REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL CASE NO. 61 OF 2024

THE KENYA POWER & LIGHTING COMPANY PLC::APPELLANT

VERSUS

NICHOLAS MUTHINI MUTISO:::RESPONDENT

JUDGEMENT

Being dissatisfied with the Judgment and Orders of the Tribunal delivered in LAT Case No. E031 of 2024 delivered on the 11th November 2024, dismissing the Appellant's preliminary objections and allowing the Respondent's suit herein the Appellant wishes to appeals against the same based on the following grounds;

1. That the Honourable Tribunal erred in law by failing to consider and to find out that subject matter is purely under the purview of the Energy Act No. 1 of 2019 and its predecessor the Energy Act of 2006.
2. That the Honourable Tribunal erred in law, and in principle and failed to find and determine that subject of the Respondent's suit was not compulsory land acquisition or statutory creation of wayleaves and/or rights of way under the Land Act as to warrant the Jurisdiction of the Tribunal to be invoked.

3. That the Honourable Tribunal contradicted itself in its application and interpretation of the law and ended into the wrong conclusion that a matter regulated by the Energy Act No. 1 of 2019 and its predecessor the Energy Act of 2006 gave rise to a cause of Action under the Land Act.
4. That the Honourable Tribunal erred in law and in principle and failed to determine, hold and find that disputes may only be initiated before it by way of reference from the National Land Commission or as Appeals from the decision of the National Land Commission.
5. That the Honourable Tribunal erred in law and in principle and failed to find and hold that it was explicit from the pleadings by both parties that the Respondent's suit was time barred but instead delved on matters of fact and evidence presented by the Respondent to dismiss the Preliminary Objection.
6. That the Honourable Tribunal erred in law and in principle in failing to find and hold that the Respondent did not discharge his burden of proof but instead shifted the burden of proof to the Appellant.
7. That the Honourable Tribunal erred in law in failing to appreciate the overwhelming Constitutional and Statutory provisions and binding authorities of superior Courts tendered by the Appellant to demonstrate that the Trial Court lacked jurisdiction.

8. That the Honourable Tribunal erred in law and in principle by replying on its case law delivered in circumstances that were distinguishable from the case before it.
9. That the Honourable Tribunal erred in law by awarding the Respondent prayers that had not been sought and thus re-wrote the Respondent's pleadings.
10. That the Honourable Tribunal erred in law by invoking its jurisdiction to issue compensation orders for the Respondent against the Appellant and thus improperly initiating a process of compulsory land acquisition or statutory creation of wayleaves or rights of way.
11. That the Honourable Tribunal acted ultra vires of its powers to issue orders as granted under the Land Act No. 6 of 2012.

The Appellant prays for Orders that:

I. This Appeal be and hereby allowed.
II. The Honourable Court may declare as per incuriam and strike off the Judgment delivered on 11th November 2024 by the Honourable Tribunal.
III. That the Judgment delivered on the 11th November 2024 be substituted with a Judgment upholding the Appellant's Prelimanary Objections.

IV. That the Judgment delivered on the 11th November 2024 be substituted with a Judgment dismissing the Respondent's suit with costs to the Appellant.

V. That the Judgment delivered on the 11th November 2024 be substituted with a Judgment striking out the prayers granted to the Respondent.

VI. That the costs of this Appeal be met by the Respondent.

By way of a brief background, vide a claim dated the 30th June 2024, the Claimant/Respondent avered that he was the beneficiary proprietor of Plot No. LR 2574 Kivaa Market in Kivaa Adjudication Section. That sometimes in 2012 the Appellant erected an electric pole on the Claimants property and the later was not able to adequately appropriate his property. In the year 2020 he wrote to the Appellant to reroute the same but was ignored. The Respondent sought the following prayers before the Tribunal;

1. A declaration that creation of the wayleave on the property known as of Plot No. LR 2574 Kivaa Market in Kivaa Adjudication Section was unlawful.
2. An order compelling the Respondent to pay compensation to the Claimant for the unlawful creation of the wayleave.
3. A mandatory injunction compelling the Respondent to reroute the electricity pole on the Claimant's property known as Plot No. LR 2574 Kivaa Market

in Kivaa Adjudication Section in such a way it does not limit the exercise of proprietary rights.

4. Costs of the suit.

The Respondent/ Appellant upon service of the claim rerouted the offending pole. The Appellant filed a notice of preliminary objection challenging the jurisdiction of the Tribunal which was dismissed and later filed their response. The Appellant reiterated that the Tribunal had no jurisdiction and that the claim was time barred.

This court has considered the evidence, submissions and authorities cited therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in

doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

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."*

The Supreme Court in the case of Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 others (2015) eKLR 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."

