Kariuki v Kenya Power & Lighting Company Limited (Environment and Land Appeal E001 of 2024) [2025] KEELC 7630 (KLR) (5 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7630 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E001 OF 2024

SM KIBUNJA, J

NOVEMBER 5, 2025

BETWEEN

EDWARD MBURU KARIUKI ..... APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... RESPONDENT

RULING

1. The appellant moved the court through the application dated 9th June 2025 seeking for the following orders:

   a. "Spent.

   b. That this Honourable Court be pleased to review, vary and/or set aside the judgment of this court dated 17th July 2024.

   c. That this Honourable Court be pleased to award costs of this application.

   d. That this Honourable Court be pleased to make other or further relief as deems fit."

   The application is premised on the nine (9) grounds on its face marked (1) to (9) respectively, and supported by the affidavit of Edward Mburu Kariuki, the appellant, sworn on 9th June 2025, in which he among others deposed that he is the registered owner of L.R No. Mgumopastsa/Mazeras/540, and had claimed for damages against the respondent for trespass when the respondent asserted rights of wayleaves holder; that the trial court determined that it had no jurisdiction, which promoted him to file the appeal before this court; that this court upheld the trial court decision, and held that only the Energy Tribunal has exclusive jurisdiction; that the Supreme Court of Kenya in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 OF 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) has held that the jurisdiction of the Energy Tribunal was limited to licensing disputes under section 25 of the

Energy Act and that matters to do with enjoyment of property rights fell within the jurisdiction of the ELC by virtue of Article 162 (2) (b) of *the Constitution*, and section 13 of the ELC Act; that had the court have been aware of the Supreme Court judgement, its decision would have been different, and there is sufficient reasons to review the judgement and allow the appeal, at the very least on costs; that courts of similar jurisdiction such as in the case of Gatere & Another v Ketraco Ltd [2024] KEELC4560 have held that the ELC has jurisdiction on wayleaves.

2. The application is opposed by the respondent through the replying affidavit of Justus Ododa, sworn on 10th July 2025, in which he inter alia deposed that the application does not meet the threshold of Order 45 (1) Civil Procedure Rules; that discovery of a new case authority is not a ground for review; that the appellant has also not met the threshold in section 80 of the *Civil Procedure Act*; that the request to have the order on costs vacated is misplaced as it was a direction judicially exercised.

3. The learned counsel for the appellant and respondent filed their submissions both dated 29th August 2025 which the court has considered.

4. The application raises the following issues for the determinations by the court:

    a. Whether this court has jurisdiction to determine the instant application.

    b. Whether the appellant has met the threshold for the review order sought.

    c. Who bears the costs of the application?

5. The court has carefully considered the grounds on the application, the affidavit evidence, submissions filed by the parties' learned counsel, the superior court decisions cited thereon, and come to the following determinations:

    a. It is well known that for a review application of a judgment to succeed, it must adhere to the ingredients prescribed in Order 45 (1) of the Civil Procedure Rules which provide as follows:

> " Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."
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> Though applications for the court to review its judgment delivered in an appellate capacity are not common, in the case of Standard Chartered Financial Services Limited & Another v Manchester Outfitters & 2 Others C.A application 224 of 2006, the Court of Appeal, when asked to review its decision, focused on what the Statutes and *the Constitution* provided.

b. The question of jurisdiction has been dealt with in several superior court decisions including in the case of Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] KESC 8 (KLR) where the court held that:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."
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> Therefore, the question to ask before embarking on determining whether the appellant has met the threshold for review on its own merit is whether this court, in its appellate capacity, has jurisdiction to review its own judgement. The parties herein have not referred the court to any provision in *the Constitution* or in the *Environment and Land Court Act* Chapter 8D of Laws of Kenya or any other statute that enables this court to review its own decision in an appellate capacity.

c. However, in the case of Kariuki v Wolff; Kariuki (Interested Party) [2022] KEELC 115 (KLR) this court held as follows:

> "It is trite law that litigation must come to an end and once a court has adjudged a matter, it becomes functus officio although it retains residual jurisdiction to reopen cases on very limited circumstances. The doctrine of functus officio is discussed at length in the Supreme Court decision of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR:
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> "18. The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.....A court is functus when it has performed all its duties in a particular case.....Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available".

Therefore, the question whether the appellant has met the threshold for review of the said judgement has been answered by the Court of Appeal in the case of Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & Another [2019] eKLR in the following words:

> "... As stated in the opening paragraphs of this ruling, the residual jurisdiction of this Court to re-open its own decision is exercised with caution and only in exceptional cases. It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. In other words, the following must be demonstrated:
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> 1) The decision in issue has occasioned injustice or a miscarriage of justice; and
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> 2) The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and
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> 3) No appeal lies against in the decision in issue."

This court does not have exclusive jurisdiction under *the Constitution* and Statutes to review its decision in an appellate capacity. However, it does possess residual jurisdiction in exceptional cases that meet the above stated criteria. In the court's judgment delivered on 17th July 2024, the court relied on sections 36 (3) and 35 (4) of the *Energy Act* 2019 to uphold the trial court's judgment. The appellant seem to believe that had the Supreme Court of Kenya decision in the case of Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 OF 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment), been brought to the attention of this court, it would have come to a different finding on the question of jurisdiction. He therefore seeks for the court to review its judgement and at the very least allow costs. I have perused the above outstanding and ground shaking decision by the Supreme Court of Kenya, and simply put, the apex court was edifying the fact that constitutional issues cannot be determined before the Energy Tribunal, which position this court vehemently agrees with. Unfortunately for the appellant herein, the subject matter of his claim since inception before the trial court was not a constitutional issue, but a civil claim based on the exercise of wayleaves rights, which ought to be pursued through the laid down statutory dispute resolution process. The decision of the court therefore remains as pronounced on 17th July 2024. It is important to observe in obiter, that the appellant is still not without redress under the *Energy Act* 2019. The trial

court and this court had in its judgment restated the same position earlier.

d. That as the appellant has failed in his application, the respondent is thus entitled to costs as provided for under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.

1. From the foregoing conclusions, the court finds and orders as follows on the application dated 9th June 2025:

a. That the appellant's application is without merit.

b. That the application is hereby dismissed.

c. That the appellant to pay the respondent's costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF NOVEMBER 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellant: M/s Nduku

Respondent: M/s Kabole

Kalekye-court Assistant.

S. M. KIBUNJA, J.