



Thuo v Kenya Electricity Transmission Company Limited & 2 others (Tribunal Case E040 & E041 of 2024 (Consolidated)) [2024] KELAT 1666 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KELAT 1666 (KLR)

**REPUBLIC OF KENYA
IN THE LAND ACQUISITION TRIBUNAL
TRIBUNAL CASE E040 & E041 OF 2024 (CONSOLIDATED)
NM ORINA, CHAIR & G SUPEYO, MEMBER
NOVEMBER 18, 2024**

BETWEEN

GABRIEL NGUG THUO CLAIMANT

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED 1ST
RESPONDENT**

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The instant suits relate to the construction of a transmission line on the Claimants' parcels of land known as Maji Mazuri Block 1 (Iguire)/1121 and Maji Mazuri Block 1 (Iguire)/1120, respectively (the suits properties). This was part of the Olkaria-Lessos-Kisumu Transmission Power Line.
2. Following this creation of a wayleave, the Claimant in E040 was offered Kshs. 713,229.44 while the Claimant in E041 was offered Kshs. 519,503.04 in compensation. However, the Claimants have approached this tribunal through Statements of Claim dated 10th July 2024 seeking, among others, orders that the suit properties were undervalued and an order that the Claimants are each entitled to the sum of Kshs. 2,000,000.00 as compensation.
3. In Response, the 1st Respondent filed notices of preliminary objection dated 4th October 2024 to both claims wherein the 1st Respondent asserts that the tribunal lacks jurisdiction to hear and determine the instant suits on the grounds that the same offend the provisions of Sections 3(1) and 224(2) of the Energy Act 2019 as read together with Regulations 4(a) and 7 of the Energy (Complaints and Dispute Resolution) Regulations 2012.



4. The 1st Respondent further avers that the tribunal lacks jurisdiction to hear and determine the suits following the holding of the Court of Appeal on 3rd February 2023 in Kisumu Civil Appeal No. 42 of 2021 – Abidha Nicholus v. Attorney General & 7 Others; National Environmental Complaints Committee (NECC), NEMA, Siaya County, KPLC & Others [2023] eKLR.
5. When the matters were mentioned on 14th October 2024, parties were directed to file submissions in support and in opposition to the preliminary objections. The same were filed on 21st October 2024 (1st Respondent) and on 29th October 2024 (Claimants).
6. We have considered the submissions by the parties in support and in opposition to the preliminary objections. This ruling addresses the preliminary objections in the two cases since they are in regard to the same issue. The issue for our determination is one – that is if we have jurisdiction to entertain the claims before us.
7. Our jurisdiction is provided for under Section 133C of the [Land Act](#) which provides as follows:

Jurisdiction of the Tribunal

1. The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
 2. A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.
 3. Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.
 4. Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
 5. If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
 6. Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
 7. Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
 8. The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of [the Constitution](#), using the framework set out under the Fair Administrative Act or any other law.
8. While acknowledging that Section 133C (6) of the [Land Act](#) bestows upon the tribunal jurisdiction to hear and determine disputes relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way, the 1st Respondent notes that Section 11(i) of the [Energy Act](#) No. 1 of 2019 vests jurisdiction to investigate and determine disputes between a licensee and a third-party upon the Energy and Petroleum Regulatory Authority (EPRA).



