



REPUBLIC OF KENYA



KENYA LAW
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**Mburu v Kenya Power & Lighting Company Limited (Environment & Land
Case 151 of 2013) [2024] KEELC 4630 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4630 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 151 OF 2013**

NA MATHEKA, J

JUNE 11, 2024

BETWEEN

SAMUEL MBURU PLAINTIFF

AND

THE KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. The application is dated January 19, 2024 and brought under section 1A, 1B, 3A and 63 (e) order 51 rule 1, article 50 (1) of the [Constitution of Kenya](#) seeking the following orders;
 1. That this Honorable Court be pleased to adopt the Kwale Land Registrar's report dated 15th November 2022 as the judgement of this court.
 2. That this Honorable Court at its own discretion be pleased to issue orders that it deems fit and just to grant for the interest of justice.
 3. That further costs on this suit and this application be provided for.
2. It is based on the annexed affidavit of Samuel Mwangi Mburu and on the following grounds that the Court of Appeal vide its judgment delivered on the May 6, 2022 ordered that the court remit the proceedings back to this court and order the County Land Registrar Kwale to inspect the property for the purposes of establishing whether the Defendant's (Appellant's) power poles are erected within the boundaries of the suit property in which the said inspection has Since been done.. That the County Land Registrar Kwale has already done the inspection and filed a report before this court which report indicates that the power line and/or Power poles are erected within the boundaries of the Plaintiff's suit property Kwale Ukunda/50. That the said report though served upon the Defendant herein has not been reviewed and or appealed against by the Defendant herein. That there will be no prejudice that will be subjected to the Defendant/Respondent in the event that this application is allowed.



3. The circumstances leading to the above application was that the Court of Appeal in the *Kenya Power & Lighting Company Limited v Samuel Mburu* (CA 130 of 2019) (2022) KECA 512 (KLR) (6 May 2022) had directed that the matter be remitted back to this court to order the District Land Registrar to inspect Kwale/Ukunda/50 hereafter the suit property and establish whether the defendant had erected power lines and power poles within the suit property. The land registrar prepared a report dated 15th November 2022 and confirmed that the power lines and power poles are in the suit property.
4. The defendant filed grounds of opposition dated April 22, 2024 and relied on the grounds that the court lacks jurisdiction to grant the orders as sought in the application. The land registrar is yet to inspect the suit property in accordance with the order of February 13, 2023 and that the land registrar's report dated 15th November 2022 was conducted before the above said court order and was therefore not the report in view of the judgement in the said appeal case. The Court of Appeal directed that any other evidence be considered together with the above-mentioned report and that the plaintiff has no basis for requesting this court to adopt the said report. The defendant also filed a notice of preliminary objection dated 22nd April 2024 on grounds that the Court lacked jurisdiction to grant the orders of the instant application as there is no law providing for this court to adopt the report as a judgement of this court.
5. The plaintiff's submissions reiterated the grounds relied on in the application and argued that the land registrar had invited all the parties as per section 18 and 19 of the *Land Act* to witness the said inspection vide a letter dated 1st September 2022 and consequently the same made the said report on November 15, 2022. Furthermore, counsel submitted that the defendant has never made any application for review, vacating or setting aside or appeal of the said report which implied that the defendant was content with the said report. They concluded that there was no other issue for determination and the only thing left for the court to do was to adopt the said report.
6. Counsel for the defendant filed their submissions and argued that the said report of November 15, 2022 cannot be relied on as it dependent on the perimeter wall which the district surveyor's report dated 20th August 2014 stated was contrary to the cadastral map. Furthermore, counsel argued that the survey conducted on November 14, 2022 was a violation of the defendant's constitutional right to fair administrative action and they relied on *R v National Land Commission & 2 others ex parte Archdiocese of Nairobi Kenya Registered Trustees* 2018 eKLR. Counsel also stated that the adoption of the said report would be adverse to the defendant as the location of the power lines is the basis for the plaintiff's claim of trespass. No reasons have been given why the District surveyor's report dated 30/8/2016 which found that the plaintiff's property was not affected by the defendant's power lines. They have written several letters to the land registrar seeking a convenient date for a joint survey pursuant to the court order of 13th February 2023 which the same replied that sometime in July 2024 would be convenient.
7. I have considered the application, the grounds of opposition, the notice of preliminary objection and counsel for the defendant submissions. The issue that arises is whether or not the court should adopt the report dated 15th November 2022 as a judgment of this court.
8. The plaintiff used provisions of section 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, order 51 of the civil procedure rules and article 50(1) of the *constitution*. The plaintiff alleged that there is nothing left for the court to determine as the report had determined that the power lines were in the suit property and thus there was trespass. Looking at the said report it states in introduction:

“Introduction



The owner of the parcel number Kwale/Ukunda/50 requested our office to undertake the above exercise of ascertaining the boundary of parcel no. Kwale/Ukunda/50 on 6th October 2016. The Environment and Land Court Mombasa ordered that the Kwale Land Registrar to visit the suit property for purposes of confirming whether the electricity pole is on plot no. Kwale/Ukunda/50 or on the boundary of the said plot and to prepare a report on the findings.”

9. The wording insinuates that there was an order by this court when the fact that remains is that this court issued orders on 13th February 2023 which is around 3 months after the said report was done. However, the court must look at the report as a whole vis a vis the court of appeal directions in its said judgment vis a vis the boundary dispute between Kwale/Ukunda/47 and the suit property. The defendant has through its ground of opposition challenged the findings in the registrar’s report claiming that the perimeter wall is not a boundary and instead wants the court to rely on the district surveyor’s report dated 30th August 2016.
10. The Court is not an expert in survey and boundary disputes, this is a preserve of the surveyor for the former and the land registrar for the latter. Section 15 (1) of the [Land Registration Act](#) states as follows:

“The office or authority responsible for the survey of land shall prepare and thereafter maintain a map or series of maps, to be known as the cadastral map, for every registration unit.”
11. The findings in the surveyor’s report dated 30th August 2016 contradict the surveyor’s report dated 20th August 2014 and the latest report by the surveyor dated 4th October 2016 stated that the surveyor could not re-establish the boundaries using the preliminary index diagrams (PID) which is what established the boundaries during adjudication of the suit property and the neighbouring property of Plot No. 47. This therefore means that one party has clearly invaded into the property of the other. The defendant having claimed that the power lines are in Plot No. 47 had the burden of proving that the boundaries were fixed. None of the various surveyors’ reports stated that the boundaries were fixed as provided for in section 19 of the [Land Registration Act](#). Hence, the dispute fell under the jurisdiction of the land registrar as provided in section 18 (3) of the [Land Registration Act](#).
12. In [Andrew Marigwa vs Josphat Ondieki Kebati](#) ELC No. 1163 of 2016 Justice Mutungi stated as follows;

“Recognizing the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The Land Registrar is the custodian of the records relating to land, has the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the [Land Registration Act, 2012](#).”
13. The defendant is aware that the Land Registrar is the final arbiter in resolving the boundary dispute but still requests the court for an inspection where both parties will be present and it also requests the court to allow both parties to tender any relevant evidence for the court to make final and full judgment.



14. The Court relies on the principle of audi alterem partem as described in *Halsbury's Laws of England*, 5th Edition Vol. 61 page 545 at para 640 states;

“The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing...The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases.”

15. The presence of the defendant may not change the outcome of the previous report however, I am guided by the case of *General Medical Council vs. Spackman* (1943) 2 All ER 337 cited with approval in *R vs Vice Chancellor JKUAT* Misc. Appl. No. 30 of 2007 which states that;

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

16. Also *Ridge vs. Baldwin* (1963) 2 All ER 66 at 81, Lord Reid expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

17. It appears to me that the last Surveyor's report was not conducted jointly and that the respondents have raised reservations on the same and that they would be prejudiced. In the circumstances and to ensure all parties get a fair hearing I make the following orders;

1. That a joint survey be carried out by the County Land Registrar Kwale on a convenient date and in the presence of both the parties who will share the costs.
2. A report be filed in this court within the next 60 days for the court to give further directions and/ or orders.
3. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

