law by failing to analyze and take into consideration the Appellant's submissions and authorities cited hence arriving at unsupported and erroneous conclusion to the Appellant's detriment.
16. The Learned Magistrate erred in law by exercising his discretion in a capricious manner to the detriment and prejudice of the Appellant.
17. The decision of the Learned Magistrate is self-contradictory and plainly wrong.
18. The decision made by the Learned Magistrate was wrong in principle and unfair in effect.

### **Submissions**

6. The parties canvassed the appeal by way of written submissions at the order of the court. The appellant filed its submissions on April 25, 2022 while the respondents complied on May 31, 2022.

### **The Appellant's Submissions**

7. The appellant set out the background to the suit which is as laid out herein above and identified the issues for determination as follows: whether the trial court erred by delving into the creation of the wayleave as opposed to compensation payable; whether the trial court erred by disregarding the nature of a wayleave and instead applied the standard of compulsory acquisition in awarding 100% compensation rather than 38% being the area affected by the wayleave; whether the trial court erred in misinterpreting, misconstruing and/or ignoring the law facts and evidence on record and so arrived at the wrong determination and whether the trial court erred in awarding special damages that were neither pleaded nor proved.
8. It was submitted on the first issue that the respondent had in his plaint sought monetary compensation equivalent to the value of the property and he never sought a declaration that the process of acquiring the wayleave was illegal or unprocedural hence the trial court erred when it delved into the issue of propriety of the acquisition and found that the appellant did not obtain consent to construct the transmission line through the suit land, and further that the entry thereon was not legal or constitutional as in doing so the court pronounced itself on an issue that was not presented before it for determination. It was further submitted that Section 148 of the *Lands Act* provides for compensation for use of land in respect of public right of way or wayleave of which a person is in lawful or actual occupation, in addition to compensation for the use of land for any damage suffered in respect of trees crops and buildings based on the value of the land as determined by a qualified valuer. The appellant submits that in addition if the parties are unable to agree on the amount or method of payment of compensation or if the intended payee is dissatisfied, then that person may apply to court to determine the amount and method of payment or compensation. It is further submitted that the trial court ignored the fact that wayleaves are overriding interests in land as per Section 26(1) as read with Section 28(i) of the *Land Registration Act* and that the dispute before court concerned the compensation payable and not the wayleave itself. The respondent having not objected to the creation of the wayleave in his claim, it was urged, the court went beyond the scope of the issues for determination.



9. Regarding the second issue it was urged, citing *Kenya Power & Lighting Co Ltd v Josphat P Kingara [2013] eKLR*, that the trial court erred in law in awarding compensation at 100% of the value of the suit land while the law in Section 148(1) of the *Land Act* provided for compensation for limited loss of land use and only 38% of the property was affected by the wayleave, leaving the rest for the respondent's desired use. It was urged that the respondent admitted that only a part of his land was affected in his evidence at the trial. It is stated that the trial learned Magistrate disregarded the law on wayleave on arriving at a determination. In urging this ground, the appellant also relied on the cases of *Kenya Electricity Transmission Company Limited v Valeria Helen Wangechi Kigano and 3 others [2019] eKLR*, *Kenya Electricity Transmission Company Limited v Rachael Wangechi Watson [2018] eKLR*, *Kenya Electricity Transmission Company Limited v Lepton Lengidi [2018] eKLR*, and finally *Kenya Power & Lighting Company Limited v B M Wambua [2019] eKLR*.
10. The appellant submitted that extraneous factors which disregarded the law and precedent were considered by the court in arriving at its decision in that it awarded the respondent compensation as though the appellant was compulsorily acquiring its land. It was urged that notwithstanding the acquisition the predominant user of the land in terms of agricultural activities would still be exploited.
11. The appellant further submitted that the learned trial court, disregarded the law, facts and evidence arrived at a wrong determination in pronouncing himself on the issue of consent in the creation on the wayleave, legality of the appellant's entry into the suit land and diminutive value of the suit property. It was further submitted that Article 40 (3) (b) of the *Constitution* prohibits deprivation of a person's property where the deprivation is not in the public interest and is carried out procedurally with prompt payment in full of just compensation to that person. In this regard it was argued that the appellant is charged with the mandate of improving the quality and reliability of the electricity supply throughout the country and its mandate is in the furtherance of the interest of the general public; that Section 143 (2) of the *Land Act* grants the National Land Commission the power to create public right of way for the benefit of national or county government or other public bodies as may be necessary to enable them carry out their functions; that Section 148 of the *Land Act* provides that compensation shall be payable for the use of land of which a person is in lawful occupation as well as damage suffered in respect of trees, crops and buildings. The appellant avers that a disagreement only arose on the compensation payable hence the lower court suit and the trial court was in error in disregarding the valuation report of the appellant at the trial and relying on the respondent's valuation while the respondent had not controverted the former valuation reports. It is also claimed that the magistrate disregarded the law and authorities on creation of wayleaves and the evidence of compensation for limited loss of land use in properties neighbouring the respondent some of which had been accepted and which showed that payment of compensation was based only on affected acreage.
12. Regarding the special damages, it is submitted that they were neither pleaded nor proved and the appellant refers to Order 4 Rule 2 of the *Civil Procedure Rules 2010* the case of *Tracom Limited and another v Hassan Mohamed Adan [2009] eKLR* and *Mathew Mutua Mutio v Car and General Kenya Limited [2000] eKLR*.

