



**Cape Suppliers Limited v Kenya Power & Lighting Company PLC (Environment & Land Case E307 of 2021) [2023] KEELC 21406 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21406 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E307 OF 2021**

**JA MOGENI, J**

**NOVEMBER 6, 2023**

**BETWEEN**

**CAPE SUPPLIERS LIMITED ..... PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING COMPANY PLC ..... DEFENDANT**

**RULING**

1. Before this Court for determination is the Defendant's Application dated 14/07/2023 brought pursuant to Articles 50(1), 159(2), 162, 164(3) & 169(1) of *the Constitution*, Sections 1A, 1B, 3, 3A, 5 & 80 of the *Civil Procedure Act*, Order 42 Rule 6 & Order 45 Rule 1 of the Civil Procedure Rules 2010, Sections 3 & 13 of the *Environment and Land Court Act*, Section 3 (1), 10, 11(e), (f), (i) (k) & (l) and Section 23, 24, 36, 40, 42 and 224 (2) (e) of the *Energy Act* 2019 as read together with Regulations 2, 4 and 9 of the Energy (Complaints and Disputes Resolution) Regulations 2012, Section 9(2) & (3) of the *Fair Administrative Action Act* 2015 and all other enabling provisions of the law. The Applicant is seeking for the following orders: -
  1. Spent.
  2. That this Court be pleased to set aside, vary and/or review the Ruling and Order given on 22/03/2022 in its entirety.
  3. That further and in the alternative, this Court be pleased to uphold the Defendant/Applicant's Notice of Preliminary Objection dated 17/09/2021.
  4. Spent.
  5. That this Court be pleased to grant such further orders/reliefs as it may deem fit and expedient to further the ends of justice.



6. That the costs of this application be in the cause.
2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Justus Ododa, on behalf of the Defendant herein sworn on 14/07/2023. I do not need to reproduce the same.
3. The application was opposed through the Replying Affidavit of Kinaro Kibanya, who is a Director of the Plaintiff Company herein, sworn on 7/08/2023.
4. Directions were given on filing of written submissions to the application. The Defendant/Applicant filed their written submissions on 8/09/2023 while the Plaintiff/Respondent's submissions were filed on 1/11/2023.

### **The Defendant/Applicant's contention**

5. The Defendant/Applicant depones that at the very heart of the Plaintiff/Respondent's grievance is that the Defendant/Applicant allegedly trespassed on its property and constructed thereon high voltage power lines and accompanying infrastructure. The gravamen of the dispute between the Plaintiff/Respondent and Defendant/Applicant was the existence (or lack thereof of a wayleave of L.R. No. 36/IV/14 (20A) situated in Eastleigh Nairobi.
6. It is the Defendant/Applicant's position that the issues set out in the Plaint are, at first instance, a preserve of the Energy and Petroleum Regulatory Authority and/or the Energy and Petroleum Tribunal.
7. Subsequent to the Ruling delivered on 15/03/2022, the Court of Appeal (P.O. Kiage, M. Ngugi & F. Tuiyott, JJA.) cemented the issue of the three-tiered dispute resolution mechanism envisaged by the *Energy Act* 2019 in respect of such matters as those pleaded by the Plaintiff herein. The Court ultimately affirmed the fact that the Environment and Land Court has no original jurisdiction to entertain claims where original jurisdiction to hear and determine the same are legislatively conferred on other forums and institutions.
8. The Defendant asserts that the Court of Appeal cemented the jurisprudence with respect to the jurisdictional hierarchy in matters of this nature and consequently, this Court ought to down its tools in the interest of justice. It is trite law that all Courts have jurisdiction to try all suits of a civil nature unless expressly or impliedly barred (see section 5 of the *Civil Procedure Act*) and in this case, this Court is barred by the dispute resolution mechanism provided for under the *Energy Act* 2019.
9. Further, because of the hierarchical order of Courts in Kenya (see article 162 of *the Constitution*) this Court is bound to give effect to the decision of the Court of Appeal.
10. Furthermore, under article 164(3) of *the Constitution*, the Court of Appeal has jurisdiction to hear and determine appeals from the High Court and other Courts of equal status, and its decisions are binding on the High Court and all courts equal and inferior to it.
11. The foregoing falls within any other sufficient reason envisaged by section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules 2010.
12. The Defendant/Applicant submitted that they have come to this Court under section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules 2010 seeking a review of the Ruling of 15.03.2022, on the ground of any other sufficient reason. They pray that the Court exercises its discretion to grant the orders sought.



