



**Kigunda v Kenya Power and Lighting Company (Environment & Land Petition E024 of 2021) [2023] KEELC 22495 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22495 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E024 OF 2021  
MD MWANGI, J  
DECEMBER 20, 2023**

**BETWEEN**

**ROBERT JAMES KIGUNDA ..... PETITIONER**

**AND**

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

**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 7th November, 2021. This Court after considering the said Preliminary Objection rendered its ruling on 28th February, 2022. The Court's finding was that the preliminary objection was not merited and went ahead to dismiss it with costs.
2. The court's finding was that the Petitioner's complaint is majorly about the Respondent's actions of passing high voltage electricity power lines over his land making it impossible for him to utilize it. The Court therefore concluded that the issues raised in the Petition do not fall under the mandate of either the Energy and Petroleum Authority or the Energy and Petroleum Tribunal as submitted by the Respondent.
3. The Respondent has now moved this court vide the application dated 18th 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 Respondent prays for orders that:
  - a. The Honourable Court be pleased to review its order made on the 28th of February, 2022, so as to set aside and/or vary the ruling and order dismissing the Applicant/Respondent's Notice of Preliminary Objection dated 7th November, 2021.



- b. This Honourable court be pleased to review its ruling and order made on the 28th February, 2022, so as to grant an order upholding the Applicant/Respondent's Notice of Preliminary Objection dated 7th November, 2021.
- c. The costs of the application be in the cause.
4. The application is premised on the grounds on the face of it and the supporting affidavit of Joseph Muthii Machia, the legal officer of the Respondent herein deposed on the 18th July, 2023. The deponent avers that the Petitioner's case herein relates to an alleged breach of terms of the Wayleave Agreement that existed between the two parties and disconnection of power to the Petitioner's property without any justifiable cause.
5. The Officer avers that the Respondent's position is that the dispute herein relates to Wayleaves and/or rights of wayleaves in relation to the generation, transmission, distribution and supply of electrical energy, which is a preserve of the Energy and Petroleum Authority and/or the Energy and Petroleum Tribunal. That was the reason why the Respondent raised a Preliminary Objection dated 7th November, 2021 contesting this court's lack of jurisdiction to hear and determine this matter. The court subsequently delivered its Ruling on 28th February, 2022.
6. The deponent avers that the Court of Appeal has since pronounced itself on the issue of the appropriate forum or jurisdiction relating to Wayleaves and related aspects. The Court of Appeal's pronouncement was made in the case of *Nicholus v Attorney General & 14 Others; National Environmental Complaints Committee (NECC) & 5 Others (Interested Parties)* (2023) eKLR. The court held that for disputes relating to the issue of wayleaves, the first establishment with original jurisdiction to hear and determine such a dispute is the Energy & Petroleum Regulatory Authority. Thereafter, an aggrieved party is at liberty to move to the Energy and Petroleum Tribunal, thereafter to the Court.
7. The deponent further deposes that the Court of Appeal further held that the Environment and Land Court lacks original jurisdiction to hear and determine disputes which are a preserve of the institutions set up under the *Energy Act* and the *Energy (Complaints and Dispute Resolution) Regulations, 2012*. The Respondent therefore seeks this court to review its Ruling in view of the Court of Appeal's decision.

### **Petitioner's Replying Affidavit**

8. The Petitioner opposed the application by the Respondent through a Replying Affidavit deposed on the 15th August, 2023. The Plaintiff avers that he is the registered proprietor of the property known as LR No 14969/38, LR No 14969/39 and 14969/40 Kasarani. He confirms that his Petition herein seeks for remedies in light of the Respondent's continued infringement of his Constitutional Rights under articles 40, 42, 47, 60, 64, 69 and 70 of the *Constitution*. He avers that the Respondent's Preliminary Objection in opposition to the Petition was dismissed on the 28th February, 2022.
9. The Petitioner contends that the Respondent continues to misconstrue the issues before this court despite the court categorically holding that the issues are purely constitutional issues of breach of fundamental rights and freedoms of the Petitioner.
10. He asserts that the Respondent has not raised any new or important evidence to warrant a review. Further, that the Respondent has not taken any step to challenge this court's Ruling delivered on 28th February, 2022. The application is therefore materially defective, frivolous, lacks merit and should be dismissed with costs.



## Court's directions

11. The court directed parties to canvass the application by way written submissions. Both parties complied. The Respondent's submissions are dated 13<sup>th</sup> September, 2023 whereas the Petitioner's submissions are dated 6<sup>th</sup> October, 2023, which submissions the court has read and considered.

## Issues for determination

12. 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 Respondent's application meets the threshold for review under the law.

## Analysis and Determination

13. 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 28th February, 2022. The Respondent 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.
14. The Respondent's ground in my respectful view is however not a ground for review of the ruling, rather a ground for appeal.
15. In the case of *Mary Wachuka Kimani v 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.”
16. The Respondent in this matter likewise proceeded in the wrong direction when they opted for a review rather than an appeal.
17. I too wish to address the proposition by the Respondent 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.
18. In the case of *Pancras T. Swai v Kenya Breweries*, where the Court of Appeal 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.”
19. My conclusion therefore is that the Respondent's application lacks merit and is hereby dismissed with costs to the Petitioner.



It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY  
DECEMBER, 2023.**

**M. D. MWANGI**

**JUDGE.**

In the virtual presence of:

Mr. Munene h/b for Mr. Ayeko for the Petitioner/Respondent

Mr. Muchai h/b for Mr. Ochieng for the Applicant

