



Green Power Generation Company Limited v Kenya Power & Lighting Company Ltd & another (Civil Application E048 of 2020) [2024] KECA 718 (KLR) (21 June 2024) (Ruling)

Neutral citation: [2024] KECA 718 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E048 OF 2020
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
JUNE 21, 2024**

BETWEEN

GREEN POWER GENERATION COMPANY LIMITED APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LTD 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

(Being an Application to strike out the Notice of Appeal dated 18th May, 2020 against the Judgment of the High Court at Malindi (J. O. Olola, J.) delivered on 6th May 2020 in Malindi ELC No. 179 of 2013)

RULING

1. Green Power Generation Company Limited, the applicant, was the plaintiff in Malindi ELC No. 179 of 2013 while the 1st and 2nd respondents were the 1st and 2nd defendants respectively. The suit was instituted by way of a plaint dated 4th September 2013 filed on 10th October 2013. The applicant's contention was that, in July 2010, it purchased land parcel No. Lamu/Lake Kenyatta 1/3690 (the suit property) measuring approximately 1.94 Ha from the former owners, Mpeketoni Electricity Project. On purchase of the suit property, the applicant asked the 1st respondent to remove therefrom any electric generating plant or machinery that may have been put thereon, alleging that the continued occupation and use of the suit land had occasioned its pollution and degradation. The applicant prayed for punitive and aggravated damages, as well as an order that the 1st respondent vacates the suit property or, in the alternative, purchases the same at the market rate.
2. In its defence, the 1st respondent denied that the applicant was the proprietor of the suit property. According to it, the suit property had been clandestinely subdivided from the original Plot No. Lamu/Lake Kenyatta 1/2834, which was wholly owned by the Government of Kenya; that the suit property could not have been sold off or acquired by the applicant or any other party without its knowledge or



- consent; that the existence of its assets on the suit property created an overriding interest, which had not been defeated by the subsequent acquisition of the land by Mpeketoni Electricity Project and/or the subsequent transfer to the applicant; and that the applicant had not suffered any loss.
3. On its part, the 2nd respondent denied the applicant's claim of ownership of the suit property and any loss and damages alleged to have been suffered by the applicant. According to the 2nd respondent, the suit offended sections 13A(1) of the [Government Proceedings Act](#) (Cap. 40) and 3(1) of the [Public Authorities Limitation Act](#) (Cap. 39).
 4. On 6th May 2020, Olola, J. delivered his judgement in which he found that the 1st respondent was a trespasser and in wrongful occupation of the suit property and awarded to the applicant general damages in the sum of Kshs. 10,000,000 with interest at courts rate plus costs of the suit. Aggrieved by the said decision, the 1st respondent, on 20th May 2020, lodged a Notice of Appeal dated 18th May 2020.
 5. By its Notice of Motion dated 19th June 2020, the applicant sought to have the said Notice of Appeal struck out for failure to effect its service on all parties affected by the appeal, which we were informed has since been filed. In support of the application, the applicant filed a supporting affidavit sworn on 16th June 2020 by its director, Peter Njiiri Murachia. According to the deponent, service of the Notice of Appeal was not effected on Mpeketoni Electricity Project, who were the original owners of the suit property from whom the applicant acquired its title; that, although it was acknowledged that Mpeketoni Electricity Project did not fully participate in the proceedings from which the decision appealed against arose, it was deposed that the said entity has a right to participate in the appeal; that the obligation to serve all affected parties is statutory and mandatory as envisaged in the Court of Appeal Rules; that no application was made to dispense with service of the Notice on Mpeketoni Electricity Project; that striking out the Notice of Appeal will not in any way prejudice the 1st respondent, who will be at liberty to restart the process all over again; and that Mpeketoni Electricity Project stands to suffer prejudice should the appeal proceed to hearing without its notice as it would be condemned unheard.
 6. We heard the application on 4th March 2024 on the Court's GoTo virtual platform during which learned counsel Mr. S. M. Kimani appeared for the applicant while learned counsel Mr. Makori appeared for the 1st respondent. There was no appearance for the 2nd respondent despite due service of the hearing notice upon them. Mr. Kimani and Mr. Makori relied on their respective written submissions, which they briefly highlighted.
 7. The submissions in support of the application were dated 4th April 2022 and were filed by Stephen [aka Suleiman] Macharia Kimani Advocate. According to the applicant, the Notice of Appeal only named the applicant and the 1st respondent as the parties intended to be served therewith, but left out Mpeketoni Electricity Project, the entity that had illegally and surreptitiously sold the suit property to the applicant; that the appeal intended to challenge the probity of the contract between the applicant and Mpeketoni Electricity Project; that, in the event of the appeal succeeding, its effect would be the reversal of the judgement and, consequently, not only nullification of the contract between the applicant and Mpeketoni Electricity Project, but also the setting at nought the process of subdivision of Lamu/Lake Kenyatta 1/2834; that, whereas the respondents in the court below claimed that Mpeketoni Electricity Project acquired the suit property irregularly and secretly sold it to the applicant, the respondents did not seek to join Mpeketoni Electricity Project to those proceedings; that Mpeketoni Electricity Project cannot be expected to explain the probity of the acquisition of the suit property without being served with the Notice of Appeal; that, being a person directly affected by appeal, and in the absence of an order dispensing with service on it, Mpeketoni Electricity Project is mandatorily required to be served with the Notice of Appeal, otherwise it stands to be condemned to refund the purchase price unheard. In this regard, reliance was placed on the cases of [Ruithibo v Nyingi](#)



