



**Kiragu (Suing Through her Attorney Nancy Mwhiki vide Power of Attorney Registration Number NPA 6/43 file 5103) v Kenya Power and Lighting Company (Environment & Land Case E047 of 2022) [2023] KEELC 21966 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21966 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E047 OF 2022  
MD MWANGI, J  
NOVEMBER 30, 2023**

**BETWEEN**

**JACINTA WAIRIMU KIRAGU ..... PLAINTIFF  
SUING THROUGH HER ATTORNEY NANCY MWHIKI VIDE POWER OF  
ATTORNEY REGISTRATION NUMBER NPA 6/43 FILE 5103**

**AND**

**KENYA POWER AND LIGHTING COMPANY ..... DEFENDANT**

*(In regard to the Defendant's application seeking review of the court's ruling on the preliminary objection challenging the jurisdiction of the court)*

**RULING**

**Background**

1. The Defendant herein, Kenya Power and Lighting Company Ltd earlier on had raised a Preliminary Objection against the Plaintiff's suit challenging the jurisdiction of this Court to entertain the suit. The Preliminary Objection was dated 14<sup>th</sup> March, 2022. This Court after considering the said Preliminary Objection rendered its ruling on 27<sup>th</sup> September, 2022. The Court's finding was that the dispute herein is not a dispute between the Defendant and a licensee. It is a dispute on the use and occupation of Land, that is, trespass to land. The Court therefore concluded that the issues raised in the Plaint do not fall under the mandate of either the Energy Regulatory Commission or the Energy Tribunal as submitted by the Defendant.
2. Upon delivery of the said ruling, the Advocate for the Defendant sought leave to appeal against the ruling to the Court of Appeal and a stay of proceedings for 30 days. Both requests were promptly granted on the same date of the ruling.



3. When the matter came up for mention on 14<sup>th</sup> November, 2022, over 45 days after the delivery of the ruling, the Defendant's Advocate sought 60 days to enable her file and serve witness statements and a list and bundle of documents. She was granted the 60 days to comply. There was no more mention of an appeal against the ruling of the court despite leave to appeal having been granted.
4. The Defendant eventually filed its witness statements and a list and bundle of documents on 5<sup>th</sup> May, 2023.
5. Earlier on, on 23<sup>rd</sup> February, 2023, the Defendant's Advocate then, Ms. Walala had informed the Court that the Defendant was ready to proceed with the hearing. That was why, on 22<sup>nd</sup> March, 2023, the Court issued a hearing date for the 4<sup>th</sup> July, 2023 but with a mention date on 8<sup>th</sup> May, 2023 to confirm filing of witness statements and a list and bundle of documents by the Defendant.
6. On the date scheduled for the hearing of the case, on the 4<sup>th</sup> July, 2023, Mr. Ochieng Advocate for the Defendant sought an adjournment on the basis that the Advocate who had been on record for the Defendant earlier on had since left the Company and the file had just been placed on his desk. He therefore needed time to familiarize with the file. He further informed the Court that he intended to amend the Defendant's statement of Defence. The matter was taken out of the day's hearing list and the Defendant granted 14 days to file and serve a formal application to amend the Defendant's statement of Defence.
7. The Defendant however, instead of the application to amend the Defendant's statement of Defence as earlier intimated, filed the application before me, for review of the Court's ruling of 27<sup>th</sup> September, 2022, allegedly in view of a 'recent' ruling from the Court of Appeal on a similar issue.
8. The Defendant's application is dated 17<sup>th</sup> July, 2023. It is brought under the provisions of Order 45 Rule 1 & 2 of the Civil Procedure Rules, amongst the other provisions of the law referred to on its face. The Defendant prays for orders that:
  - (a) Spent
  - (b) This Honourable Court be pleased to review and set aside its ruling dismissing the Defendant's Preliminary Objection dated 14<sup>th</sup> March, 2022 delivered on 27<sup>th</sup> September, 2022.
  - (c) This Honourable Court be pleased to vary its ruling delivered on 27<sup>th</sup> September, 2022 to a ruling allowing the Defendant/Applicant's Preliminary Objection dated 14<sup>th</sup> March, 2022 with costs of the suit to the Defendant/Applicant.
  - (d) The costs of this application be in the cause.
9. The main ground upon which the Defendant's application is based on, is that the Court of Appeal sitting in Kisumu on 3<sup>rd</sup> February, 2023 pronounced itself on the jurisdiction of this court in respect to matters on Wayleaves by the Defendant/Applicant in exercise of its functions as an energy sector entity. The Defendant avers that the Court of Appeal's determination was that the first forum for resolution of a dispute that involves a Wayleave for transmission of electricity by Kenya Power and Lighting and Company would be 'the Energy and Petroleum Regulation Tribunal and a subsequent appeal to the Energy and Petroleum Tribunal.