9. The 1st Respondent further directs us to Regulations 4(a) and 7 of the Energy (Complaints and Disputes Resolution) Regulations 2012 which vest original jurisdiction over disputes touching on wayleave and transmission upon EPRA.
10. The 1st Respondent urges us to find that EPRA has the original jurisdiction over disputes or complaints touching on wayleaves. This position is primarily held by the 1st Respondent on the basis of Section 3(1) of the Energy Act 2019 which speaks to conflicting provisions of the law. It provides as follows:
 3. Acts to prevail -
 - (1) If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters –
 - (a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy;
 - (b) the exploration, production, transportation, distribution, and supply of any other form of energy; and
 - (c) all works and apparatus for any or all of these purposes.
11. It is the 1st Respondent’s submissions, therefore, that on the basis of Section 3(1) of the Energy Act, the Energy Act supersedes any Act of Parliament in reference to disputes touching on construction of electricity transmission lines.
12. The question then before us then is whether a dispute arising out of laying of wayleaves is a matter within the exclusive jurisdiction of the bodies under the Energy Act as argued by the 1st Respondent. We note that even though we have been urged to find that the exclusive jurisdiction to determine disputes arising from creation of wayleaves lies with EPRA, we do not find explicit reference to disputes of that nature in Section 3(1). Furthermore, Section 11(i) refers to disputes between parties over any matter relating to licences and licence conditions.
13. On the other hand, Section 175 of the Energy Act in regard to disputes touching on compensation states as follows:

175. Payment of compensation

If any difficulty or question arises as to the amount, entitlement to compensation or person entitled to compensation payable under this Act, the determination shall be made in accordance with the provisions of the relevant written law.
14. This Section refers to “the relevant law” and makes no specific reference to any body established under the Act. Were it the intention of the legislature to ringfence these disputes for the exclusive determination of EPRA, it would have been stated so. As we have stated in *Mathew v Kenya Electricity Transmission Company Limited (KETRACO)* [2024] KELAT 516 (KLR)

“...A relevant law, to our understanding is any law which at the moment deals with determination of disputes in regard to the matters in question. Section 133C of the Land Act, 2012 which establishes the Land Acquisition Tribunal is a relevant law in this case....”
15. We addressed this matter at length in the Mathew case and we reiterate the same. We stated as follows:
 16. The Land Act in Section 133C (6) outlined above gives the Tribunal, as a court of first instance, jurisdiction in matters relating to creation of wayleaves. To our mind, there is no confusion or



overlap as may be urged as in this case. Creation of wayleaves relates to acquisition of interests in land and hence by dint of the subject matter, such disputes can only be properly adjudicated before the Land Acquisition Tribunal. Even though we are clear in our minds, as determined below, that the intention of the legislature is very clearly stated under the [Land Act](#), we are also convinced that looking at the expertise of the agencies under the [Energy Act](#) vis-à-vis the Land Acquisition Tribunal would lead to the conclusion that the latter is the right forum to adjudicate the instant case.

17. Furthermore, if one were to look at the two statutes, it is the [Land Act](#) that provides for jurisdiction in regard to disputes relating to creating of wayleaves in a precise manner. The reference to relevant written law finds precise mention in the [Land Act](#) rather than the [Energy Act](#). Indeed, the authority relied upon by the Respondent, *Speaker of the National Assembly v. Karume* [1992] eKLR, supports a conclusion that the right forum for matters arising from creation of wayleaves is the Land Acquisition Tribunal. In the *Karume* case, the Court of Appeal stated as follows:

Where there is a clear procedure for the redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed.