13. This sufficient reason comes in the form of a binding authority in the form of the Court of Appeal (*Nicholus v Attorney General & 14 others (supra)*) which buttressed all the arguments initially made by the Defendant/Applicant in support of the preliminary objection aforementioned, thus necessitating this application for review.
  14. The Applicant submitted that on the one hand, the Plaintiff/Respondent's main grievance against the Defendant/Applicant, discernible from paragraphs 4, 5 and 6 of the *Plaint*, is that the latter allegedly entered the suit premises and erected high voltage electricity lines and accompanying infrastructure without their knowledge, consent or any legal justification.
  15. The Plaintiff/Respondent further alleges that there has never been any easement or restriction registered against the title of the property. Ultimately, the Plaintiff/Respondent seeks inter alia a declaration that the Defendant/Applicant has trespassed on the suit property and is liable to pay general damages for continuous trespass, compensatory damages and loss of income. According to the Court of Appeal and the *Energy Act*, 2019, these remedies are readily available to the Plaintiff/Respondent at the Energy and Petroleum Tribunal.
  16. On the other hand, the Defendant/Applicant has advanced a defence and evidence that a way leaves trace has existed on the suit premises since as early as the year 1992 when the suit land was still government land and the approvals for the way leave was given way back in the year 1970. It is our submission that the only way the Defendant/Applicant can put up electricity infrastructure on any land is where it has a express authority to do so which means an existing wayleave. Notably, even Plaintiff/Respondent's maps show existence of wayleave on the suit property. (see paragraphs 7-11 of the *Statement of Defence* and the *Defendants List and Bundle of Documents* dated 14.04.2022 and *Supplementary List and Bundle of Documents* dated 15.07.2022 and the *Plaintiff's List and Bundle of Documents*).
  17. The foregoing lead to the glaring conclusion that this is indeed a wayleaves matter and consequently, it is clear that the Plaintiff/Respondent has not exhausted the dispute resolution mechanism envisioned by the *Energy Act*, 2019. This case is thus premature and the jurisdiction of this Honourable Court has been invoked erroneously.
  18. It is their submission that Court of Appeal is the second highest court in the land (see article 164(3) of *the Constitution*) and therefore, it cannot be disputed that its decisions have a binding effect on the High Court, Courts of equal status including the ELC and all subordinate Courts and Tribunals. This is in light of the hierarchy of courts and the doctrine of precedence that is extant in this jurisdiction. (See also *Kennedy Mwaura Kibebe & 3 others v Annie Wanjiku Kibeh & 3 others /2021*] eKLR-para. 30).
  19. That the foregoing reasons, the Applicant submits that the Defendant/Respondent is deserving of the orders sought and pray that this Honourable Court be pleased to review its decision and uphold the Defendant/Applicant's Preliminary Objection and down its tools.
  20. On stay of proceedings, the Applicant submitted that the question of jurisdiction is fundamental and thus it would be prudent to stay the proceedings in this case until it is heard and determined, especially in light of the jurisprudence of the Court of Appeal. Additionally, an order for stay of proceedings would save valuable judicial time.
- The Plaintiff/Respondent's contention**
21. The Plaintiff/Respondent on the other hand contends that this honourable court, upon reviewing the parties' pleadings and submissions on the Defendant's preliminary objection, rendered its finding via the ruling dated 15/03/2022, dismissing the Applicant's objection and asserting its jurisdiction.



22. The Plaintiff/Respondent depones that the actions of the Defendant illegally and irregularly entering the suit property and laying thereon power lines and other infrastructure were not sanctioned by the Plaintiff as required by the Energy Act and therefore amounts to trespass as statutorily defined at Section 3 of the Trespass Act Cap 294 of the Laws of Kenya. As such the main issue for determination in the suit herein is that of the illegal entry and illegal use of the suit property and trespass on the part of the Defendant. That the provisions of Section 10 - 11 of the Energy Act, 2019 relating to the functions and powers of the Energy and Petroleum Regulatory Authority: and section 36 of the Energy Act, 2019 relating to the jurisdiction of the Energy and Petroleum Tribunal do not clothe either of the two bodies the Jurisdiction to handle matters of illegal entry and use of property i.e. trespass.
23. The Constitution of Kenya, 2010 which is the Supreme Law of the land, confers upon this Honourable court, unlimited original jurisdiction to hear and determine disputes relating to the environment and the use and occupation of and title to, land. That any law that is inconsistent with the Constitution is void to the extent of inconsistency.
24. The Applicant's averments attempting to strip-off the court's powers are therefore devoid of merit and are in fact unconstitutional.
25. The Applicant's motion herein is res-judicata, as the question of this Honourable Court's jurisdiction was raised in the Applicant's Preliminary Objection and determined with finality in the ruling dated 15/03/2022. This court cannot seat on an Appeal on its own decision.
26. An order of stay of proceedings as sought herein is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial.
27. The subject matter herein is part-heard before this Honourable court. which is competent and clothed with the necessary jurisdiction to hear and determine it. Indeed, the Plaintiff has one witness left before it closes its case.
28. The Honourable court ordered and facilitated a site visit to the suit property on 24/02/2023 to determine the factual position on the ground. A report from the Deputy Registrar on the court's findings (dated 6/03/2023) forms part of the court record.
29. The Defendant/Applicant's attempts at staying the proceedings herein at this advanced stage can only serve to unnecessarily delay the determination of the dispute between the parties. In fact, this will have the complete opposite effect and will not serve the purported desired effect of saving precious judicial time. Indeed, judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice. Justice dictates that this Honourable court ought to proceed and complete the hearing of the subject dispute. having been adjudged competent and empowered to so do.
30. Other than the same being res judicata and therefore ripe for dismissal. The timing of Defendant/Applicant's application dated 14/07/2023 is also suspect coming closely after the Plaintiff's witnesses have already testified and have been cross-examined. It is clear the Defendant/Applicant is only keen on scuttling proceedings that are at an advanced stage with a view of stealing a march of the Plaintiff.
31. The jurisdiction of the Energy and Petroleum Tribunal under Energy Act 2019 and the Energy (Complaints and Dispute Resolution) Regulations 2012 (Legal Notice No. 42 of 2012) is only invoked where a complaint, (as defined in the Regulations at Section 3), relates to an undertaking carried by an entity pursuant to a license, permit or registration issued or granted by the Energy and Petroleum