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 tribunal had jurisdiction to hear and determine the matter before it and also whether the matter was time barred.

The Respondent made out a claim in the Land Acquisition Tribunal and the core issue was compensation for creation of a wayleave. They stated that, the Appellant created a wayleave on their property without notification, consultation or compensation by creating an electric pole thereon. They have in their claim pointed out that there was violation of Section 143 to 144 of the Land Act. These sections of the law prescribe the manner in which public rights of way and wayleaves ought to be created. Inter alia Section 143 provides that a public right of way or wayleave may be created for the benefit of the national or county government, local authority, or a public authority or corporation, to enable such institutions carry out their functions. Section 144 provides for the manner of application for a wayleave. Such application is made to the National Land Commission (the Commission) by the state department, county government, or public institution requiring the same. The Commission is to consider the application, invite comments and objections

and initiate and facilitate negotiations in order to reach consensus. If a public right of way or wayleave is created, Section 148 provides for compensation.

Parliament established the Land Acquisition Tribunal under Part VIIIA of the Land Act for dispute resolution. Section 133C provides for the jurisdiction of the Tribunal and states that:

> *"The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.*(2)*A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.*(3)*Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.* (4)*Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.*(5)*If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.*(6)*Despite the provisions of sections 127, 128 and 148 (5), a matter*

relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.(7)*Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.*(8)*The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of the Constitution, using the framework set out under the Fair Administrative Action Act or any other law."*

From the above, especially subsection (6) it will be seen that matters relating to compulsory acquisition of land or creation of wayleaves, easements and public rights of way, shall in the first instance be referred to the Tribunal.

In the instant claim, there is certainly the argument that the Appellant created a wayleave without consultation or compensation. The issue of compensation, in my opinion is now the core issue here. The issue of compensation can certainly be presented to the Land Acquisition Tribunal.

It is also a well-established principle that where the law prescribes a clear procedure for the resolution of a dispute, that procedure must be strictly followed. This position was affirmed by the Court of Appeal in Speaker of the National Assembly vs James Njenga Karume (1992) eKLR, thus:

"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed……"This observation alluded to the application of the exhaustion principle where there exists other dispute resolution mechanisms prescribed by the Constitution or an Act of Parliament."

In response, the Appellant filed a Preliminary Objection challenging the jurisdiction of the Tribunal contending that the claim was in contravention of provisions of the Energy Act, 2019 and the Energy (Complaints and Dispute Resolution) Regulations, 2012.

The Appellant stated that, the Tribunal's decision in this regard was erroneous and the dispute, being for compensation for a right of easement created in favour of the Appellant under the Energy Act, the Energy and Petroleum Regulatory Authority (EPRA) had original jurisdiction to determine the same. On its part, the Respondent maintains that the Tribunal was correct in assuming jurisdiction which has been granted to it pursuant to the provisions of the Land Act. Further in their submissions before this court the Appellant stated that the jurisdiction of the Tribunal is firstly Appellate against the decision of the National land Commission on a dispute arising from the process of compulsory land acquisition. That the

jurisdiction of the Tribunal is an exception to the provisions under Section 127, 128 and 148(5) of the Land Act. That it is vital to consider what comprises the process of compulsory land acquisition and the import of Sections 127, 128 and 148(5) of the Land Act.

It is indeed undisputed that the dispute involves wayleaves compensation. A wayleave is a legal right granted by a landowner to a third party typically a utility company or public body to access, use, or pass through private land for the purpose of installing, operating, and maintaining infrastructure such as electricity transmission lines, poles, cables, and other related facilities.

The legal framework governing wayleaves is primarily addressed under two statutes: the Energy Act, 2019 and the Land Act, 2012. The Energy Act regulates the licensing, development, and operation of energy services, including the authority of licensees to access land for the construction, operation, and maintenance of energy infrastructure.

The Land Act, establishes the legal and procedural framework governing land tenure and use in Kenya. It deals with proprietary interests in land, including easements and servitudes such as wayleaves, and also provides statutory safeguards for the protection of private land rights.

Sections 143, 144, and 148 of the Land Act governs the legal regime relating to wayleaves. Section 143 empowers the National Land Commission (NLC) to create public rights of way, including wayleaves, for the benefit of the national or county government, a public authority, or a corporate entity, where such access is necessary for the discharge of public functions while Section 148 provides for compensation in respect to public rights of way.

Section 133C of the Land Act, which establishes the Land Acquisition Tribunal and sets out its jurisdiction. Subsection (6) is categorical that:

> *"Despite the provisions of sections 127, 128 and 148(5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal."*

The Energy Act, 2019, under Part VII, titled "Rights of Way, Wayleaves and Use of Land for Energy Resources and Infrastructure" provides the regulatory framework under which licensed energy undertakers may gain access to land for purposes of energy development. This includes detailed procedures for engagement with landowners and affected parties.

