



**Muchuku v Kenya Electricity Transmission Co. Ltd (Environment and Land Constitutional
Petition E3 of 2022) [2023] KEELC 16693 (KLR) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E3 OF 2022
FM NJOROGE, J
MARCH 30, 2023**

BETWEEN

PATRICK MWANGI MUCHUKU PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO. LTD RESPONDENT

RULING

1. This ruling is in respect of the petitioner’s Notice of Motion application dated May 17, 2022 brought under Article 23(1) of the Constitution of Kenya, Rules 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which sought the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That pending hearing and determination of this petition, an order do hereby issue directing the respondent to forthwith promptly deposit into court or an interest earning account of any reputable commercial bank of Kenya the sum of Kshs 14,495,270.96 being wayleave compensation payable to the petitioner for way leave through the petitioner’s properties known as Titles No Naivasha/Maraigushu Block 32/80, 81, 82, 83 and LR No 425/65 situated in Naivasha sub-county in Nakuru county.
 - e. That the costs of the application herein be paid by the Respondent.
2. The application is supported by the supporting affidavit of Patrick Mwangi Muchuku sworn on May 16, 2022. The grounds on the face of the application and the supporting affidavit are that the petitioner is the registered owner of land parcel No’s Naivasha/Maraigushu Block 32/80, 81, 82,



83 and LR No 425/65; that around August and December 2020, the respondent sought wayleave corridor through the petitioners suit properties for construction of its 400/220/132kv Olkaria-Lessos-Kisumu transmission line to strengthen its geothermal plants in Olkaria and link between the eastern and western parts of its national grid; that by the letter of offer dated December 18, 2020, the respondent offered wayleave trace of 60 meters wide corridor transmission line traversing through the suit properties herein and offered compensation of Kshs 14,495,270.96; that the petitioner accepted and signed the offer letter; that on December 24, 2020, the respondent took possession of the suit properties, commenced the work and completed the same in January/February 2021; that the respondent has to date neglected to pay the compensation of Kshs 14,495,270.96; that the petitioner therefore claims the compensation of Kshs 14,495,270.96 plus interest from December 24, 2022 until settlement in full; that the petitioner has consistently followed up on the payments but he is yet to be paid; that the failure to pay wayleave compensation is ultra vires Section 173(3) of the *Energy Act* which requires that no works should commence unless compensation is paid and Article 40(3) and (4) of the *Constitution* which requires that the respondent shall ensure prompt payment of just compensation in full and that the respondent's actions have violated his fundamental rights and freedoms to property, equal treatment among others.

3. In response to the application, the respondent filed a preliminary objection dated June 19, 2022 and a ruling on the same delivered on January 19, 2023. The respondent also filed grounds of opposition dated June 19, 2022 and filed on October 5, 2022. The grounds are as follows;
 - a. That the Petitioner's Notice of Motion Application dated May 16, 2022 and the Petition dated May 17, 2022 violate the provisions of Sections 25, 36 and 37 of the *Energy Act* as read together with the provisions of Part VII of the *Energy Act* 2019. The jurisdiction to hear and determined disputes under the *Energy Act* 2019 lies squarely on the Energy and Petroleum Tribunal.
 - b. That this Honourable Court lacks jurisdiction to hear and determine the Petitioner's Notice of Motion Application dated May 17, 2022 and Petition dated May 17, 2022 as filed as the prayers sought have no constitutional underpinning as was held by the Court of Appeal in *Sumayya Athmani Hassan v Paul Masinde Simidi & Another [2019] eKLR*.
 - c. The Honourable Court lacks jurisdiction to hear and determine the Petitioner's Notice of Motion Application dated May 16, 2022 and the Petition dated May 17, 2022 as framed and pleaded as the pleadings discloses no constitutional cause of action against the Respondent, as the Petitioner's claim is for compensation claim under Section 148 of the *Land Act* as read with section 7(d) of the *Environment & Land Court Act 2011*, and with section 150 of the *Land Act*.
 - d. The Notice of Motion Application dated May 17, 2022 and Petition dated May 16, 2022 are non-starters as there is no written and signed agreement between the Petitioner and the Respondent to warrant the grant of the orders sought pursuant to Section 3(1) of the *Law of Contract Act*, Cap 23 of the Laws of Kenya.
 - e. The Honourable Court lacks jurisdiction to hear and determine the Notice of Motion Application dated May 17, 2022 and Petition dated May 16, 2022 offends the provisions of Article 22(1) and Article 23(1) & (3) of the *Constitution* of Kenya 2010 and with rule 4(2) (ii) of *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*.
 - f. The Honourable Court lacks jurisdiction to determine the Notice of Motion Application dated May 17, 2022 and Petition dated May 16, 2022 which are nullity and fatally defective ab initio as held in *Macfoy v United Africa Co Ltd [1961] 3 ALL ER*.



