



**Wesonga v Mangoli & 5 others (Environment & Land Case E010 of 2024)  
[2024] KEELC 13920 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E010 OF 2024  
EC CHERONO, J  
DECEMBER 17, 2024**

**BETWEEN**

**MARGARET WESONGA ..... PLAINTIFF**

**AND**

**SAKHASIA MANGOLI ..... 1<sup>ST</sup> DEFENDANT**

**WILLIAM SAKHASIA ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH WERE ..... 3<sup>RD</sup> DEFENDANT**

**K.P.L.C ..... 4<sup>TH</sup> DEFENDANT**

**THE LAND SURVEYOR BUNGOMA COUNTY ..... 5<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR BUNGOMA COUNTY ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff/Applicant has moved this court vide a Notice of Motion application dated 19/08/2024 seeking the following orders;
  1. (SPENT)
  2. That judgment on admission be entered against the 4<sup>th</sup> Defendant herein in terms set out in prayer (C) and (e) of the plaintiff's plaint dated 18<sup>th</sup> April 2024 be granted.
  3. That the trial court to determine the quantum of the damages against the 4<sup>th</sup> Defendant herein as sought out by the plaintiff in prayer (d) of the plaintiff's plaint dated 18<sup>th</sup> April, 2024 be.
  4. That the costs of this Application be provided for.
2. The application is premised on grounds shown on the face of the application supported by the affidavit of the Applicant sworn on even date. The application is further supported by photographs annexed to



the supporting affidavit and a supplementary affidavit with numerous annexures sworn on 9<sup>th</sup> October, 2024.

3. The application is opposed vide a Notice of Preliminary objection dated 11<sup>th</sup> September, 2024.
4. When the application came up for directions, the parties agreed to have it canvassed by way of written submissions. Since the Respondent raised a Notice of Preliminary objection, it is imperative to establish whether the said objection is merited or not.

#### **4<sup>th</sup> Defendant/Respondent's Written Submissions**

5. The 4<sup>th</sup> defendant/Respondent in their notice of Preliminary Objection dated 11<sup>th</sup> September, 2024 raised the following grounds;
  1. That the Application offends the provisions of Rule 3 of the High Court (practice and procedure) Rules (under the *judicature Act*, CAP 8).
  2. That the Application is fatally defective, incompetent, a monumental legal nullity and inconsequential.
  3. That the Application is therefore incongruous, inept, vexatious and constitutes an abuse of the court process warranting its immediate dismissal with costs to the 4<sup>th</sup> Defendant.
6. In their submissions in support of the Preliminary objection dated 30/9/2024 and a supplementary submissions dated 24/10/2024, the 4<sup>th</sup> Respondent through the Firm of Ochieng J. Advocate raised the following issue;
  - i. Whether the Honourable court has jurisdiction to hear the suit against the 4<sup>th</sup> defendant.
7. On this issue, the 4<sup>th</sup> defendant argued that the foundational basis of their Preliminary objection is on the Question of jurisdiction. They submitted that courts across this jurisdiction have declined to entertain disputes presented to it when there is a clear alternative remedy. They submitted that the jurisdiction of the Energy & Petroleum Regulatory Authority and Energy & Petroleum Tribunal has been expressly set out in the *Energy Act*, 2019 and that this Honourable court lacks jurisdiction to hear and determine this suit.
8. The 4<sup>th</sup> defendant referred to paragraph 17 of the plaintiff's pleadings dated 18/4/2024 which spells the entire plaintiff's alleged complaint against the 4<sup>th</sup> Defendant which they submitted is about alleged erection of electricity poles and cables purportedly on her parcel of land which complaint relates to wayleaves within the context of the *Energy Act*, 2019. They further submitted that it is easy to deduce from the pleadings that the plaintiff's claim against the 4<sup>th</sup> defendant relates to a wayleaves or rights of way in relation to the distribution and supply of electrical energy. Reliance was made to numerous decided cases inter-alia;
9. Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal NO.260 of 2013 (2017) eKLR; Kilonzo & 2 Others (Suing on behalf of Newlife Prayer Centre & Church) v State Law & Another (Civil Application E201 of 2024) KECA 1219(KLR) (20 September 2024)(Ruling); Leonard Otieno v Airtel Kenya Limited (2018) KLR; Albert Chaurembo Mumbo & 7 Others v Maurice Munyao & 148 Others, SC Petition NO.3 of 2016, (2019) eKLR; United Millers Ltd v Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 Others (2021) eKLR; Ngugi v Commissioner of Lands; Owindo & 63 Others (Interested Parties) (Petition 9 of 2019 (2023) KESC 20 (KLR) (Civ) (31 March 2023) (judgment); Joseph Njuguna Mwaura & 2 Others v Republic (2013) eKLR; Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel (2016) eKLR; Phoenix of



EA Assurance Company Limited v SM Thiga T/A Newspaper Service (2019) eKLR; Kenya Ports Authority v Modern Holdings(EA) Ltd (2017) eKLR; Kibos Distillers & 4 Others v Benson Ambuti Atega & 3 Others (2020) eKRL.

