



**Njue v Kenya Electricity Transmission Company Limited (Tribunal
Case 2 of 2022) [2023] KEET 55 (KLR) (Civ) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEET 55 (KLR)

**REPUBLIC OF KENYA
IN THE ENERGY & PETROLEUM TRIBUNAL
CIVIL
TRIBUNAL CASE 2 OF 2022**

**KIOKO KILUKUMI, CHAIR, D.K MWIRIGI, VICE CHAIR, B.H
WASIOYA, F. M KAVITA, D JEMATOR & F.S IBRAHIM, MEMBERS**

MARCH 1, 2023

BETWEEN

JANE WAWIRA NJUE CLAIMANT

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY
LIMITED RESPONDENT**

RULING

A. Procedural History

1. Jane Wawira Njue (“the petitioner”) petitioned the Environment and Land Court (ELC) at Thika on September 7, 2021, alleging violation of various articles of the Constitution of Kenya, 2010 (Constitution); specified articles of the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1976; particularized sections of the Land Act No 6 of 2012 and the Energy Act No 1 of 2019; several sections of the Fair Administrative Action Act and the Access to Information Act, No 31 of 2016.
2. On February 18, 2022, Kenya Electricity Transmission Company Limited (hereinafter “the respondent”) filed a replying affidavit, as a response to the petition.
3. Parties thereafter filed written submissions. The petitioner filed her submissions on March 22, 2022, whilst the respondent filed her submissions on June 9, 2022.
4. It was agreed before the ELC that the dispute will be disposed of through written submissions. Significantly, in the written submissions, both the petitioner and the respondent took issue with the jurisdiction of the ELC.



5. It was the respondent's submission that "...owing to the alleged breach of the provisions of the [Energy Act](#),...the appropriate forum to adjudicate a dispute pertaining to the provisions of the [Energy Act](#) would be the Energy and Petroleum Tribunal "
6. The judgement was initially to be rendered on October 18, 2022, which was subsequently rescheduled to the October 31, 2022.
7. The ELC found that "the court was not the proper adjudicatory body to hear and determine the dispute in" the petition and remitted the dispute to this tribunal. It was formally filed on December 21, 2022.
8. The parties appeared before the tribunal on January 11, 2023. It was agreed by the parties that the pleadings filed in the ELC will be deemed to have been filed under the rules and procedures governing the tribunal. It was agreed that judgement will be rendered by the tribunal on the basis of all pleadings and submissions filed before the ELC. The matter was mentioned on January 18, 2023, when the tribunal directed that it's decision will be rendered on March 1, 2023.

B. The Dispute

9. It is not contested that the petitioner, Jane Wawira Njue is the registered proprietor of all that property known as Thika Municipality Block 17/1855 measuring approximately 0.00288 ha ("the property") situated within Thika Municipality under a freehold title acquired on January 14, 2009.
10. Similarly, there is no contestation that the respondent's core mandate is to develop new and high voltage electricity transmission infrastructure to form the backbone of the National Transmission Grid and to plan, design, build and maintain electricity transmission lines and associated substations. In that pursuit, the respondent erected electricity transmission infrastructure on the petitioner's property.
11. In a letter dated December 1, 2020, the respondent stated that "construction work on the 132kV Kilimambogo – Thika transmission line started in 2011 and was completed in 2013. The wayleave corridor is 40m wide and our records indicate that the subject property is wholly within the above corridor"
12. The respondent in her written submissions, stated that "...the instant dispute primarily revolves around compensation for a wayleave. The respondent does not dispute entry on the suit parcel of land in the year 2010 pursuant to its mandate of developing new and high voltage electricity transmission infrastructure to form the National Transmission Grid."
13. Then the dispute between the parties narrows down to whether in carrying out the construction work, the respondent complied with the applicable constitutional, statutory and regulatory requirements in accessing and erecting electricity transmission infrastructure upon the petitioner's land
14. Stripped off legalese, the primary dispute between the parties is that the respondent without the authority or consent of the petitioner, erected electricity transmission infrastructure on the petitioner's property, illegally and unlawfully without complying with the law governing acquisition of wayleaves. The dispute is essentially a wayleave dispute.
15. The wayleave dispute has given rise to other grievances of constitutional and statutory non- compliance leading the petitioner to make numerous allegations on the violation of her fundamental rights and freedoms under the bill of rights.