- g. The Petitioner's Notice of Motion Application dated May 17, 2022 and Petition dated May 16, 2022 are made in bad faith.
 - h. The Petitioner has approached a court of equity with unclean hands and ought not to benefit from the same.
 - i. The Petitioner's Notice of Motion Application dated May 17, 2022 and Petition dated May 16, 2022 are otherwise incompetent, misplaced, an abuse of court process, lack merit, a waste of precious judicial time and resources.
 - j. The Respondent has at all times acted in accordance with the law and there is no act of the Plaintiff herein that can be said to be contrary and/or in contradiction to law.
4. The respondent also filed a replying affidavit sworn by Johnson Muthoka, its senior manager wayleave acquisition. The replying affidavit was sworn on January 25, 2023 and filed on February 1, 2023. He reiterates the contents of the grounds of opposition and states that the petitioner's Notice of Motion application is premature as it condemns the respondent to deposit colossal sums of money prior to a determination of the rights, interests and obligations that are the subject matter of the petition; that the application is a non-starter as it seeks enforcement of proprietary rights and yet there is no written and signed agreement between the parties herein; that the petitioner's application offends the principles of public finance under Article 201 (e) of the Constitution of Kenya; that the petitioner's application is based on a claim for compensation over wayleave rights for which he relies on the letters of offer given to him and dated December 18, 2020; that the letters of offer are not contracts for disposition of land within the meaning of Section 3(3) of the Law of Contract Act; that the entry of the respondent on the suit property was formal and with consent; that the parties are yet to complete the formalities involved in land compensation procedures which include executing contracts for disposition of interests in land and registration of such interests on the certificate of lease with respect to the affected parcels of land; that the petitioner cannot therefore state that the respondent has failed in making good any payments for compensation in the absence of completion of such formalities and procedures; that there is no evidence attached to the petitioner's application to substantiate his allegations of follow ups and the alleged promises of compensation based on budgetary allocations; that granting of the prayers sought by the petitioner of depositing Kshs 14, 495, 270.96 in court would be tantamount to condemning the respondent to satisfy the judgment amount sought in the petition without an ascertainment of rights and obligations and that for that reason, the petitioner's application should be dismissed.

Submissions

- 5. The petitioner filed his submissions dated January 30, 2023 and filed on February 6, 2023. The respondent filed its submissions dated February 28, 2023 on February 24, 2023.
- 6. The petitioner in his submissions raised only issue for determination which is whether he is entitled to the injunctive reliefs sought in his Notice of Motion application dated May 17, 2022.
- 7. The petitioner relied on Article 40(3), (4) and 23 (3)(b) of the Constitution of Kenya, Sections 173 and 175 of the Energy Act, the cases of Hellen Chelel Mulama v Kenya Electricity Transmission Company Limited (KETRACO) [2018] eKLR, Center for Rights Education and Awareness (CREAW) & 7 Others v Attorney General [2011] eKLR among other cases and submitted that the respondent took possession of his land on the promise that it would promptly compensate him which it is yet to do to date.
- 8. The petitioner also submitted on whether he is entitled to injunctive reliefs and relied on the case of Giella v Cassman Brown & Company Limited [1973] EA 358. He stated that he has demonstrated



that he has a prima facie case with high chances of success as the suit property belongs to him and that the respondent is in breach of constitutional and statutory provisions by failing to pay the agreed amount of compensation. The petitioner also submitted that he stands to suffer irreparable harm if the orders sought in the application are not allowed as he has been denied use of the suit property as the respondent is using it. The petitioner relied on various cases and submitted that the balance of convenience tilts in his favour. In conclusion, he sought that his application be allowed as prayed.

9. The respondent identified the following issues for determination in its submissions;
 - a. Whether the petitioner is entitled to the orders sought in his Notice of Motion application dated May 17, 2022.
 - b. Who is liable to cater for the costs of the Notice of Motion application dated May 17, 2022?
10. On the first issue, the respondent relied on the Supreme court of Kenya at Nairobi, Application No 5 of 2014, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR* and submitted that the petitioner failed to meet the criteria set for grant of conservatory orders. The respondent also submitted that the petitioner's application is premature as any order that would require the deposit of any amount for compensation ought to be made upon a determination of rights between the parties. The respondent submits that the basis on which the petitioner seeks for a deposit of the alleged compensation is based on Section 173(3) of the *Energy Act* which requires that any compensation amount payable be deposited in a special compensation fund held by the government agency responsible for management of that land and therefore, a determination ought to be made as to whether the offer letters relied upon constitutes a decision on compensation payable in accordance with Section 175 of the *Energy Act*. The respondent reiterated the contents of his replying affidavit and sought that the petitioner's application be dismissed.

Analysis and Determination

11. After considering the application, grounds of opposition, replying affidavit and the submissions, the only issue that arises for determination is whether the respondent should be directed to deposit in court or in an interest earning account of any reputable commercial bank in Kenya the sum of Kshs 14, 495,270.96 being wayleave compensation payable to the petitioner for way leave through the petitioner's parcels of land known as title No's Naivasha/Maraigushu Block 32/80, 81, 82 and 83 and LR No 425/65.
12. The petitioner alleges to be the owner of land parcel No's Naivasha/Maraigushu Block 32/80, 81, 82 and 83 and LR No 425/65. He further alleges that by the letters of offer dated December 18, 2020 and accepted on December 24, 2020, he accepted the respondent's offer to pay wayleave compensation totaling to Kshs 14,495,270.96 as the respondent was to construct its Olkaria-lessos-Kisumu 400/220/132kv transmission line through the suit properties. He also alleges that the respondent has completed the said construction but has neglected to compensate him. In support of his application, he has annexed copies of his certificates of lease for the suit properties and the copies of letters of offer.
13. The respondent on the other hand admits that it entered on the suit properties with the consent of the petitioner and put up infrastructure but they are yet to complete the formalities involved in the land compensation procedures to enable them pay the petitioner. The respondent also alleges that its commitment to pay all the dues to the petitioner was subject to the following the laid down loss of land compensation procedures.



14. It is my view that since the respondent has admitted that they have constructed the transmission line on the suit properties and that it is yet to compensate the petitioner, it is in the interest of justice that the respondent be ordered to deposit in court the said sum sought by the petitioner in his application dated May 17, 2022.
15. Consequently, pending the hearing and determination of the instant petition, the respondent is hereby ordered to deposit in court the sum of Kshs 14,495,270.96. The costs of the application can be in the cause. The petition will be mentioned on May 3, 2023 to ascertain compliance.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

