



**Mutiso v Kenya Power & Lighting Company Limited (Tribunal Case
E031 of 2024) [2024] KELAT 1547 (KLR) (11 November 2024) (Judgment)**

Neutral citation: [2024] KELAT 1547 (KLR)

**REPUBLIC OF KENYA
IN THE LAND ACQUISITION TRIBUNAL
TRIBUNAL CASE E031 OF 2024
NM ORINA, CHAIR & G SUPEYO, MEMBER
NOVEMBER 11, 2024**

BETWEEN

NICHOLAS MUTHINI MUTISO CLAIMANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

JUDGMENT

1. Vide Statement of Claim dated 30th June 2024, the Claimant herein avers that he is the beneficiary proprietor of property known as L.R. No. 2574 – Kivaa Market in Kivaa Adjudication Section (hereinafter, the suit property).
2. It is the Claimant's case that sometime in the year 2012, the Respondent erected an electricity pole on his property in such a manner that he was not able to adequately appropriate his property.
3. The Claimant further alleges that in the year 2020 when he wanted to undertake construction on the suit property, he wrote to the Respondent requesting for the electricity pole to be rerouted but he received no response.
4. Subsequently, in the year 2024, the Claimant asserts that he commenced construction and issued a demand to the Respondent following which a representative of the Respondent visited the suit property but failed to reroute the electricity pole. It has, however, been admitted by both parties that the electricity pole has since been rerouted.
5. The Claimant's grievance is that he was neither consulted nor compensated for the creation of a wayleave on the suit property.
6. The Claimant, therefore, prays for the following orders:
 - a. A declaration that creation of the wayleave on the property known as L.R. 2574 Kivaa Market in Kivaa Adjudication Section was unlawful;



- b. An order compelling the Respondent to pay compensation to the Claimant for the unlawful creation of the wayleave;
 - c. A mandatory injunction compelling the Respondent to reroute the electricity pole on the Claimant's property known as L.R. 2574 Kivaa Market in Kivaa Adjudication Section in such a way that it does not limit the exercise of his proprietary rights;
 - d. Costs of the suit plus interest until payment in full;
 - e. Any other relief that the honourable tribunal deems fit.
7. In response, the Respondent contests the Claimant's claim to ownership of the suit property. The Respondent avers that the suit property is not registered and hence the Claimant does not hold a valid title to the same.
 8. In response to the allegation of illegal creation of a wayleave on the suit property, the Respondent avers that contrary to the Claimant's assertion in regard to erection of the electricity pole in the year 2012, the same was erected and power successfully connected to the Claimant's premises as at 15th November 2011.
 9. Further, the Respondent avers that the said electricity pole was installed at the request of the Claimant for electricity connection which was an implied consent that the electricity infrastructure will be laid onto his property to allow his connection.
 10. The Respondent asserts that the said electricity pole has been on the suit property since November 2011 and the Claimant has never raised any complaint or objection until 9th July 2024 when he applied for rerouting.
 11. The Respondent, therefore, avers that the Claimant is guilty of laches having not raised a complaint for creation of wayleaves and/or compulsory acquisition of land since the electricity pole was erected in 2011.
 12. Nevertheless, the Respondent refutes the Claimant's Claim and states that the same is precluded by estoppel as the Claimant had conscientiously applied for rerouting of the electricity pole and paid the sum of Kshs. 53,303/= to cater for the process.
 13. The Respondent also contests the jurisdiction of the tribunal to adjudicate over the Claim and urges that the same is dismissed with costs.

Analysis and Determination

14. When this matter came up for hearing on 26th August 2024, parties mutually agreed to have the same disposed of by way of documentary evidence and submissions. All parties have filed submissions identifying issues that the Tribunal should pronounce itself on. We have narrowed down on the following cross-cutting issues for our determination.
 - a. Jurisdiction;
 - b. Whether the suit is time barred;
 - c. Whether the suit is precluded by the doctrine of estoppel;
 - d. Whether the Respondent unlawfully created a wayleave on the suit property;
 - e. Whether the Claimant is entitled to the reliefs sought; and