16. As an auxiliary issue, when the petitioner became aware of the trespass and interference with her proprietary rights, she sought information from what she considered relevant state agencies and the information was not forthcoming. That in our view is the gravamen of the dispute between the parties.
17. In remitting the petition to the tribunal, the ELC judge aptly remarked that: -

“24. ...This court is therefore in agreement with counsel for the respondent that this being a dispute about compensation in relation to electricity transmission lines laid over the petitioner’s land, the primary adjudicatory body to hear and determine the dispute is the tribunal established by parliament under section 25 of the Energy Act. Clothing this dispute as a constitutional petition does not in any way divest that jurisdiction from the tribunal”
18. We will therefore focus on the real dispute between the parties, which has been camouflaged with multiple allegations of violation of the Constitution, hence the filing of a constitutional petition.

C. The Petitioner’s case

19. The petitioner avers that in 2014 while carrying out a routine inspection of the property, she found electricity transmission lines over the property. She then proceeded to the Kenya Power and Lighting Company (“KPLC”), Thika branch to enquire about the lines on her property. She further avers that at the KPLC office she was told to write a formal letter giving her contact details and that the right person would get in touch with her. She was however never contacted, despite going back to the KPLC office several times seeking to follow up.
20. On the September 17, 2020 she managed to hire an advocate, who wrote to the respondent seeking to inquire on their presence on the petitioner’s land. The letter did not elicit any response from the respondent. This prompted them to again write another letter dated October 2, 2020 to the respondent requesting to be furnished with information relating to “the acquisition of the suit property”. This letter was copied to the Commission on Administrative Justice (hereinafter “the CAJ”). No response was forthcoming from the respondent on this letter.
21. The CAJ thereafter wrote to the respondent requesting their compliance with the requests made by the counsel for the petitioner in their letter dated October 2, 2020. This was met with no response from the respondent prompting the CAJ to issue an order requiring the respondent to comply with the request for information within 7 days, failing which the petitioner would be at liberty to seek redress from the court.
22. Following this letter, the respondent through a letter dated December 1, 2020 responded to the petitioner and instructed her to pick her offer letter and compensation for use of her land from KPLC’s Electricity House offices in Nairobi.
23. It was this that led the petitioner to seek for the amicable resolution of the dispute through a letter dated January 18, 2021.
24. The petitioner contends that the respondent through its varied actions and omissions has violated her quiet possession rights with regard to the property and prays for judgement against the respondent.

The petitioner seeks relief, jointly and severally for:

 - a. A declaration that the suit property Thika Municipality Block 17/1855 is the petitioner’s property and is entitled to equal protection in law.