The Appellant has submitted that the Energy and Petroleum Regulatory Authority (EPRA) has first-instance jurisdiction over the present dispute. It relies on Sections 11 sub sections (e), (f), (i), (k) and (l), and 23 of the Energy Act. With regards to

Section 11, the cited subsections outline the powers and functions of EPRA, as including the issuance of directions to ensure compliance with license conditions, issuance of orders requiring performance of acts or prohibiting acts and timelines thereto, investigation and resolution of licensing disputes, and imposition of penalties.

On the other hand, Section 23 of the Energy Act provides for procedural timelines and decision-making frameworks within which EPRA operates. Crucially, none of these provisions directly reference dispute resolution on matters of wayleave compensation. Section 175 of the Energy Act falling under Part VII aforesaid dealing with inter-alia wayleaves addresses the question of compensation and expressly provides as follows:

> *"If any difficulty or question arises as to the amount, entitlement to compensation or person entitled to compensation payable under this Act, the determination shall be made in accordance with the provisions of the relevant written law."*

I find that "relevant written law" for purposes of determining disputes related to wayleave compensation, as contemplated under Section 175 of the Energy Act is the Land Act. Section 133C (6) of the Land Act is unequivocal in mandating that

all disputes relating to among others creation of wayleaves must in the first instance be referred to the Land Acquisition Tribunal.

The Appellant maintained that Section 3(1) of the Energy Act provides that in the event of a conflict between the Energy Act and any other law, the Energy Act shall prevail. This section is very clear that the Energy Act shall prevail in matters touching on:

> *"a)the importation, exportation, generation, transmission, distribution, supply or use of electrical energy;(b) the exploration, production, transportation, distribution, and supply of any other form of energy; and(c)all works and apparatus for any or all of these purposes."*

This section does not oust the application of other laws particularly in relation to the adjudication of compensation disputes over wayleaves. Therefore, the Appellant's reliance on Section 3(1) aforesaid as a basis for excluding other legal frameworks from addressing the dispute is misconceived. I find that there is no conflict between the Land Act and the Energy Act on matters of dispute resolution as regards wayleave compensation. I find that the Tribunal does have the jurisdiction to determine the matter.

The Appellant further submitted that the electricity pole was erected in 2011 and not 2012 as alleged hence the Respondent is guilty of laches. That the claim was time barred. Section 7 of the Limitation of Actions Act provides as follows;

> *"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."*

In the case of Edward Moonge Lengusuranga vs James Lanaiyara & Another (2019) eKLR, it was held as follows;

> *"Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement."*

The purpose of the Law of Limitation was stated in the case of Mehta vs Shah (1965) E.A 321, as follows;

> *"The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a*

Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

In the case of Gathoni vs Kenya Co-operative Creameries Ltd (1982) KLR 104, the Court of Appeal held as follows;

"…The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga vs Makerere University (1972) EA, the Court had this to say on the Law of Limitation;

"A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought."

The Respondent submitted that they installed the power line on the said land sometime in 2011 and the claim was filed before the tribunal on the 5th July 2024. That the Respondent attached a demand letter dated 25th April 2024 and applied for rerouting of the same which was subsequently done. That it was over twelve years since the cause of action arose. I have perused the court record and no evidence has been adduced to prove that the power line was erected and completed in 2011. The Appellant has attached a billing statement and a electricity supply form of the Respondent both dated 2024. There is also attached a document titled Design of Works stating it was approved with no end date and no evidence of when the works stated and/or ended on the ground. Section 107 of the Evidence Act is clear that he who alleges must prove. In any event the trespass continued upto and until the Appellants rerouted the electric pole.

This brings us to the doctrine of estoppel submitted by the Appellant. The doctrine of estoppel in codified in Section 120 of the Evidence Act which provides as follows;

> *"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any*

suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

In the case of Pickard vs Sears 112 ER 179 captured the doctrine as follows;

"The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time."

In Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR the Court of Appeal held that;

"The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person."

Estoppel is fundamentally an equitable doctrine and a principle of justice and fairness. From the totality of the documents filed, it is clear that the offending electric pole was only rerouted when the Respondent paid Kshs. 53,303/- the cost of the rerouting and only after the claim was filed and served on the Appellant. He who comes to equity must come with clean hands. The fact that the Respondent

paid for the exercise does not mean that the he should not be refunded the compensated for the wayleave and the cost of relocating it.

I find that the Tribunal did not err in law by invoking its jurisdiction to issue compensation orders for the Respondent against the Appellant. For those reasons I find that the Appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF MARCH 2026.

N.A. MATHEKA

JUDGE