- f. Costs.
15. Whenever jurisdiction is challenged or a court of law, on its own motion, considers it necessary to determine if it has jurisdiction, it is trite law that the same must as of necessity be addressed first before any other issues. In this case, the Respondent has challenged the tribunal's jurisdiction on two fronts. First, the Respondent argues that the tribunal lacks subject matter jurisdiction to handle disputes emanating from creation of wayleaves under the Energy Act. Second, the Respondent challenges the tribunal's jurisdiction to handle this matter, in any case, on the grounds that the same is time barred. We shall address these two limbs of jurisdiction before we address the other issues, if we will be satisfied that we have jurisdiction.
 16. In support of the first limb of jurisdiction, the Respondent argues that the tribunal's jurisdiction only extends to, "where a compulsory acquisition process has been initiated as per statute; or an application for creation of a right of way has been made or a matter relating to compulsory acquisition of land, public rights of way or wayleave provided under the Land Act..."
 17. It is the Respondent's argument that the Energy and Petroleum Tribunal retains the original jurisdiction to handle disputes between a licensee and a third party. To buttress this argument, the Respondent refers to Section 3(1) of the Energy Act which states as follows:

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; (emphasis added)
 - 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.
 18. The Respondent argues that since "distribution supply and use of electrical energy" falls under the definition of works under Section 2 of the Energy Act, dispute resolution for creation of wayleaves falls under the institutions established under the Energy Act, to wit – the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal.
 19. The Respondent, therefore, seeks to make a distinction between creation of wayleaves under the Land Act and under the Energy Act. According to the respondent, the instant case does not fall within the jurisdiction of the Land Acquisition Tribunal as it is a dispute arising from a matter regulated under the Energy Act and, secondly, that no compulsory acquisition process had been initiated either under the Energy Act or the Land Act.
 20. With respect, this is a misapprehension of the provisions of the Energy Act vis-à-vis the Land Act. Our reading of the two legislations makes it clear to us that there was clear intention on the part of the Legislature in bestowing jurisdiction on the Land Acquisition Tribunal on disputes arising out of the creation of a public right of way and wayleaves, in addition to compulsory acquisition of land.
 21. Whereas the Energy Act bestows primacy upon institutions created thereunder in regard to the regulation of the specific functions that are relevant to the energy sector, there is no express reference to the institutions under the Energy Act when it comes to dispute resolution arising out of creation of wayleaves. An important provision that the Respondent did not refer to is Section 175 of the Energy Act which is specific to conflicts touching on wayleaves. It 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.
22. We have had occasion to address this matter at length in the case of *Mathew v Kenya Electricity Transmission Company Limited (KETRACO)* [2024] KELAT 516 (KLR) where we held as follows:
16. This Section refers to “the relevant law” and makes no specific reference to any body established under the Act. 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 and we explain our reasons below.
17. 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.
18. Further, in regard to Section 3 (1), above, there is no conflict that would necessitate the triggering of the exclusion clause therein as the question as to compensation of wayleaves relates to acquisition of land rather than dealings in energy. To our minds, 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](#). 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?
23. We do not find any reason to depart from the above findings. Additionally, as we held further, provisions of subsidiary legislation cannot oust statutory provisions:
21. 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 quasi-judicial body by subsidiary legislation cannot oust the jurisdiction of a Tribunal which is vested in an Act of Parliament. This matter is settled by the hierarchy of laws whose net effect is that the provisions of a subsidiary legislation cannot supersede statute. In considering this matter, the High Court in *Margaret Wangui Gachara V Bank Of India Limited* [2008] Eklr 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.

