



**Kenya Electricity Generating Company PLC v Tiribe Investments Limited & another (Land Case E045 of 2024) [2025] KEELC 3031 (KLR) (Environment and Land) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3031 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
LAND CASE E045 OF 2024  
MC OUNDO, J  
APRIL 3, 2025**

**BETWEEN**

**KENYA ELECTRICITY GENERATING COMPANY PLC ..... PLAINTIFF**

**AND**

**TIRIBE INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LOLDIA MUKUYU LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff's suit was instituted vide a Plaint dated 16<sup>th</sup> October, 2024 wherein the Plaintiff sought for declaratory orders that there existed easement rights over L.R. 417/1/2 Naivasha and L.R. 27275 Naivasha in its favour wherein its scope extended to the installation, use and maintenance of the access road on L.R 417/1/2 and underground water supply pipe installed along both L.R 417/1/2 and L.R. 27275. They therefore sought that in line with the said easement, that the Respondents be restrained from obstructing/preventing them (Plaintiff) from accessing the pipeline road all the way to the water pumps at Lake Naivasha, for use and maintenance of the said water pumps, for generation of electricity.
2. Simultaneously with the Plaint, the Plaintiff filed a Notice of Motion Application brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules; Section 1A, 1B and 3A of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya; and all other enabling provisions of the law seeking temporary orders of injunction barring the Respondents from obstructing/preventing them from accessing the road on LR 417/1/2 and the underground water pipeline under both adjacent suit properties, LR 417/1/2 and L.R 27273, all the way to the water pumps at Lake Naivasha, for purposes of using the electrical line, and using and maintaining the water pumps, and other activities related to generation of electricity.



3. In response to the said Notice of Motion, the Respondents herein filed a Notice of Preliminary Objection dated the 14<sup>th</sup> November, 2024 to the effect that the Honorable Court had no jurisdiction to entertain, hear or determine the suit and the Application for reasons that;
  - i. From the facts pleaded in the suit and the Application it was patently clear that the dispute herein pertained to the creation of wayleave and easement rights.
  - ii. That Section 133C of the [Land Act](#), 2012 was clear that proceedings touching on the creation of wayleaves, easements and public rights of way should be referred to the Land Acquisition Tribunal established under Section 133A of the [Land Act](#), in the first instance and thereafter brought to court as an Appeal on the decisions of the Tribunal as was stipulated under Section 133D of the [Land Act](#).
4. Their argument therefore was that the matter before the court was premature, mischievous, vexatious and an abuse of the court process application for which the court lacked jurisdiction to entertain.
5. In response to the Preliminary Objection, the Plaintiff/Applicant through its Replying Affidavit dated 3<sup>rd</sup> December 2024 which was sworn by its Property Manager, Francis Kaloki, deponed that whereas Section 133C (6) of the [Land Act](#) indeed sought that matters in relation to compulsory acquisition of land or creation of wayleaves, easements and public right of way be referred to the Tribunal in the first instance, the dispute herein did not relate to creation of wayleave/easement rights, but pertained to the enforcement of the said rights which were already in existence.
6. That the suit properties had already been encumbered by easements in favour of the Applicant by virtue of both the Wayleave Agreement of 24<sup>th</sup> February 1987 and Section 32 of the [Limitation of Actions Act](#) thus rendering the Respondents' claim against the jurisdiction of the court, a nullity.
7. That in the circumstances of their case, the procedure specified in Section 133C (6) of the [Land Act](#) did not apply, instead their reliance was based on the provisions of Section 128 of the [Land Act](#) which was to the effect that any dispute arising out of any matter provided for under the Act may be referred to the Environment and Land Court for determination. That accordingly, their suit had been rightly and procedurally before the Honourable Court, for which the Respondents' Preliminary Objection on jurisdiction ought to fail.
8. Directions were taken, as it was trite, to dispose of the Preliminary Objection in the first instance, by way of written submissions wherein the 1<sup>st</sup> and 2<sup>nd</sup> Respondents summarized the factual background of the matter before framing their issues for determination as follows:
  - i. Whether the Honourable Court has jurisdiction to hear and determine the Applicant's Notice of Motion and Plaint both dated 16<sup>th</sup> October, 2024.
  - ii. Whether easements can be acquired by prescription.
9. On the first issue for determination, their submission was hinged on the decided case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR to submit that jurisdiction was everything without which, a court of law should down its tools. That pursuant to the provisions of Section 133A and 133C (6) of the [Land Act](#) and the contents in prayers (i) and (ii) of the Plaint, their contention through various correspondences, was that the 1987 wayleave agreement had been devoid of merit and had on its face constituted an illegal instrument.
10. That there had existed a registered Easement for Power Wayleave in favor of East Africa power and Lighting Company Limited, (later referred to as KPLC), against title LR No. 417/1/2 in the year 1973. That subsequently, the registered Easement had by all means superseded the Easement that had



purportedly been established by the Wayleave agreement dated 24<sup>th</sup> February, 1987. That indeed, the Plaintiff had unlawfully encroached upon their properties since its activities had been beyond the scope of the 1973 agreement.

