



Olang v County Government of Kwale & 3 others (Environment & Land Case 165 of 2021) [2024] KEELC 7092 (KLR) (28 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7092 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 165 OF 2021**

AE DENA, J

OCTOBER 28, 2024

BETWEEN

MARGARET AKOTH OLANG PLAINTIFF

AND

COUNTY GOVERNMENT OF KWALE 1ST DEFENDANT

**THE BOARD OF MANAGEMENT MGOME PRIMARY
SCHOOL 2ND DEFENDANT**

THE ATTORNEY GENERAL 3RD DEFENDANT

KENYA POWER & LIGHTING CO LTD 4TH DEFENDANT

RULING

1. The 4th Defendant herein seeks for the following verbatim orders before court; -
 1. That this honourable court be pleased to review its ruling dated 31/7/2023 so as to set aside and/or vary the ruling and order dismissing the 4th Defendant's/Applicants preliminary objection dated 27/4/2022.
 2. That this honourable court be pleased to review its ruling and order made on the 31/7/2023 so as to grant an order upholding the 4th Defendant/Applicants preliminary objection dated 27/4/2022
 3. Spent
 4. That this honourable court be pleased to grant any other orders that it may deem fit and just to grant in the circumstances herein
 5. That costs of this application be in the cause.



- 2 The application is premised upon grounds set on its face and the supporting affidavit of Joseph Muchai. It is averred that this court delivered its ruling over the 4th Defendants preliminary objection dated 22/4/2022 and 27/4/2022 on 31/7/2023. That the preliminary objection dated 27/4/2022 was neither dismissed nor upheld and the 4th Defendant is now at crossroads on how to proceed with its intended appeal. At paragraph 6 of the supporting affidavit, it is deponed that this court on 25/10/2023 upheld a separate preliminary objection in ELC No E021 of 2021 whose subject matter was similar to the one in the instant suit. The deponent states that the subject matter in the instant suit relates to an alleged connection of electricity and passing of a wayleave on the Plaintiff's parcel of land.
- 3 According to the deponent, the preliminary objection and whose ruling informs the instant application, was premised on the lack of jurisdiction by this court to handle the instant dispute. Reference was made to the Court of Appeal decision in *Nicholas Abidha Versus Attorney General & 14 Others National Environmental Complaints Committee[NECC] & 5 others [Interested Parties] Civil Appeal No 42 of 2021*[2023] KECA 34 KLR where it was held that disputes rising from wayleaves such as the one herein ought to be first heard by the Energy & Petroleum Regulatory Authority. It is stated that jurisdiction is at the heart of every suit and a court cannot proceed to determine a suit without jurisdiction. The court is urged to allow the instant application as prayed.
- 4 The application is opposed by the replying affidavit of Margaret Akoth Olang the Plaintiff herein. Reference is made to paragraph 3 of the ruling in contention and it is stated that a clerical error was made in reference to the date of the application. It is stated that the said error can be amended by the court under Section 99 and 100 of the *Civil Procedure Act* and also by the inherent jurisdiction of the court. The Plaintiff maintains that the court made a determination on the contested preliminary objection and which ruling the Applicant, if dissatisfied with, ought to have proceeded with the filed appeal as had been preferred. That the court in its ruling dismissed the preliminary objection as opposed to the averments raised by the Applicant. That the fact that the court gave different orders in Kwale ELC No E021 of 2021 should not form a ground for review in the instant matter. The court is urged to dismiss the application.
- 5 The application was dispensed by written submissions filed by both parties herein which the court has considered in rendering this ruling.
- 6 Before delving into rendering myself over what is before me, it is proper to make reference to the ruling dated 31/7/2023 and which is the basis of the application before court. At paragraph 1 of the ruling, it is indicated that the same is subject of two preliminary objections dated 22/2/2023 and 22/4/2022. However, at paragraph 3 of the same, this typographical error is corrected when the court indicates that the 4th Defendant's preliminary objection is dated 27/4/2022 and which is the correct date. Section 99 and 100 *Civil Procedure Act* deal with amendments to errors, defects in any proceedings in a suit. Section 99 *Civil Procedure Act* provides;
- Clerical or arithmetical mistakes in judgements, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”
- Section 100 *Civil Procedure Act* provides;
- “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”



7 This court admits that there was an error in indicating the date to the 4th Defendant’s preliminary objection and which was 27/4/2022 and not 22/4/2022. Having clarified this, I will now proceed with the main issue for determination as here below.