### **Response by the Plaintiff:**

10. In her response, the Plaintiff termed the Plaintiff's application incompetent, bad in law, mischievous, frivolous, misleading, an afterthought and an abuse of the Court process. The Plaintiff deposed that the application was a mere waste of Court's time, only meant to delay the hearing of the main suit.



11. The Plaintiff asserted that the Defendant ought to have appealed the Court's ruling of 27<sup>th</sup> September, 2022, if it was dissatisfied with it. There was no new or important evidence that could not have been produced at the time the application was heard and the ruling made. There was also no mistake or error apparent on the face of the record to warrant a review of the ruling. The Plaintiff was categorical that no sufficient reason had been demonstrated by the Defendant to warrant a review.
12. In a further affidavit, the Defendant's Advocate deposes that the ruling of the Court of Appeal in Kisumu in CACA No. E042 of 2021 was a new and important matter that was not within his knowledge or could not be produced when the ruling of this Court was passed.

### **Court's direction**

13. The Court's directions were that the application by the Defendant be canvassed by way of written submissions. Both parties complied and the Court has had occasion to read the said submissions. The Defendant's submissions are dated 28<sup>th</sup> September, 2023. The Plaintiff's submissions on the other hand are dated 4<sup>th</sup> October, 2023.
14. I must commend both Advocates, Ms. Zainab Ali for the Plaintiff and Mr. Maanzo Dennis, Advocate for the Defendant for their comprehensive submissions backed with authorities.

### **Issues for Determination:**

15. Having considered the Defendant's application, the response by the Plaintiff and the submissions filed by the parties, I am of the view that the only issue for this Court to determine is whether the Defendant's application meets the threshold for review under the law.

### **Analysis and Determination**

16. The Defendant's primary ground for the application for review put in its proper perspective is that this Court erred in its interpretation of the Law in its ruling of 27<sup>th</sup> September, 2022. The Defendant is of the view that the ruling of the Court of Appeal sitting in Kisumu is the proper interpretation of the law in regard to the jurisdiction of Environment and Land Court in respect to disputes as the one before the court.
17. The Defendant's ground in my respectful view is however not a ground for review of the ruling, rather a ground for appeal.
18. In the case of Mary Wachuka Kimani -vs- Mark Ng'ang'a Kimani & 2 others, Nrb ELCC. E076 of 2022, this Court cited the case of Francis Origo & Another v Jacob Kumali Munagala [2005] eKLR, where the Court of Appeal aptly pointed out as follows:

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground of review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction.”
19. The Defendant in this matter likewise proceeded in the wrong direction when they opted for a review rather than an appeal.
20. I too wish to address the proposition by the Defendant that the 'discovery' of the Court of Appeal decision in Kisumu delivered subsequent to the decision of this Court was a new and important matter to warrant a review of this Court's ruling. This, I must state emphatically, is an erroneous interpretation of the provisions of rule 1(1) of Order 45. I find the proposition awkward because in



its own submissions, the Defendant made reference to the Court of Appeal decision in Civil Appeal No. 275 of 2010, Pancras T. Swai -vs- Kenya Breweries, where the Court unequivocally pronounced itself to the effect that,

“the discovery of new and important matter or evidence or mistake or error apparent on the face of the record or any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts that does not relate to ascertainment of existing Law which the Court is deemed to be alive to.”

21. My conclusion therefore is that the Defendant’s application lacks merit and is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**M. D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms. Zainab Ali for the Plaintiff/Respondent

Mr. Maanzo for the Defendant/Applicant

Yvette: Court Assistant

**M. D. MWANGI**

**JUDGE**