10. The 4<sup>th</sup> Defendant also cited the following authorities; Energy & Petroleum Regulatory Authority; The Energy & Petroleum Tribunal; Articles 159, 162 of *the constitution* of Kenya, 2010;

### **Plaintiff's Written Submissions**

11. The plaintiff through the Firm of Gideon Nakhone & Associates submitted that the preliminary objection dated 24/7/2024 is improper for the reason that it raises factual issues which are contested. She submitted that the substantive suit mounted by the plaintiff accuses the 4<sup>th</sup> defendant herein among others of trespassing and intermeddling with the estate of the late Raphael Wesonga. She submitted that in law, trespass connote the illegal entry into another's property with the intention of disturbing the owners constitutional right to quiet enjoyment of the said property as guaranteed by Article 40 of *the Constitution* of Kenya. She argued that other than requiring the reinstatement of the boundary, it seeks the enforcement of the plaintiff's constitutional rights as enshrined in Article 40 which is pleaded in paragraph 18 of the Plaintiff's plaint dated 18/04/2024. She submitted that the suit equally seeks to secure and safeguard the estate of Raphael Wesonga now deceased under Section 45 of the Succession Act as pleaded under paragraph 19 of her plaint. She relied in the following cases; Oraro v Mbaja (2005) 1 KLR 141; Nicholas v Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested parties) (2023) KESC 113(KLR); William Kiprono Towett & 1597 Others v Farmland Aviation Limited & 2 Others (2016) KLR; Omar v Mag (2022) KEHC 13571 (KLR) Centre for Rights Education & Awareness (CREAW) & Another v Speaker of the National Assembly & 2 Other (2017) eKLR.

### **Legal Analysis And Decision.**

12. I have considered the Notice of Preliminary Objection dated 24/7/2024 and the submissions by counsel, both in support and in objection thereto. I have also looked at the pleadings and the applicable law. A preliminary objection was defined in the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd. (1969) E.A 696 where Lord Charles Newbold P. held thus;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 in 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 issue. The improper practice should stop.”

13. The plaintiff commenced these proceedings vide a plaint dated 18/4/2024 seeking orders for inter-alia Damages for trespass, criminal sanctions for intermeddling into the estate of the late Raphael Wesonga. I have looked at the plaint and find nowhere the 4<sup>th</sup> defendant is accused of any of the acts complained of. At paragraph 2 of her affidavit sworn on 19/8/2024 in support of the Notice of Motion dated 19/8/2024, the plaintiff/Applicant deposed as follows;

“2. Sometime in 2023 the 4<sup>th</sup> Defendant herein illegally entered into the suit property known as Title NO. W.BUKUSU/N.MYANGA/600 illegally sunk holes, planted electricity poles and strung electric cables through the said poles with the intention of utilizing the same to



transmit electricity to its clients neighbouring the suit property. (Annexed and marked MW1 are copies of the pictures taken on the suit property in December 2023) SEE PAGES 1-5 OF THE ATTACHED ANNEXURES)

Section 3(1) of the *Energy Act*, 2019 deals with conflict of laws and provides as follows;

“3

- (1) If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters;
  - a. The importation, exportation, generation, transmission, distribution, supply or use of electrical energy; (Emphasis mine)
  - b. ..
  - c. All works and apparatus for any or all of these purposes.

14. Flowing from the above provisions, I find that the applicable law giving rise to the preliminary objection is the *Energy Act*, 2019 which came into force on 28/3/2019.

15. Section 9 of the *Energy Act*, 2019 establishes the Energy & Petroleum Regulatory Authority and Section 11 sets out the powers of the Authority.

- a. Under Section 11(i), the Authority has the power to;
  - i. Investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act.
- b. To add under section 11(e), (f) (k) & (l) the Authority has power to;
- e. Make and enforce directions to ensure compliance with this Act and with the conditions of licences issued under this Act;
- f. Issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon or before which such acts or things shall be performed or done or such conditions shall be fulfilled;
- (k) issue orders or directions to ensure compliance with this Act;
- (l) impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;

16. It is clear that the complaint herein concerns an alleged erection of electricity posts and power lines on alleged plaintiff's parcels of Land (lack of wayleaves), by the 4<sup>th</sup> Defendant, a body governed by the provisions of the *Energy Act*, 2019. The Energy Act, 2019 provides for the procedure for redress of any grievances for acts under the *Energy Act*, 2019. There is no indication that the plaintiff has sought redress through the said procedures under the *Energy Act*, 2019. I agree with Counsel for the 4<sup>th</sup> Respondent that this matter should have first been presented before the Energy and Petroleum Regulatory Authority. Consequently, this matter is prematurely before this Honourable Court. There is clearly a dispute resolution mechanism provided under the *Energy Act*, 2019 which must be followed.



In the case of Speaker of National Assembly v Njenga Karume (1992) 1KLR 425, the Court of Appeal held'

“There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by *the constitution* or any Act of parliament that procedure should have been strictly followed.” (Emphasis mine)

17. Again in Cyrus Komo Njoroge v Kiringa Njoroge Gachoka & 2 Others (2015) KLR, the Court held;

“ The principle that where *the Constitution* and or statute has provided a dispute resolution procedure, then that procedure must be strictly followed is well established.” The Court further held “ The plaintiff must therefore exhaust the remedy by the *Land Registration Act*. The upshot of the foregoing is that the suit herein is dismissed.”

18. I agree with the findings by the Court in the two decisions. Consequently, the Notice Preliminary Objection dated 24<sup>th</sup> July, 2024 is upheld and the Notice of Motion application dated 19<sup>th</sup> August, 2024 as well as this suit are hereby struck against the 4<sup>th</sup> defendant/respondent with costs.

19. Orders accordingly.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr Nakhone for the plaintiff/Applicant.
2. Mr. Muchai for the 4<sup>th</sup> Defendant/Respondent
3. Bett C/A

