



Mburu v Kenya Power & Lighting Company Limited (Environment & Land Case 151 of 2013) [2023] KEELC 20976 (KLR) (24 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20976 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 151 OF 2013
NA MATHEKA, J
OCTOBER 24, 2023**

BETWEEN

SAMUEL MBURU PLAINTIFF

AND

THE KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. The application is dated 26th April 2023 and is brought under Section 3A of the [Civil Procedure Act](#) seeking the following orders;

The application be certified urgent and heard ex parte in the first instance.

2. Within seven (7) days or such other period as the court may direct, the plaintiffs advocates on record, Mburu Nyamboye & Company Advocates, do execute the necessary instruction letter and/or consent authorizing NIC Bank Ltd, ABC Place Branch to uplift the principal sum and accrued interest held in the joint account number 1007295088, and to credit the account of Hamilton Harrison and Mathews, the advocates for the defendant, at Hamilton Harrison & Mathews Client A/C, Standard Chartered Bank Kenya Limited, Chiromo Branch, Account No: 0104024116500, Bank code - 02, Branch code - 084, swift Address: SCBLKENXXXX with the proceeds.
3. In default of compliance with order 1 above, within seven (7) days or such other period as the court may direct, the Deputy Registrar of this Court, in place of the firm of Mburu Nyamboye & Company Advocates, do execute the necessary instruction letter and/or consent authorizing NIC Bank Ltd, ABC Place Branch to uplift the principal sum and interest accrued held in the joint account number 1007295088, and to credit the account of Hamilton Harrison and Mathews, the advocates for the defendant, at Hamilton Harrison & Mathews Client A/C, Standard Chartered Bank Kenya Limited, Chiromo Branch, Account No: 0104024116500, Bank Code - 02, Branch Code - 084, Swift Address: SCBLKENXXXX with the proceeds.



4. The costs of this application be provided for,

It is based on the grounds that on 17th July 2019, the defendant deposited the sum of Kshs 300,000 in account number 1007295088 at NIC Bank Ltd, ABC Place Branch in the joint names of Hamilton Harrison & Mathews and Mburu Nyamboye & Company Advocates in compliance with a consent order dated 16th February 2019. The order was made following an application by the defendant for stay of execution pending appeal of this court's judgment which was entered in favor of the plaintiff on 21st September 2021. The appeal was heard and on 14th February 2022, the Court of Appeal allowed the appeal and set aside the judgment dated 21st September 2021. Each party was directed to bear its own costs. The defendant wishes to uplift the sum held in the joint account but the plaintiffs advocate has refused to execute the joint letter of authority to the bank to facilitate the uplifting of the funds. It is only fair and in the interest of justice that the monies deposited in the joint account be released to the appellant,

5. The Plaintiff stated that the said application is incurably defective, a non-starter, vexatious, scandalous, and malicious and an abuse of the court process. That the said application is prematurely before this court as the disputes between parties herein is still active. That the defendants misinterpreted the court of appeal's judgement to mean that the power line in question was not related on the suite property herein when the reality is the contrary. That the court of appeal had held that the proceedings before the said court be remitted back to this court to order the District Land Registrar Kwale to inspect the property for the purposes of establishing whether the appellant's power line and power poles are erected within the boundaries of the suite properties in which the said registrar has since conducted inspection and the report has been filed before this court to that effect. That the said report holds that the power line in questions has been erected on the suit property. That the defendant has waited for about four years, it can be patient for another period of one month or so depending on when this honorable court is going to deliver its final verdict on this suit.
6. That the court vide it orders issued on 2nd May 2023 did find that there is no urgency in the defendant's application herein and in view of the a foregoing there is no prejudice that would be occasioned to the defendants in the event that the same is dismissed as the funds the defendant intends to access is safely intact in the joint account and it is for the interest of justice for the court to order that the status quo be maintained, the issues pending determination before this court be expeditiously dealt with for the court to make its final determination. That the report as filed before this court has not been appealed against, it is therefore conclusive evidence before this court should adopt the same as its final decision.
7. This court has considered the application and submissions therein. I have perused the court record and find that the appeal was heard and on 14th February 2022, the Court of Appeal allowed the appeal and set aside the judgment dated 21st September 2021. Each party was directed to bear its own costs. The defendant wishes to uplift the sum held in the joint account but the plaintiffs advocate has refused to execute the joint letter of authority to the bank to facilitate the uplifting of the funds.
8. In the said appeal, that is, The Kenya Power & Lighting Company Limited vs Mburu (Civil Appeal 130 of 2019) (2022) KECA 512 (KLR) (6 May 2022), the court held that;

We are satisfied, therefore, that the learned Judge misdirected herself. Rule 31 of the Court of Appeal Rules empowers this Court to remit the proceedings to the lower court with such directions as may be appropriate and to make any necessary incidental or consequential orders. Pursuant thereto, we remit the proceedings back to the ELC and direct that court to order the District Land Register, Kwale to inspect the property within a time period



to be determined by the ELC for purpose of establishing whether, as a matter of fact, the appellant's power lines and power poles are erected within the boundaries of the respondent's property and for the Land Registrar to file a report with the ELC court, within a period to be prescribed by that court. Based on such report, and any other evidence it may consider relevant, the ELC shall then determine whether the appellant has trespassed into the respondent's property.

35. To that extent, we allow the appeal and set aside the judgment of the ELC in ELC Case Number 151 of 2013 dated and delivered on 21st September 2018. Each party shall bear its own costs of the appeal.”

9. The Respondent submitted that, the court of appeal had held that the proceedings before the said court be remitted back to this court to order the District Land Registrar Kwale to inspect the property for the purposes of establishing whether the appellant's power line and power poles are erected within the boundaries of the suite properties in which the said registrar has since conducted inspection and the report has been filed before this court to that effect. He annexed a copy of the said report marked as "SMMI". I have perused the said report and find that it indeed indicates that there was trespass onto the Defendant's land by the Plaintiff. I agree that it would be premature to release the said sums of money back to the Plaintiffs. I find this application is premature and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