### **The Respondent's submissions**

13. The respondent's submissions dwelt on four issues as follows: whether the learned trial court erred in law by delving into the creation of a wayleave as opposed to compensation; whether the trial magistrate erred in law by disregarding the nature of a wayleave and applying instead the standards of compulsory acquisition; whether the learned trial magistrate misinterpreted the law, facts and evidence and if he erred in law by awarding special damages that were neither pleaded nor proved. The respondent submitted that if the law is not observed in the creation on a wayleave then such an act amounts



to compulsory acquisition of land. He relied on Sections 143(1), 148(5) and 149(i) of the [Land Act](#) and submitted that the statute does not limit the court in any manner whatsoever in making a determination in enforcement of a public right of way. He states that the magistrate had to establish whether the wayleave was properly acquired for the purposes of compensation. On the other hand, he states that the appellant was unable to prove propriety in the creation of the wayleave at the hearing hence the magistrate was correct in finding the process to be irregular and so forceful acquisition of the respondent's property was the result.

14. It is stated that the respondent is handicapped by Section 183 of the [Energy Act](#) and his property's land use was limited and the land devalued and so the appellant could not use the land as he desired or sell it.
15. Regarding special damages, it is submitted that they were pleaded and though it is admitted that the amount was not specifically stated, the learned magistrate took notice that undertaking a valuation is an activity that requires a professional who is normally paid for his services and hence awarded the same. The appellant relied on the case of [Premier Dairy Limited v Amarjit Singh Sagoo & another \[2013\]eKLR](#). He submitted that the respondent submitted receipts in court to demonstrate the special damages. He seeks costs of the instant appeal

### **Determination**

16. From the grounds in the memorandum of appeal filed by the appellant it is clear that the issues arising for determination in the present appeal are as follows:-
  - a. Whether the court misinterpreted the law and facts and evidence and so delved into the issue of the propriety of the process of the acquisition of the wayleave;
  - b. Whether the court misinterpreted the law in awarding 100% compensation as opposed to the 38% being commensurate to the area affected by the wayleave;
  - c. Whether the trial court erred in awarding special damages;
  - d. Who ought to pay the costs of the instant appeal?
17. Regarding the first issue, no dispute arises as to whether the appellant is a public body charged with mandate of transmission of electricity throughout the republic of Kenya and related duties, and that the acquisition of a wayleave by it was for a public purpose. Neither is there any question arising as to whether the respondent's land was affected by the said acquisition.
18. The appellant avers that the trial court delved into the issue of the process of creation of a wayleave while the plaintiff, which merely sought monetary compensation equivalent to the value of the suit property and which never sought declarations that the process of acquisition was unprocedural, and so the trial court waded into errors. The reflex at this point is to refer to pleadings and in particular the plaintiff. It reveals that most of the statements in that pleading were riveted on the dimensions of land to be affected and the effect on its utility after the construction of the appellant's project, including inability to dispose of the land at "any considerable value"; albeit some of the facts pleaded by the respondent in paragraph 12 and 13 unsuccessfully cast aspersions on the appellant's handling of the acquisition process they are not explicit that the process was irregular and in addition, the reliefs claimed in the end fell far short of seeking declarations that the process was irregular or unprocedural. The remedies sought were principally pecuniary reliefs. The draftsmanship of the respondent's plaintiff in the lower court was also such that while general damages were included among the reliefs there was no specificity as to what act of transgression on the part of the appellant they could be attributed to. This in my view should have appealed to the court to adopt the approach that only pecuniary reliefs were sought without any intent to impugn the integrity of the acquisition process.