- b. A declaration that the respondent's actions of entering and laying electricity transmission lines on Thika Municipality Block 17/1855 without notice and prompt payment to the petitioner is illegal trespass, arbitral and unconstitutional.
 - c. A declaration that the respondent's actions of entering and laying electricity transmission lines on Thika Municipality Block 17/1855 is a violation of articles 27, 35, 40, 47, 48 and 50 of the [Constitution](#) of Kenya and therefore null and void
 - d. A declaration that the respondent's actions of entering and laying electricity transmission lines on Thika Municipality Block 17/1855 is a violation of articles 2, 3(1), 10, 19, 20, 22, 23, 24, 27, 35, 40, 47, 48, 50, 60, 64(a), 258 and 259 and 50 of the [Constitution](#) of Kenya and is therefore null and void.
 - e. A declaration that the respondent has violated sections 143, 144, 147 and 148 of the [Land Act](#), sections 2, 3(c), 4, 6 and 7 of the [Fair Administrative Act](#), section 4, 5, 8, 9, 11, 14, 20, 21 and 23 of the [Access to Information Act](#) and section 170, 171, 172, 173, 174, 175, 177, 184 and 186 of the [Energy Act](#).
 - f. An order of mandamus be and is hereby issued compelling the respondent to comply with the law and make the due compensation on the suit property based on the petitioner's valuation report.
 - g. An order of *mandamus* be and is hereby issued compelling the respondent to execute a wayleave agreement with the petitioner within 45 days from the date of judgement or in the alternative and without prejudice an order of permanent injunction to issue compelling the respondent to remove the electricity transmission lines from the suit property.
 - h. General damages for trespass and continued trespass
 - i. General damages for constitutional violation
 - j. General damages for psychological and mental suffering for over 10 years
 - k. Punitive damages for arbitrarily depriving the petitioner right to her property for over 10 years.
 - l. Special damages at Kshs 501,430/-
 - m. Diminution value @ 15% of value of property
 - n. 100% compensation for the wayleave pursuant to article 40(3)(b)(i) of the [Constitution](#) based on petitioner's valuation report
 - o. Cost of the petition
 - p. Such other orders or reliefs to issue pursuant to article 23(3) of [the Constitution](#) of Kenya.
25. The petitioner relies on [Mwangi Wa Iria & 3 others](#) [2015] eKLR, [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) (2013) eKLR, [James Waringa Mwangi v Kenya Medical Research Institute](#) [2020] eKLR, [Peter Mwangi Kabue v Rural Electrification Authority](#) [2018] eKLR, among others, in support of her case.

D. The Respondent's Case

26. The respondent, denies the claims by the petitioner through a replying affidavit sworn on February 16, 2022 by Johnson Muthoka, the respondent's senior manager-way leaves acquisition. He deposes that



the claim herein has been instituted in bad faith, is ill advised, misconceived, misplaced, scandalous, frivolous, vexatious and a gross abuse of the court process.

27. The respondent is charged, with among other responsibilities, the responsibility of improving the quality and reliability of electricity supply throughout the country; transmission of electricity to areas that are currently not connected to the national grid; evacuation of power from planned generation plants; providing a link with neighbouring countries in order to facilitate power exchange; and development of electricity trade in the region.
28. The respondent contends that the Land Act (Act No 6 of 2012) as relied on by the petitioner had not come into force at the time of creation of the wayleave and as such application of its provisions would amount to retrospective application of the law contrary to the provisions of article 50 of the Constitution.
29. The respondent further contends that there was no trespass on its part as entry into the subject land was governed by the Wayleaves Act (cap 292) of the Laws of Kenya (repealed) . It is the respondent's position that it complied with the repealed Wayleaves Act and all constitutional and statutory requirements in accessing the petitioner's property.
30. The respondent states that there was an unexplained inaction by the petitioner for six years between 2014 when she alleges, she became aware of the existence of the electricity transmission lines and September 15, 2020 when her advocates first wrote to Thika Power Limited. It draws the inference that the petitioner deliberately went missing in action for a period of nine years since installation of the transmission lines in 2011 in a bid to unjustly enrich herself.
31. The respondent filed written submissions dated June 6, 2022 which she places reliance on.

E. Issues For Determination

32. The tribunal has considered the pleadings and evidence on record as well as the submissions made. The tribunal identifies the main issues for determination to be:
 - a. Whether this tribunal has jurisdiction to entertain the petitioner's claim.
 - b. Can the tribunal entertain the petitioner's claim in the first instance?
 - c. Whether the petitioner's fundamental rights and freedoms specified in the petition were violated.
 - d. Whether the respondent violated the petitioner's rights with regard to the subject property and was a wayleave legally created over the property.
 - e. Whether the respondent's actions amount to trespass
 - f. Whether the respondent allowed for adequate access to information by the petitioner.
 - g. Whether the petitioner is entitled to prayers sought.
 - h. Which party should bear the costs?