(1984) KLR 505 and *Abn v Openda* (1982) KLR 87, both of which emphasised the requirement to serve the Notice of Appeal on all parties directly affected by the appeal or intended appeal, unless an order dispensing with such service is obtained.

8. On its part, the 1st Respondent cited the proviso to rule 77(1) of the *Court of Appeal Rules*, 2010 and submitted that the question for this Court's determination is whether Mpeketoni Electricity Project is a person that will be directly affected by the outcome of this appeal and, if so, whether failure to serve it with Notice of Appeal renders the appeal unsustainable.

Citing the case of *Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others* (2012) eKLR; *Daniel Odindo Waga v Nabil Hassan* [2009] eKLR; and *Trade Bank Limited v LZ Engineering Construction Ltd & Others* [1995-8] 1 EA 317, it was urged that the test must be whether if the appeal were to succeed, its result will adversely affect that person. In this case, it was submitted that, since the trial court made no findings or orders in favour of or against Mpeketoni Electricity Project, this Court, sitting on appeal against that decision, cannot make any orders or findings in favour of or against it. This submission was made on the authority of *Daniel Nkirimpa Monirei v Sayialele Ole Koilel & 4 Others* [2016] eKLR, and on the import of rule 77(1). The 1st Respondent submitted that Mpeketoni Electricity Project will not be affected by this appeal and, hence, there is no need to alert them that the matter is not concluded, as was held by Sichale, JA. In *Municipal Council of Kisumu v Teleposta Pension Scheme Registered Trustees & 19 Others* [2021] eKLR. Sections 1A, 1B of the *Civil Procedure Act*, sections 3A and 3B of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution*, as well as the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR, were cited in support of the submission that courts are required to sustain appeals as far as possible and hear them on merit rather than striking them out on purely technical grounds.

9. It was submitted that the case of *Ruithibo v Nyingi* (*supra*) and *Abn v Openda* (*supra*) were decided before the enactment of the cited provisions; that it is not proper for the applicant to argue that Mpeketoni Electricity Project will be affected by the outcome of the appeal when it may have no interest whatsoever in the proceedings; that whereas in the cited cases the parties not served had participated in the High Court, in the instant case, Mpeketoni Electricity Project had not and has not shown what interest, if any, it has in the appeal; and that Mpeketoni Electricity Project has not sought leave to be joined to the proceedings, which is what it ought to have done in line with the decision in *Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 Others* (*supra*). Reliance was also placed on *Joseph Kiangoi v Wachira Waruru & 2 Others* [2010] eKLR on the need to give effect to the overriding objectives. The 1st Respondent urge this Court to dismiss the application with costs.
10. The 2nd respondent neither filed a replying affidavit nor submissions.
11. We have considered the Motion, the affidavits in support of and in opposition to the Motion as well as the submissions made by and on behalf of the parties.
12. Rule 79(1) of the *Court of Appeal Rules, 2022* (formerly rule 77(1) of the 2010 Rules) provides that:

An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.