11. They further relied on the Court of Appeal's decision in the case of Attorney General v Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment) to submit that a declaratory order was a legal determination made by court for purposes of resolving legal uncertainty for the parties involved. That the said order conclusively ruled on and affirmed the rights, duties or obligations of one or more parties in a civil dispute. That further, a declaratory order was only sought when there was a need to clarify legal rights or status without necessarily ordering any specific action or implying damages or an injunction since it provided legal certainty and could help prevent further disputes or litigation by clearly defining the legal standing of the parties involved.
12. That for the Plaintiff to seek a declaratory relief, it meant that it was not sure whether it had easement rights over the properties and was therefore seeking the court's assistance to confirm if it was right or wrong. That indeed, it was the said declaration that would either crystalize the wayleave or state that non-had existed. That ostensibly, the instant matter related to creation of wayleaves and easements and the court could therefore only make such a declaration if it had jurisdiction and power to award the said remedy.
13. That subsequently, the Plaintiff's attempt to run away from clear pleadings should not be entertained since the dispute herein concerned the creation of easement rights and which dispute thus ought to be heard by the Land Acquisition Tribunal established under section 133A of the Land Act. Reliance was placed in a combination of decisions in the case of Mathew v Kenya Electricity Transmission Company Limited (KETRACO) (Tribunal Case E005 of 2023) [2024] KELAT 507 (KLR) (22 February 2024) (Ruling), Willis Ochola v Mary Ndege [2016] eKLR and Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR) (8 November 2019) (Judgment)
14. On the second issue for determination as to whether an easement could be acquired by prescription, reliance was placed on the provisions of Section 98 (7) of the Land Registration Act to submit that no easement and right in the nature of an easement was capable of being acquired by any prescription of a grant from long and uninterrupted use.
15. Reliance was also placed on the decided case of MJ V NK & another [2017] eKLR where the court had cited the Indian Supreme Court in the case of Commercial Tax Officer, Rajasthan v M/S Binani Cement Ltd & Another, Civil Appeal No.336 OF 2003 to submit that whereas previously easement could be acquired by prescription (see Kamau v Kamau [KLR] EA 105 and Esther Wanjiku Mwangi & 3 others v Wambui Ngarachu [2019] eKLR), it was now well established in law that where general law conflicted with specific law, specific law shall prevail. That subsequently, the governing law pertaining to the doctrine of prescription was Section 98 (7) of the Land Registration Act 2012, and as such, the Applicant was not entitled, either reasonably or legally, to claim easement rights over LR 27275 based on the doctrine of prescription outlined under the provisions of Section 32 of the Limitation of Actions Act.
16. That similarly, by dint of the principle of implied repeal which posits that when there was a conflict between two statutes, the later statute was deemed to repeal the former to the extent of the inconsistency. That the rationale for the said principle was that legislative intent was based on the assumption that the legislature was aware of the existing laws and had intended that the most recent



expression would take precedence in order to ensure legal clarity and consistency by resolving conflicts between statutes. Reliance was placed in the decided case of Republic v Kenya School of Law & another Ex Parte Kithinji Maseka Semo & another [2019] eKLR.