22. It is also noteworthy that disputes in relation to creation of wayleaves are not mentioned in the Energy (Complaints and Dispute Resolution) Regulations as would be the case with the Section 133C (6) of the Land Act. In conclusion, therefore, the jurisdiction of EPRA does not supersede that of the Tribunal.
24. We, therefore, find that we are properly seized of this matter. The Respondent's first limb of objection on jurisdiction is dismissed.
25. The next issue for our determination is whether the suit is time barred. Section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya provides as follows:
- An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person.
26. The Respondent submits that the Claimant has brought this claim more than 12 years since the cause of action accrued. In support of this assertion, the Respondent relies on a copy of the Claimant's Design of (installation) Works from the Respondent's system and a copy of InCMS Account Status of the Claimant.
27. In rebuttal, the Claimant has disputed that the installation process was completed in the year 2011. Further, the Claimant has impugned the documents relied upon by the Respondent for violating the provisions of Section 106B of the Evidence Act which requires that electronic evidence must be accompanied by a certificate of production.
28. We are unable to sustain this objection as the Respondent has not discharged the evidentiary burden. The Respondent has urged us to find that the installation of the electricity pole was done in the year 2011 on the suit property and hence the suit is time barred. The Respondent has, however, failed to adduce cogent evidence to prove that fact. The documents relied upon by the Respondents fall in the category of electronic evidence as they are computer generated documents that require accompaniment of a certificate in the terms of Section 106B (4) of the Evidence Act. We find that such evidence is inadmissible for violating this mandatory provision.
29. The net effect of finding the documents relied upon by the Respondent to be inadmissible is that the Respondent has not discharged the burden under Section 107 of the Evidence Act which bestows the burden to prove existence of any fact on the person seeking to prove that fact. This position has been reiterated by the Court of Appeal in the case of Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi [2013] eKLR.
30. In any case, we are also not convinced that the suit could be statute barred even if the Respondent's evidence were to be found to be admissible. The nature of the claim is such that the infringement complained of is continuing which would refute any objection on the basis of limitation of actions. The Claimant is entitled to pursue a claim of trespass which was ongoing until the electricity pole was rerouted. This position was affirmed in the case of Samwel Motari Nyambati v Kenya Power and Lighting Company [2018] KEELC 4661 (KLR).¹

¹ Para. 17.



31. The next issue for determination is whether the case is impeded by the doctrine of estoppel. The Respondent has urged us to find that the suit is unsustainable, in any case, as it seeks to enforce rights which the Claimant has expressly or impliedly waived. The Respondent argues that the Claimant applied for rerouting of the electricity pole on 9th July 2024 and paid the sum of Kshs. 53,303/= for the same. The parties are in agreement that the said pole has since been rerouted.
32. The question, therefore, before us is whether the Claimant can sustain a claim for compensation for the alleged unlawful creation of a wayleave having applied for the same to be rerouted. We note that at the time the suit was filed, the said pole had not been rerouted but one of the prayers in the Claim was for an order to compel the Respondent to reroute the pole in addition to compensation for the alleged unlawful wayleave.
33. It is also the Respondent's argument that the Claimant is barred by the doctrine of estoppel as he acquiesced of the Respondent erecting an electricity pole on his land. This argument is made without further elaboration. It should also be noted that the Respondent has not provided any evidence of the Claimant's consent to the erection of the electricity pole on the suit property.
34. On the question whether the rerouting of the said pole precludes the Claimant from instituting a suit against the Respondent, we make a finding that the same does not preclude a Claimant from seeking compensation for the wayleave. Infact, the Respondent is under a duty to ensure that in creation of wayleaves due care is given to the land use to ensure optimal use of the land and minimal disruption to the owner of the land. This position has been reiterated in the case of *Samwel Motari Nyambati v Kenya Power and Lighting Company* [2018] KEELC 4661 (KLR) where the court observed as follows:
- The defendant had a duty and obligation to lay and erect the power line in such a way and manner that the plaintiff's use of his land was least compromised and/or affected. The defendant did not do that and chose the easier option of running the power line through the middle of the plaintiff's land. The plaintiff may then have been using the land for subsistence farming but he could also have chosen and/or his children may have opted to put up buildings on the portion along where the power line runs. There is increasing pressure on land availability and every usable portion is treasured.²
35. The evidence in this case suggests that the Respondent erected a pole on the suit property for a high voltage line that impeded the Claimant's ability to utilise his parcel of land optimally. In this case, the Claimant wanted to construct commercial dwellings on the suit property. This necessitated the Claimant to apply for a rerouting which was later undertaken at the Claimant's cost.
36. The next issue for resolution is whether the Respondent unlawfully created a wayleave on the suit property. First, before we address this issue, the Respondent has challenged the Claimant's standing on the basis of lack of ownership documentation of the suit property.
37. It is undisputed that the Claimant does not hold a certificate of title to the suit property. It is however expressly and implicitly admitted through the actions of the Respondent that the Claimant is the owner of the suit property in two ways. First, the Respondent has argued that the Claimant applied and was connected with electricity on the suit property, and, second, the Respondent has acknowledged that the Claimant applied and paid for a rerouting of the said electricity pole from the suit property. We find that these admissions are an acquiescence of the Claimant's ownership of the property on the part of the Respondent. Nevertheless, we note that since this is a claim for compensation for creation of a wayleave, we must be satisfied that the Claimant is the owner of the suit property.