13. That rule was explained in *Ruithibo v Nyingi* (*supra*) where it was held that:

“The whole of the provisions of rule 76(1) of the *Court of Appeal Rules* are mandatory, including the proviso thereto which lays down an alternative to meet a situation such as the one in which the appellant found himself. Either all persons directly affected by the appeal must be served with notice of appeal, or the court asked upon application, which may be made *ex parte* to direct that service need not be effected on any person who took no part in the proceedings in the Superior Court. The appellant did not take either of these steps.”

14. In this case, Mpeketoni Electricity Project was not a party to the proceedings appealed from. Those proceedings were commenced by the applicant herein, who did not deem it fit to join Mpeketoni Electricity Project to the proceedings, presumably because it did not discern the interest (if any) that Mpeketoni Electricity Project. Had it been otherwise, the applicant would have been expected to take advantage of Order 1 rule 3 of the *Civil Procedure Rules*, which provides that:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

15. As is clear from rule 79(1) of the *Rules*, what is required is service of the Notice of Appeal on a person directly affected by the appeal or intended appeal. The use of word “persons” as opposed to “parties” in our view denotes that service is not only on parties to the proceedings appealed from, but to all persons directly affected. However, we must stress that it is not just persons affected but only persons directly affected. It is not the rule that any person affected, however, remotely, must be served. Therefore, the question for determination is whether Mpeketoni Electricity Project is a person directly affected by the appeal.

16. Where it is contended that a particular person ought to have been served with the Notice of Appeal, but was not served, the burden lies on the person making that allegation to prove that, not only was the person not served, but also that the person is directly affected by the appeal. This is necessarily so because section 112 of the *Evidence Act* provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

17. The Court ought to be satisfied that the person who ought to have effected service, the 1st respondent in this case, was aware of the role played by that person in the transaction giving rise to the proceedings appealed from. The burden is heavier on the person making the allegations where the initial proceedings were commenced by that person and, in those proceedings, the applicant did not deem it fit to join the person in question. It was therefore held by this Court in *Aggrey Peter Thande v Abn Amro Bank Ltd & 2 Others* Civil Appeal (Application) No.250 of 2005 (UR) that, where a party did not take part in the proceedings in the court below and the respondent could not have possibly known about their interest in the litigation, *prima facie*, it was not a party directly affected by the appeal.

18. In this case, the proceedings in the court below were commenced by the applicant, who did not realise at that time that the proceedings would affect Mpeketoni Electricity Project. It is that same party that is now alleging that the interests of Mpeketoni Electricity Project are likely to be adversely affected. Mpeketoni Electricity Project has not come before this Court to protect its alleged interests.



As correctly pointed out by the 1st respondent, no orders were made either in favour of or against Mpeketoni Electricity Project. Without pre-empting the orders that may be made in the appeal, we are not satisfied, based on the material placed before us, that Mpeketoni Electricity Project is a person directly affected by the appeal. While it may well be affected, we are not satisfied that it is directly affected by the appeal. While any party may apply for striking out of an appeal or a Notice of Appeal on the ground that a person directly affected by the appeal or intended appeal was not served with the Notice, in the circumstances of this case where it is the applicant that omitted to join Mpeketoni Electricity Project in its own case is now the one seeking to have that person's purported interest in the appeal protected, we find no substance in that contention.

19. In view of the foregoing, we find no merit in the Motion dated 19th June 2020, which we hereby dismissed with costs.

20. We so order.

DATED AND DELIVERED AT MALINDI THIS 21ST DAY OF JUNE, 2024.

A. K. MURGOR

..... **JUDGE OF APPEAL**

DR. K. I. LAIBUTA C.Arb, FCIArb.

..... **JUDGE OF APPEAL**

G.V. ODUNGA

.....
JUDGE OF APPEAL

I certify this to be a true copy of the original

Singed

DEPUTY REGISTRAR