- Regulatory Authority under the Act. No such licence, permit or authority has been asserted by the Defendant.
32. The Plaintiff's claim against the Defendant does not fall within the definition of a complaint under the Energy (Complaints and Dispute Resolution) Regulations 2012 as the Defendant/Applicant is not a licensee whose actions were sanctioned under the Energy Act but is a trespasser whose actions in illegally erecting equipment on the Plaintiffs property, are illegal under Section 3 of the Trespass Act CAP 294 Laws of Kenya. As such the matter is one that solely falls under section 162 (2)(b) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court and the Trespass Act thereby granting this Honourable Court jurisdiction.
  33. The matter before this Honourable court is not one of resolution of a dispute between the two parties as contemplated in the Energy Act and the relevant regulations but one of an assertion of proprietary rights of the Plaintiff relating to the illegal entry and use of the suit property. Therefore, violation of the rights of a Plaintiff, as proprietor, can only be properly adjudicated by this Honourable Court and not the bodies established under the Energy Act.
  34. This Honourable court has jurisdiction by virtue of section 162 (2)(b) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act as this is a dispute relating to the use and occupation of the land.
  35. That where an Act is silent on what is to be done in the event of a disagreement, the High Court would have jurisdiction on the matter. It therefore follows that as the Energy Act is silent regarding the jurisdiction of the Authority or Tribunal to deal with matters regarding trespass, this Honourable court must necessarily possess the requisite jurisdiction to adjudicate this matter.
  36. Sections 9(2) and (3) of the Fair Administrative Action Act are not applicable to the instant suit as there is no specific internal mechanism available to remedy an act of trespass
  37. Without prejudice to the foregoing, it is trite law that where a case raises hybrid issues cutting across the jurisdiction of different courts or bodies, the court ought to adopt the predominant test.
  38. Taking into consideration the above test, it is clear that the main issue to be determined before this court is the matter of trespass by the Defendant. As such the dispute is rightfully before this Honourable court.
  39. In light of the foregoing, it is clear that the Notice of Motion application dated 14/07/2023 filed by the Defendant is malicious, ill-advised with the intentions therein being to disenfranchise the Plaintiff herein and is therefore ripe for dismissal with costs.

### **Analysis and determination**

40. I have considered the Applicant's Application, both affidavits (in support and against) and the written submissions and I find the main issue for determination to be whether the Court should review the Ruling that was delivered by this Court on 15/03/2022 by setting it aside in its entirety.
41. As can be seen from the prayers set out at the beginning of this ruling, prayer 2 seeks orders that the Court grants an order to set aside, vary and/or review the ruling and order given on 22/03/2022 in its entirety. I wish to correct the Applicant and clarify that the Court only gave a Ruling in relation to their Preliminary Objection dated 17/09/2021 on 15/03/2022 and not 22/03/2022.
42. On whether the grounds and facts presented make the Application merited thus calling for a review of the order given on 15/03/2022, it is common ground that the High Court has a power of review,



but such power must be exercised within the framework of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

43. It is now well settled law that for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, the applicant must prove that:

“

- i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants’ knowledge and which could not therefore produce at the time the order was made or,
  - ii. Some mistake or error apparent on the face of the record or,
  - iii. Any other sufficient reason.
- Further that the application has been brought without undue delay.”

44. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying object of this provision is neither to enable the court to write a second ruling nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

45. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

“The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper.”

46. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same. In the case of Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) –v- Kariuki Marega& Another (2018) eKLR the Court of Appeal stated as follows:

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”

47. In the same breadth, the Court of Appeal in the case of Rose Kaiza –v- Angelo Mpanju Kaiza (2009) eKLR held that not every new fact will qualify for interference of the judgment.

48. On whether there was an error apparent on the face of record, in *Muyodi Vs Industrial and Commercial Development Corporation & Another* EA LR [2006] 1 EA 213 and cited in *Muhamed Mungai Vs.*



Ford Kenya Election, and Nominations Board and Another, Nairobi High Court Judicial Review Misc. Application No. 53 of 2013, the court inter alia went on to state;

“For one to succeed in having an order reviewed for mistake or error apparent on the record, he must demonstrate that the order contains a mistake that is there for the whole world to see. It is not enough for an applicant to say that he is dissatisfied with the decision or that the same is wrong. Such opinions ought to be the subject of an appeal. The applicant before us has not established that there is an error or mistake in decision he has asked us to review. He has not even pointed out what in his opinion is the error or mistake in that decision. He has just told us to review the court’s decision. That is not good enough, his dissatisfaction with the decision aforesaid notwithstanding. We therefore find no reason for reviewing the decision on the said ground.”

49. Further, in *Attorney General & O’rs v Boniface Byanyima*, HCMA No.1789 of 2000 the court citing *Levi Outa v Uganda Transport Company* [1995] HCB 340, held that the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.
50. The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. Put differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court concerned cannot sit in appeal over its ruling/decision. In this case, nothing has been pleaded by the applicant herein to denote an apparent error on the face of the ruling they endeavour to review. From the Applicant’s submissions, it is clear to me that they are faulting the court for making the decisions or orders it made. From the above decisions, it is trite that such errors by the court, if at all, can only be subject of appeal and not review. Otherwise, the court will be risking sitting on appeal on its own decisions, which is prohibited by law.
51. The Court of Appeal in *Mumby’s Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited* Civil Appeal No. 270 of 2002, where it was held that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.
52. The other ground for review is, if there is a sufficient cause. The applicant herein has applied for review and seeks to rely on the ground that there is sufficient cause. In the case of *Sadar Mohamed vs Charan Signh and Another* [1963] EA 557, it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure, Sir Dinshah Fardunji Mulla, The Code of Civil Procedure, 18<sup>th</sup> Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; [2001] LLR 6937 (CAK), (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’ ...means



a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

53. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga* [2004] eKLR where they held as follows:-
- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. (Emphasis added)
  - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
54. I have considered the grounds upon which this application is based and it is clear that the Defendant/Applicant contends that this court the Court proceeded on an incorrect exposition of the law and facts and reached an erroneous conclusion. Misconstruing a statute or misapprehension of facts, in my view cannot be a ground for review.
55. This court notes that the orders being sought by the applicant are similar in nature to those that had already been dealt with by the court, in that, the Applicant seeks to have their Notice of Preliminary Objection dated 17/09/2021 upheld. The court heard all the parties concerned and then made a determination on the application. I am not convinced that sufficient cause has been explained in the instant matter. If the parties are dissatisfied with the orders and wish to pursue the matter further, they can approach the Appellate court for review and or setting aside of the orders.
56. I am not persuaded that the reasons offered by the applicant amounts to ‘sufficient reason’ within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda* Civil Appeal No. 103 of 2000, Kisumu; [2000] LLR 8340 where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.
57. One of the issues that are the subject of a full trial include whether there has been any easement registered on the suit property. The evidence being produced of its existence needs to be interrogated in full trial since each party has contrary averments of the existence of a way leave. Additionally, hearing of this matter had already commenced. Parties have even gone for a site visit that was scheduled for 24/02/2023. Counsel for the defendant’s submissions that the matter is not yet ripe for hearing and determination by this Court is misleading.
58. With respect to other issues raised, the Court of Appeal in *Mahinda vs. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:
- “The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made.”
59. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the applicant do not quality to be any of the grounds prescribed in Order 45 Rule 1 of the Civil Procedure Rules.



60. Consequently, I find that the grounds cited do not qualify to be grounds for review to bring the applicant's application within the ambit of the grounds specified in Order 45 Rule 1. It is my finding that this is not a proper case for the court to grant the review sought or even to exercise its discretion in favour of the applicant. Accordingly, the applicant's application dated 14/07/2023 is bereft of any merit and it is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 6<sup>th</sup> Day of NOVEMBER 2023.**

.....

**MOGENI J**

**JUDGE**

In the virtual presence of:

Miss Kirwa for the Plaintiff

Ms. Owano for the Plaintiff/Respondent

Ms. Caroline Sagina: Court Assistant