² Para. 22



38. Whether unregistered or not, land attracts the same protection under Article 40(3) of the Constitution. As we have stated in the case of Gunda (Suing as a legal representative of the Estate of Banzi Gunda Banzi (Deceased) v Kenya Railways Corporation & another [2024] KELAT 677 (KLR):

Even though unregistered land is different from registered land in terms of proof of ownership, either attracts the same protection of the law and especially Article 40(3) of the Constitution. As held in the case of Danson Kimani Gacina & another v Embakasi Ranching Company Ltd [2014] eKLR:

The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law.³

39. We are, therefore, satisfied that the letter presented in evidence by the Claimant from Kivaa Adjudication Section Office together with uncontroverted evidence of continued occupation and dealings on the suit property by the Claimant is sufficient evidence of ownership.
40. Turning to the question whether the Respondent unlawfully created a wayleave on the Claimant's land, we note that Section 46 of the Energy Act Cap 314 (2006) (now repealed) required the Respondent to seek permission from the Claimant before laying an electric supply line on the suit property. Further, Section 47 of the said Act provided that an owner may assent in writing to the construction of the electric supply upon payment of compensation. The bottom-line is that the owner of the land is entitled to compensation. The same can be done through a wayleave agreement between the owner and the Respondent. The Respondent has not provided any material before us to show that such an agreement was reached between the parties or any compensation was paid to the Claimant. It is therefore our finding that the impugned wayleave was unlawfully created.
41. Having made a determination that the impugned wayleave was unlawfully created, we are now left with the question of what reliefs are appropriate in the circumstances. We take note that the wayleave has since been rerouted but it is not clear to us how the rerouting affects the suit property. We also note that the Claimant has not specifically pleaded any special damages that may have been suffered prior to the rerouting of the electric pole save for the costs of the rerouting which would be in the alternative since the prayer for the rerouting of the electric line has been overtaken by events. The only remedy remaining in the prayers in the claim for compensation.
42. Neither party has availed to the tribunal an assessment of the value of land affected by the wayleave (as rerouted). In that case, the proper approach would be to allow the parties to agree by consent but if they fail to agree then each shall appoint a valuer to conduct a joint valuation upon which compensation will be paid to the Claimant.
43. The upshot of the above analysis is that the Claimant's case succeeds and is allowed as follows:
- A declaration be and is hereby issued that the Respondent unlawfully created a wayleave on the property known as L.R. 2574 Kivaa Market in Kivaa Adjudication Section;
 - An order is hereby issued compelling the Respondent to negotiate with the Claimant for purposes of compensating the Claimant for the said wayleave;

³ Para. 29



- c. If the parties fail to reach a settlement within 60 days of this Judgement, they shall each nominate a valuer to conduct a joint valuation within 30 days thereafter. A failure by one party to nominate a valuer within these timelines shall entitle the other party to conduct the valuation upon issuance of a 7 days notice to the defaulting party;
- d. That the Respondent shall pay the determined amount in (b) or (c) above within 21 days upon the said agreement or valuation, as the case may be;
- e. That the Respondent shall reimburse the Claimant the sum of Kshs. 53,303.00 being the costs of the rerouting within 21 days of this judgement;
- f. That the Respondent shall bear the costs of this suit.
- g. Interest shall accrue on (e) and (f) above, at court rates, from the date of this judgement until payment in full.

44. Orders accordingly.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH NOVEMBER, 2024

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Dr. Nabil M. Orina George Supeyo

Chairperson Member

Before:

Ms. Nyagah for the Claimant

Mr. Maanzo for the Respondent

Everlyne K – Court Assistant