19. Consequently, the only vital evidence in support of the respondent’s claim ought to have focused on the issue of whether compensation offered by the appellant was appropriate and in accordance with the conventional computation mechanisms relating to wayleave acquisition. Hence, this court has no hesitation in finding that the trial court misdirected itself and misconstrued the facts of the case as presented in the pleadings and evidence. The dicta addressing the propriety of the acquisition which is found in four successive paragraphs in the judgment ending up with a conclusion in paragraph 19 that the entry and construction of the appellant’s project over the suit land was not legal or constitutional was in error. It would appear also that the plaintiff dropped the only relief, being the prayer for an injunction, that could have been awarded by the trial court on the basis of such a conclusion. Consequently, the finding of irregularity of process by the court was in vain in that it never translated into a substantive relief and the court ultimately confined itself to the pecuniary reliefs sought.
20. Regarding whether the trial court erred in law and in fact in awarding 100% compensation as opposed to the 38% being commensurate to the area affected by the wayleave, the provisions of Section 143 of the Land Act come into sharp focus. They are as follows:

“ 143. Power of the Commission to create public rights of way

- (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 benefit of the national or county government, a local authority, a public authority or any corporate body to enable all such institutions, organisations, authorities and bodies to carry out their functions, referred to in this Act as a wayleave; 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 a derivative right thereof, or under customary law or as a successor in title to any such owner or as a trespasser.
- (4) A wayleave shall authorize persons in the employment to or who are acting as agents of 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 structures and in setting all such works, installations and structures on the servient land and to pass and re-pass along that wayleave in connection with purposes of those organisations, 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 along 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.”



21. It is therefore correct for the appellant to state that there are statutory underpinnings in the Act for the creation of a wayleave, usually over private property, for public benefit.
22. The provisions that relate to compensation are however to be found in Section 148 which states as follows:

“ 148. Compensation in respect of public right of way

- (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 paid to a public body unless there is a 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 buildings so damaged were included in the route of the wayleave as delineated in the order of the Cabinet Secretary.
- (4) The duty to pay compensation payable under this section shall lie 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 payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.
- (6) The Commission shall make Regulations prescribing the criteria to be applied in the payment of compensation under this section and to give effect to this section.”

23. In urging that compensation should not have been for the full value of the suit land the appellant emphasized on the distinction between acquisition of a wayleave and compulsory acquisition. The provisions of Section 28 of the [Land Registration Act](#) providing for overriding interests, including electric supply lines, on all registered land were cited. Article 40 (3)(b) was cited for the proposition that deprivation of property for a public purpose is not barred and that it ought to be carried out in accordance with the [Constitution](#) and a law that requires prompt payment in full of just compensation to the affected person.