18. The question the Respondent does not address in its Preliminary Objection is what the use of the very precise language in the [Land Act](#) is vis-à-vis the general jurisdiction the Respondent reads into the [Energy Act](#). Why did the legislature explicitly confer upon the Land Acquisition Tribunal jurisdiction in regard to wayleaves when the [Energy Act](#) was in place?
16. We also appreciate the 1st Respondent's arguments that following the determination of the Court of Appeal in *Abidha Nicholus* then we should find that we lack jurisdiction. With respect, this argument portrays a superficial interpretation of this authority which has gained due prominence. Whereas the Court of Appeal has authoritatively pronounced itself on the doctrine of exhaustion, what is before us and the challenge to our jurisdiction is premised on the argument that there are two competing forums and one should give way to the other. In *Abidha Nicholus* the Court of Appeal was not faced with the question of two seemingly concurrent primary jurisdictions as in this case. As we held in *Mathew*, we believe that the Court of Appeal did not have the benefit of interrogating the provisions of Section 133C as they were not in issue. A finding that EPRA had jurisdiction in regard to wayleaves in *Abidha Nicholus* does not oust the jurisdiction of this tribunal which is also a creature of statute.
17. There is a possibility that this tribunal's jurisdiction overlaps with that of EPRA when it comes to disputes arising out of the creation of wayleaves. This can be attributed to a legislative drafting error. It is a plausible possibility seeing that both the [Energy Act](#) and the amendments to the [Land Act](#) that introduced the Land Acquisition Tribunal were done in the same year. However, we also note that the regulations that provide for dispute resolution under the [Energy Act](#) were enacted in the year 2012 and transitioned into the [Energy Act](#) 2019. The same ought to be amended to be in conformity with statutory provisions under the [Land Act](#). Be that as it may, we are still of the firm view that the right forum for such disputes is the tribunal. As we stated in *Mathew*:
21. Even if, arguendo, we were to be convinced that there exists an overlap between the Land Acquisition Tribunal and EPRA, as institutions of first instance, the two are differentiated by their mandate. While EPRA is a regulatory agency, the Tribunal is an adjudicatory body. We hasten to add that the Tribunal's first instance determinations are only appealable to the Environment and Land Court rather than the Energy Tribunal as would be the case for decisions of EPRA. So even if the two, EPRA and the Tribunal, were to be seen as



having analogous and overlapping jurisdiction, they do not have access to the same tools. Of interest would be Section 133C (8) of the Land Act which empowers the Tribunal to hear and determine a complaint before it arising under Article 23(2) and 47(3) of the Constitution using the framework of the Fair Administrative Action Act. In our view, this tool, which is not available to EPRA makes the Tribunal the forum conveniens in resolution of disputes that touch on and affect rights to land.

22. Furthermore, we are unconvinced that subsidiary legislation, which the Respondent relies on, can oust jurisdiction established by statute. In this case the provisions of Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations 2012 cannot oust the provisions of Section 133C (6) of the Land Act, 2012. Therefore, bestowment of jurisdiction on a regulatory body by subsidiary legislation cannot oust the jurisdiction of a Tribunal which is vested in an Act of Parliament. This matter is settled by reference to the hierarchy of laws whose net effect is that the provisions of a subsidiary legislation cannot supersede statute. See, *Margaret Wangui Gachara V Bank of India Limited* [2008] eKLR where the High Court held thus:

A valuation of the property before sale is a requirement contained in the subsidiary legislation and not in substantive law under the Auctioneers Act. Following the principles of interpretation, a substantive law takes precedence over subsidiary legislation. It is my view that rule 15(e) of the Auctioneers Rules cannot oust the provisions of section 74 of Registered Land Act, to require that a valuation of within 12 months of the date of sale is a prerequisite to the crystallization of a Chargee's statutory power of sale.

18. We take judicial notice that there have been a number of challenges to our jurisdiction on the basis of the provisions of the Energy Act and the regulations thereunder. We also take judicial notice that some of these challenges are currently before the Environment and Land Court, on appeal. Indeed, it will be of great benefit to the litigants as well as this tribunal if the question of our jurisdiction vis-à-vis that of the Energy and Petroleum Regulatory Authority on disputes arising out of the creation of wayleaves can be settled by a superior court with finality. For now, we find no new grounds that would necessitate departing from our previous pronouncement in *Mathew* that these preliminary objections are unmerited.
19. For the above reasons, we hereby dismiss the 1st Respondent's preliminary objections. Costs shall be in the cause.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH NOVEMBER, 2024

****Dr. Nabil M. Orina - Chairperson**

George Supeyo - Member

In the presence of:

Mr. Kimani for the Claimant

Mr. Opar for the 1st Respondent

Ms. Makana for the 2nd Respondent

CA: Everlyne K.