17. That since it was evident that the crux of the Applicant's Plaintiff dated 16<sup>th</sup> October, 2024 revolved around the creation and/or existence of easement rights where a clear interpretation of Section 133 of the Land Act, 2012, dictated that such disputes must be resolved by the Land Acquisition Tribunal, that the court's jurisdiction was limited to hearing appeals arising from the said Tribunal only. That the Preliminary Objection be allowed and the court proceeds to strike out the suit with costs.
18. In opposition to the Preliminary Objection, the Plaintiff/Applicant vide its Submissions dated 24<sup>th</sup> January, 2025 summarized the factual background of the matter and framed its issues for determination as follows:
  - i. Whether the Honourable Court has the jurisdiction to hear and determine the Plaintiff's matter;
  - ii. Whether the Defendants have met the threshold for the grant of orders under Preliminary Objection; and
  - iii. Whether the Plaintiff/Applicant is entitled to costs of the motion.
19. On the first issue for determination as to whether the Court had the jurisdiction to hear and determine the Plaintiff's matter, the Applicant placed reliance on the provisions of Section 133C (6) of the Land Act, to submit that contrary to the Defendant's claim, the dispute in question did not relate to creation of wayleave/easement rights, but pertained the enforcement of the said rights, which were already in existence. That there had been sufficient evidence in support of the existence of the easement rights to the effect that the suit properties were already encumbered by easements in favour of the Plaintiff by virtue of both the Wayleave Agreement of 24<sup>th</sup> February, 1987 granted to Kenya Power and Lighting Company, who later transferred its assets and liabilities to the Plaintiff, and Section 32 of Limitation of Action Act hence rendering the Defendants' claim against jurisdiction a nullity.
20. That since the procedure specified in Section 133C (6) of the Land Act did not apply to the Applicant/Plaintiff's facts, they were statutorily inclined to fall back on to the provision under Section 128 of the Land Act and accordingly, their suit was rightfully and procedurally before the Honorable Court. The Preliminary Objection on jurisdiction ought to fail.
21. On the second issue for determination as to whether the Defendants had met the threshold for the grant of orders sought in their Preliminary Objection, the Applicant/Plaintiff submitted that it was settled that a preliminary objection ought to be raised on pure points of law, it should be argued on the assumption that all the facts pleaded by the other side were correct; and it could not be raised if any fact had to be ascertained or if what was sought was the existence of judicial discretion. Reliance was placed in a combination of decisions in the case of Mukisa Biscuit v West End Distributors Ltd [1969] E.A. 696, Oraro v Mbaja (20050 KLR 141 and Avtar Singh Bhamra & Another v Oriental Commercial Bank (Kisumu HCCC No. 53 of 2004).
22. That in this case, the Defendant's Preliminary Objection was premised on the basis that a 1987 Wayleave Agreement was an illegal instrument due to the prior existence of a registered power wayleave in favour of EAPLC, registered against L.R. 417/1/2 in the year 1973. That the Defendants had argued that the easement of the year 1973 had superseded the 1987 one in validity. That subsequently, the Defendants' preliminary objection had raised other facts which were outside the ambit of a preliminary objection and hence it ought to fail in that regard.



23. That whereas the Defendants had argued that there had existed a 1973 Wayleave Agreement, the Plaintiff was neither aware of, nor had it been availed with correspondences of the existence of the claimed 1973 Wayleave Agreement. That the same was a fact entirely disputed by the Plaintiff, and as such, the facts had not been agreed upon as they had been prima facie presented in the pleadings on record. It thus urged the Honorable Court to dismiss the Preliminary Objection on that limb.
24. That the Defendants had raised new facts, whose accuracy ought to be ascertained, that the 1973 Wayleave Agreement had not only sufficed as a new fact which was not only disputed but also one which had demanded that they delve into adducing factual evidence to ascertain its accuracy. That in introducing the said claim, the Defendants had themselves ventured into an argument of facts and evidence in an attempt to buttress their preliminary objection. That it had also inevitably demanded that the Defendants venture into facts to prove their assertion that the 1987 Wayleave Agreement was an illegal instrument as they had claimed. That they had introduced a new assertion which the Plaintiff had not been aware of, and should most certainly controvert by way of factual and testimonial evidence.
25. That contrary to the Defendants assertion in their submissions that the Plaintiffs had sought a declaratory relief because they were unsure whether or not an easement right existed over the suit properties in their favour, and therefore sought the Court's assistance to confirm its existence, in the decided case of Attorney General v Bala [2023] eKLR, the Court of Appeal had cited the South African Court of Appeal in Durban City Council v Association of Building Societies to hold that in exercising its power to issue a declaratory relief, a Court must be satisfied that the Applicant was a person interested in an existing, future or contingent right or obligation. That the said authority had established that a declaratory order was designed to affirm already existing rights thus the Defendants' argument to the contrary was completely misconceived.
26. That further, whereas the Defendants' argument had been that an easement could not be acquired by way of prescription, the Plaintiff's position was that they were entitled to easement rights over the suit properties through prescription by virtue of Section 32 of the Limitation of Action Act which provided that a party must establish, in order to be conferred with easement rights over a parcel of land by way of prescription, that an easement right had been enjoyed peaceably and openly as of right, and without interruption, for a period of 20 years and that the right to such easement was absolute and indefeasible. That subsequently, proving whether or not the Plaintiff had met these pre-requisites was a matter of fact, to be established through factual evidence. That to deny the Plaintiff the opportunity to prove the said facts on the basis of the preliminary objection would be tantamount to condemning their case unheard and unmerited.
27. That therefore, the said limb of the preliminary objection required plenty of evidence to be adduced before the Court in order for it to succeed, hence it equally ought to fail. That evidence would have to be by way oral evidence or documents showing that an easement had already been registered and had already been existing over the burdened land. That the said objection could not strictly be called a preliminary objection as it called for ascertainment of certain facts as to registration of easement, which the Plaintiff had already adduced through their pleading.
28. In conclusion, the Plaintiff submitted that the Court was well within its proper jurisdiction to hear and determine their claim and grant the relief orders they sought. That the Defendants had failed to meet the criteria set for a valid preliminary objection and the same should be dismissed with costs.