24. It was averred that the respondent was only entitled to compensation for limited loss of land use as provided for in Section 148(1) as set out herein above. The explanation for limited loss of land use is further explained by the appellant by stating that only an easement is acquired over the subject land in contrast to total acquisition under compulsory acquisition of the title. The appellant referred to its offer to the respondent based on limited loss of land use.
25. The limitation of the use of the land is confined to two restrictions, to wit, a bar on planting trees or crops that at maturity exceed 12 feet in height as well as the bar regarding construction of any form of structure under the trace. In this regard it is plain to see that only a part of the respondent's land parcel was affected and even then, he was still able to utilize the entire land for the dominant use for which the land was legally authorized: agriculture. Compensation is therefore for the use of the land, and it is in cases of private land computed based on a valuation based on the value of the land as determined by a qualified valuer.
26. The appellant cited decisions in which compensation was awarded only for limited loss of land which I have read and which I agree with. In the case of *Kenya Power & Lighting Co Ltd v Josphat P Kingara 2013 eKLR* the court focused on the diminution of value of the defendant's land with respect to the portion directly affected by the wayleave and which could not be utilized for any other purpose and the diminution of the economic value of the rest of the land, the latter which it found to be minimal, and it therefore never awarded compensation for the value of the whole parcel.
27. On his part, the respondent's submission on this point is that besides the effect of limiting the respondent's use of the suit land as well as denting his chances of disposing of it, a wayleave was registered on the suit land without observance of the procedure for the creation of a wayleave and that this was effectively forceful acquisition of land for registration of a wayleave. He cites the provisions of Section 183 of the *Energy Act* which provides as follows:
- “ 183. Owner or occupier prohibited from certain acts
- Notwithstanding anything to the contrary contained in any written law, an owner or occupier of any land situated within an energy resource area shall not, except with the written approval of the implementing agency and subject to any terms and conditions that may be imposed by the implementing agency for that purpose, do any act or permit any other person to do any act, which may change the form of any energy resource situated within such energy resource area or cause the depletion of any such resource in such a manner or to such an extent, that the economic viability of developing that resource is substantially reduced.”
- With respect the reliance of that provision is quite misplaced in that its import is to prohibit “any act or permit any other person to do any act, which may change the form of any energy resource situated within such energy resource area or cause the depletion of any such resource in such a manner or to such an extent, that the economic viability of developing that resource is substantially reduced.” Establishment of an electric power wayleave over servient land would not be of any value to the public body that constructs its project over that land if the tenants underneath are let free to interfere with that infrastructure or the utility it carries at will hence the restriction under Section 83 of the *Energy Act* set out herein above.
28. On this court's part there is no merit in the respondent's express submission that if the law is not observed in the creation of a wayleave then such an act amounts to compulsory acquisition of land. There would be only as much merit in that assertion as in saying that if a shopkeeper mistakenly gives less change than a customer is entitled to, the former is rightfully entitled to the amount mistakenly



retained. An error is an error and where legal mechanisms have been put into place for its correction, such an interpretation as is urged by the respondent would result in absurd consequences. It is the manner in which the error can be corrected within the existing rules that should be urged.