a. Whether this Tribunal has jurisdiction to entertain the Petitioner's claim

33. The petitioner took the view that this tribunal does not have jurisdiction to adjudicate on violation of her fundamental rights and freedoms under the Constitution. In her written submissions, it was argued and rightly so in our view, that “It is our humble submissions that the petitioner
having raised issue of serious violation of her fundamental rights under the Constitution of Kenya, her only recourse is the constitutional court and not the Energy and Petroleum Tribunal which does not have jurisdiction to determine the issues of violation of constitutional rights.”
34. The Supreme Court has settled the source of jurisdiction in the case of In the Matter of Interim Independent Electoral Commission [2011] eKLR, where the court held that jurisdiction is conferred by the Constitution or statutory law. A body cannot clothe itself with jurisdiction through innovation or craft of interpretation.
35. Tribunals established by Acts of Parliament pursuant to article 169(1)(d) of the Constitution are conferred jurisdiction, functions and powers by legislation enacted by Parliament.
36. This tribunal is established under section 25 of the Energy Act, 2019 and its jurisdiction is provided for under section 36 of the Energy Act, 2019.
37. Section 36 of the Energy Act provides that;
36. Jurisdiction of the tribunal
1. The tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
 2. The jurisdiction of the tribunal shall not include the trial of any criminal offence.
 3. The tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
 4. The tribunal shall have appellate jurisdiction over the decisions of the authority and any licensing authority and in exercise of its functions may refer any matter back to the authority or any licensing authority for re-consideration.
 5. The tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
 6. The tribunal shall hear and determine matters referred to it expeditiously.
- The Petroleum Act, likewise provides for jurisdiction at section 117
117. Dispute resolution
1. All disputes between parties to a petroleum agreement arising from upstream petroleum operations shall be resolved through alternative dispute resolution mechanisms in the first instance as may be provided for in by the petroleum agreement.
 2. Any other disputes arising from an upstream regulated function under this Act shall be referred to the authority for determination in the first instance.
 3. Any person who is dissatisfied with the decision of the authority under subsection (2) may appeal to the tribunal.



4. Despite the provisions of sub-sections (1) and (2), the tribunal shall have original civil jurisdiction on any dispute arising out of the bidding rounds carried out under this Act.
 5. The tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees in midstream and downstream petroleum operations.
 6. The tribunal shall have appellate jurisdiction over the decisions of the authority and any licensing authority in midstream and downstream petroleum operations and in exercise of its functions may refer any matter back to the authority or any licensing authority for re-consideration.
38. Our jurisdiction will be properly invoked if the dispute arises from the Energy and Petroleum sector; it is provided for under the [Energy Act](#), the [Petroleum Act](#) or any other written law.
 39. The jurisdiction of this tribunal is therefore confined to the expressly stated areas and does not extend to resolution of article 22 petitions, designed to enforce the bill of rights. Denial, violation or infringement of fundamental rights and freedoms, whether real or threatened are litigated in the first instance, before the High Court or courts of equal status. See the case of [Okiya Omtatah Okiiti v Parliamentary Service Commission & another](#) [2021] eKLR.
 40. The Environment and Land Court in the case of [Mwangi & 844 others \(Residents in Bangladesh and Kibarani Informal Settlements\) v Kenya Power & Lighting Company Limited & another](#) (constitutional petition 8 of 2022) [2022] KEELC 15455 (KLR), held that
 33. Though the tribunal has jurisdiction to hear and determine all matters referred to it relating of the energy and petroleum sector arising from the Act, it is not conferred with jurisdiction to enforce rights and freedoms if they are threatened/infringed. The petitioners claim against the respondents is that of threats to violate their human rights, articles 22, 23 and 162 (2)(b) of the Constitution confers this court with jurisdiction to hear and determine petitions for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment, the use, the occupation of, and title to land.
 41. Decisions of the High Court and courts of equal status are binding on this tribunal. Accordingly, we do not have jurisdiction to entertain the petitioner's alleged violations of her fundamental rights and freedoms under the bill of rights nor can we grant any of the reliefs related thereto.
 42. However, it is the finding of this tribunal that we have the jurisdiction to determine the wayleaves dispute, after the parties have exhausted the internal disputes resolution mechanism provided for by the Energy (Complaints and Disputes Resolution) Regulations 2012.

b. Can the Tribunal entertain the Petitioner's claim in the first instance?