#### **Determination.**

29. I have considered the Preliminary Objection herein and the submissions by Counsel for both parties as well as the authorities, and the applicable law. The Defendants' application on a point of Preliminary



Objection was to the effect that this court had no jurisdiction to hear and determine the Plaintiffs' suit/ Application for interim orders for reason that the dispute herein pertained to the creation of wayleave and easement rights for which the provisions of Section 133C (6) of the Land Act, was clear that such disputes ought to be referred, in the first instance, to the Land Acquisition Tribunal established under Section 133A of the Land Act, and thereafter be brought to court as an Appeal on the decisions of the Tribunal as is stipulated under Section 133D of the Land Act.

30. That there had existed a registered Easement for Power Wayleave in favor of East Africa Power and Lighting Company Limited, (later referred to as KPLC), against title LR No. 417/1/2 in the year 1973. That subsequently, the registered Easement had by all means superseded the Easement that had purportedly been established by the Wayleave agreement dated 24<sup>th</sup> February, 1987. That indeed, the Plaintiff had unlawfully encroached upon their properties since its activities had been beyond the scope of the 1973 agreement. That the 1987 wayleave agreement had been devoid of merit and had on its face constituted an illegal instrument.
31. That for the Plaintiff to seek a declaratory relief in their Plaint only meant that it was not sure whether it had easement rights over the properties and was therefore seeking the court's assistance to confirm if it was right or wrong.
32. Lastly that no easement and right in the nature of an easement was capable of being acquired by any prescription of a grant from long and uninterrupted use.
33. In opposition to the to the Preliminary Objection, the Plaintiff/Applicant's stand was that the dispute in question did not relate to creation of wayleave/easement rights, but pertained the enforcement of the said rights, which were already in existence by virtue of both the Wayleave Agreement of 24<sup>th</sup> February, 1987 and Section 32 of Limitation of Action Act. That they were not aware of the existence of a 1973 Wayleave Agreement. That they were entitled to easement rights over the suit properties through prescription and by virtue of Section 32 of the Limitation of Action Act having enjoyed the same peacefully and openly as of right, and without interruption, for a period of 20 years for which that right to the easement was absolute and indefeasible.
34. Having analyzed the parties position herein above, I find the matters arising for my determination as follows;
  - i. Whether the Preliminary Objection raised is sustainable.
  - ii. Whether the said Preliminary Objection has merit and should be upheld
35. The law on preliminary objections was succinctly stated in the locus classicus case in Mukisa Biscuits Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA 696 wherein it had been held as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The Court considers that this improper practice should stop.”



36. The Supreme Court in the case of Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR at Paragraph 21 observed as follows:

“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

37. Whereas it is trite that a Preliminary Objection should only be raised on a pure point of law, which in this case was whether or not the court had jurisdiction to hear and determine the matter before it. In support of the said Preliminary Objection however there has arisen a new fact that there existed a 1973 Wayleave Agreement which superseded the Wayleave agreement of 24<sup>th</sup> February, 1987 upon which the Plaintiffs have relied on to bring suit against the Defendants and which agreement, the Defendants have termed as being illegal.

38. This assertion, as rightly put by the Plaintiff consist of new facts which was not only disputed but also one which had demanded that parties delve into adducing factual and testimonial evidence to ascertain the accuracy of the existence of the 1973 Wayleave Agreement and/whether or not the 1987 Wayleave Agreement was an illegal instrument as claimed, and indeed whether or not the Plaintiff’s claim was in relation to the enforcement of easement rights already in existence by virtue of the Wayleave Agreement of 24<sup>th</sup> February, 1987, or otherwise, so as to determine whether or not the provisions of Section 133(c) (6) of the Land Act would come into play.

39. Having considered the pleadings, the submissions by counsel, I find that the Preliminary Objection by the Defendants herein are matters that are not strictly speaking pure points of law the having been raised not on the assumption that all the facts pleaded by the other side are correct, but on issues that ought to be ascertained in a full hearing. The said Preliminary Objection, I find lacks merit and is dismissed with costs to the Plaintiffs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 3<sup>RD</sup> DAY OF APRIL 2025**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