29. What then would have been the proper basis for the assessment of just compensation? The appellant had provided valuation reports and the respondent had one of his own at the trial but the magistrate is said to have disregarded the appellant's reports in favour of the respondent's notwithstanding that the respondent never controverted the appellant's documents. In this regard the appellant felt that the trial court used its own standard rather than that set by law and precedent on creation of wayleaves and in so doing failed to exercise his discretion judiciously.
30. This court must consider the defence of the appellant in the court below where it pleaded as follows: The defendant then computed the limited loss of land use compensation and issued to the plaintiff the letter of offer dated February 25, 2020 for the sum of Kshs 1,247,607.00 over parcel No Naivasha/Oljorai Phase II/815. That it is at this juncture that the plaintiff intimated to the defendant that the parcel No Naivasha/Oljorai Phase II/815 was subdivided into three portions parcel 10616, 10617 and 10618. From the defendant's investigations, it emerged that the plaintiff registered the mutation form for the subdivision of parcel No Naivasha/Oljorai Phase II/815 on February 14, 2020 and the land was subdivided into three portions with the plaintiff being issued with title deed to parcel No Naivasha/Oljorai Phase II/10616 on February 19, 2020. The compensation for limited loss of land use is arrived at by multiplying the impact by the value of land per acer (VA) by the affected acreage (AA). The impact (I) is the affected acreage (AA) divided by the total acreage of the land multiplied by 100%. The minimum impact used to calculate compensation is 30% of the value of the acreage affected by the transmission line where the impact is below 30%. Where the impact is above 30%, the impact is used in calculating the compensation payable.
31. The respondent's real purpose in subdivision of the original plot remains a matter of speculation, but it is clear that of the three resultant subdivisions only one was affected by the trace, that is, parcel no Naivasha/Oljorai Phase II /10616. It so happens that the total acreage of the affected parcel and to total area directly covered by the trace is of great consequence in the appellant's computation of the compensation payable; the quantum arrived at by the appellant was based on the acreage of Naivasha/Oljorai Phase II /10616 and not its mother parcel and this pro-rating naturally led to a reduction in the sum the respondent expected. The appellant pleaded as follows in its defence:
- “In this case, following the subdivision of the original property by the plaintiff, the VA is Kshs1,200,000.00. The total acreage of parcel 10616 is 1.9768 acres, the AA is 0.76601 acres which represents an impact of 38/75%. The compensation payable is thus Kshs 367,684.80. The compensation is termed as compensation for limited loss of land use as the defendant does not compulsorily acquire the wayleave trace and only acquires easement over the wayleave trace.”
32. Naivasha/Oljorai Phase II /10616 is therefore the parcel subject matter in the respondent's claim. The respondent cited the case of *Tennyson Nyinge Chilyalya & 60 Others v Ketraco Malindi Case* No 63 of 2015 in which 100% compensation was ordered. However, each case of compensation must be taken on its own merits. In that case it is evident from the passage quoted by the respondent in the court below that not only was a wayleave acquired but an extra corridor 40 metres wide was also provided for around the power lines for the KETRACO's ease of access which reduced further the claimants' ability to use their land in the normal manner. 100% compensation is payable, yes, but only in deserving circumstances which in my view would deny the owner of the servient land all use thereof as in compulsory acquisition and not otherwise. It was the respondent's duty to persuade this court



that the facts of this case were similar to those the Tennyson Nyinge case (Supra) but he failed in doing so. On this court's part, it would take considerable argument to establish that in a case where the land owner will be left using any portion of his land after the wayleave acquisition is entitled to 100% market value of the servient land. I am of the firm view that only the percentage of land affected and hence quantum of compensation would be subject to adjustment. I therefore am not able to follow the decision in Tennyson case (Supra).

33. In his evidence the respondent stated in the lower court that he purchased the suit land for Kshs 800,000/= per acre in 2017. His further evidence was that when he got his land valued thereafter in 2020 it was found to be worth Kshs 1,500,000/= per acre. He also admitted in cross-examination that his neighbor, who had apparently sold the suit land to him had been compensated Kshs 557,451.83. the vital part of his evidence on cross-examination is that the valuation supporting his claim was in respect of the whole parcel of land and not just the part affected by the trace and that the appellant is only concerned with the area affected by the trace. The respondent's further evidence was that the electric power pylons were not erected on his land but the power cables passed over the plot, yet he claimed the market value for the whole plot as compensation.
34. Given that it is the rule that compensation is for affected land, and the respondent lacked a valuation for the trace-affected portion only, I hold that the learned trial magistrate erred in granting compensation for the entire plot at 100% of its value which he set at Kshs 3,000,000/- in accordance with the respondent's valuation report.
35. Regarding whether special damages were proved, it is trite law that they must be specifically pleaded and proved. By "specifically" I mean "particularly." The figure must be given so that the other party becomes prepared for the claim. A party can not be allowed to successfully claim special damages not expressed as a liquidated sum in his pleading as that term ordinarily refers to damages already incurred and which are within the knowledge of the claimant in contrast with general damages whose value has to be ascertained by the court after hearing the evidence of the parties. The respondent's plaint in the trial court contained no such sum and I find that on this ground alone the appellant's appeal against the award of special damages should succeed.
36. In the end I find that the entire appeal by the appellant has merit and I hereby grant it and issue the following orders:
  - a. The instant appeal is hereby allowed;
  - b. The decision of the Learned Magistrate dated August 18, 2021 is hereby set aside and substituted with an order directing the appellant to pay the Respondent the sum of Kshs 411,445.16;
  - c. The costs of this appeal and proceedings in the lower court shall be borne by the Respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