8 Review of a court decision is guided by Section 80 of the Civil Procedure Act Cap 21 which provides as follows: -

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

9 Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- 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.”

10. In Republic v Public Procurement Administrative Review Board & 2 others [2018] e KLR it was held: -

Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

11. For purposes of this ruling, I will reconceptualise its contents. The 4th Defendant made an application challenging the jurisdiction of this court to determine the dispute giving rise to this suit. The 4th Defendant invoked the doctrine of exhaustion and urged that installation and connection of electricity and the passing of wayleaves was at the 1st instance to be adjudicated over by the Energy & Petroleum Tribunal before escalating to this court for determination. That the Plaintiff had failed to explore alternative dispute resolution as provided for in statute before embarking on the court process.

12. In my determination of the preliminary objection, it was my finding that the suit was commenced vide a plaint whose main prayer was enforcement of the compensation agreement over the compulsory



acquisition of the land parcel subject of this suit. For ease of reference I will reproduce the contents of the prayers as outlined in the further amended plaint dated 16/3/2022.

‘The Plaintiff prays for judgement for the Plaintiff against the Defendants; -

Partition and exchange of lands as agreed between the parties hereto at a meeting held between the parties hereto on the 30th June 2011

Failing such partition and exchange to be effected within time to be fixed by the honourable court an order that the Defendants, its servants and/or agents do vacate the Plaintiffs land and remove all the Defendants structures therefrom

Damages for impairing the enjoyment by the plaintiff and use of the Plaintiff’s land

Any other relief as may appear just and proper to this honourable court costs of and incidentals to this suit

Damages for trespass to property

Special damages Kshs 3,100,000/=

13. In my view, at the time of making the said prayers, the 4th Defendant was not a party to the suit and only came into the picture after further interference with the suit property by trespass without the Plaintiffs permission. What remains to be a fact is that the gist of this suit is the failure to compensate the Plaintiff for use of her land in setting up a school which is the 2nd Defendant. The claim for loss of land remains an issue under this courts jurisdiction as envisaged under Section 13 of the *Environment and Land Court Act*.
14. I will not belabour much on the suit referred to by the Applicant and whose determination I already made as it is not my duty to juxtapose my findings in the said matter against what is before me at this point. As correctly put by the Plaintiff, this court is functus officio in the said matter. Having outlined what in my opinion is the gist in the instant suit and which is the failure to compensate the Plaintiff upon compulsory acquisition of her land, it is safe to state that the 4th Defendant/Applicant has not met the threshold for orders of review sought. I do not seem to find any new material evidence placed before me and neither was there an error on the face of the record save for the grammatical error in the date of the application subject of the preliminary objection.
15. The issue of whether the court has applied itself correctly on the issue of jurisdiction will automatically lead this court into re-evaluating the evidence placed before it and which is akin to sitting on appeal of its own decision. The law certainly does not allow this court to do so. In this regard I’m in agreement with the holding in the case of *Pancras T. Swai –vs- Kenya Breweries Ltd. (2014) eKLR* where the Court of Appeal at paragraph 29 stated thus;

It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous/precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction.”

16. The 4th Defendant has failed to meet the threshold for grant of the orders sought.



17. The upshot of the foregoing is that the Notice of Motion dated 30/4/2024 hereby fails. The Plaintiff will have the costs of the application.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 28TH DAY OF OCTOBER 2024

A.E DENA

JUDGE

No appearance for Plaintiffs

Waga for 2nd and 3rd Defendant

Mr. Ododa for 4th Defendant

Asmaa Maftah Court Assistant