43. Whilst the tribunal has jurisdiction to adjudicate on the wayleaves claim, it can only do so after the Energy and Petroleum Regulatory Authority (EPRA) has dealt with it in the first instance.
44. The Energy (Complaints and Disputes Resolution) Regulations, 2012 provide for the resolution of amongst other disputes, disputes relating to wayleaves. The regulations make it crystal clear that such disputes be referred to EPRA for hearing and determination in the first instance.



45. The Court of Appeal in the case of *Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties)* [2023], a case with striking similarities with the case before us, held that: -
37. The dispute resolution mechanism envisaged by the *Energy Act* is three tiered. The first is to raise a complaint with the Energy and Petroleum Regulatory Authority (EPRA), the successor of the Energy Regulatory Commission (ERC). The *Energy Act*, 2019 repealed the *Energy Act* No 12 of 2006 but notwithstanding the repeal are the transitional provisions of section 224(2) (e) which reads;
- Notwithstanding the provisions of sub-section (1)— (a)
- (e) any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act.
37. One of the subsidiary legislations saved by these provisions is the Energy (Complaints and Dispute Resolution) Regulations 2012 which are the regulations still used by EPRA as the successor of ERC. Regulation 4 (a) provides:
4. These regulations shall apply to complaints and disputes in the following areas—
- (a) billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
39. Regulation 7 reads:
- 7.(1) In the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the commission for recourse.
- (2) A party to a dispute may refer the dispute to the commission in form s-2 as set out in the second schedule.
- (3) Where a dispute has been referred to the commission, the commission shall appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.
- (4) Where the dispute-
- a. is resolved through mediation in accordance with paragraph (3), the parties shall file their settlement agreement with the commission within five days, and the agreement shall be final and binding on both parties.
- b. is not resolved through mediation in accordance with paragraph (3), the procedures set out in regulations 8 to 16 shall apply.
40. Given that the complaint by the appellant as against KPLC relates to a way leave for transmission, then the first forum for resolution of that dispute would be before the EPRA. A



party dissatisfied with the decision of the authority can invoke the second tier which is a right of appeal to the Energy and Petroleum Tribunal whose jurisdiction is provided by section 36 of the [Energy Act](#):

36. Jurisdiction of the tribunal

1. The tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
2. The jurisdiction of the tribunal shall not include the trial of any criminal offence.
3. The tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
4. The tribunal shall have appellate jurisdiction over the decisions of the authority and any licensing authority and in exercise of its functions may refer any matter back to the authority or any licensing authority for reconsideration.
5. The tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
6. The tribunal shall hear and determine matters referred to it expeditiously.

41. Only upon exhaustion of the appellate process before the Energy and Petroleum Tribunal can a matter be escalated to the High Court. This is the third tier. In this regard section 37(3) provides;

(3) Any person aggrieved by a decision of the tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.

42. The remedies that the tribunal can grant are wide and include injunctions, penalties, damages and specific performance. We are not told by the appellant that he would not have obtained an efficacious relief had he taken the route envisaged by the [Energy Act](#) and I have no doubt that the ELC was correct in declining jurisdiction in respect to the grievances against KPLC.

46. Needless to state, the Court of Appeal decision is binding on this tribunal. It is the most recent decision delivered on February 3, 2023. Accordingly, we cannot entertain the petitioner's wayleave dispute in the first instance. We are not the first port of call. It must be dealt with by EPRA in the first instance. The tribunal can only exercise an appellate jurisdiction on the wayleave disputes.

F. Disposition

46. In view of the foregoing findings, we cannot address the other issues identified for determination.

46. The order that commends itself for us to make is to refer the wayleave dispute to EPRA to be dealt with in accordance with the governing law and regulations.

46. Each party to bear its costs.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH, 2023.

In the presence of:



..... Mr. Kioko Kilukumi SC Chairperson
..... Ms. Doris Kinya Mwirigi Vice Chairperson
..... Eng. Buge Hatibu Wasioya Member
..... Eng. Fidelis Muli Kavita Member
..... Ms. Dorothy Jemator Member
..... Mr. Feisal Shariff Ibrahim Member
SIGNED BY: KIOKO KILUKUMI

