



REPUBLIC OF KENYA



**Nyagudi v Agricultural Finance Corporation & 2 others (Civil Suit
E176 of 2021) [2023] KEHC 1322 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1322 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E176 OF 2021**

CW MEOLI, J

FEBRUARY 23, 2023

BETWEEN

HON. KENNEDY ODHIAMBO NYAGUDI PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION 1ST DEFENDANT

LEGACY AUCTIONEERS SERVICES 2ND DEFENDANT

KENYA POWER & LIGHTING CO. LTD 3RD DEFENDANT

RULING

1. Hon Kennedy Odhiambo Nyagudi (hereafter the Plaintiff) has sued the Agricultural Finance Corporation, Legacy Auctioneering Services and Kenya Power & Lighting Co Ltd (hereafter the 1st, 2nd & 3rd Defendant(s)). Against the 1st and 2nd Defendant he seeks a permanent injunction to restrain them, by themselves, their agents, employees, and others from interfering with the Plaintiff's quiet possession of all the property known as LR No 10118/8 (IR No 78736) located in Karen, Nairobi (hereafter the suit property) and against the 3rd Defendant the Plaintiff seeks special damages in the sum of Kshs 35,109,582/- being the sum equivalent to monies payable by the Plaintiff to the 1st Defendant, general damages, and costs.
2. It was averred that at all material times, the Plaintiff was the owner of the suit property which was charged to the 1st Defendant as security in respect of a loan in the sum of Kshs. 20,000,000/- advanced to the Plaintiff in 2015 for purposes of expanding his agricultural operations on the suit property and he relied on the services of the 3rd Defendant to run the operations. That based on a legitimate expectation in that regard, the Plaintiff assumed the risk of executing a charge on his residential home ; that because of breach of the legitimate expectation and through negligence on the part of the 3rd Defendant in its duty to supply and provide reliable electricity, the Plaintiff fell into default of loan



- repayments to the 1st Defendant. As a result of which the 1st Defendant has commenced realization of the security and accordingly instructed the 2nd Defendant.
3. The 1st and 2nd Defendant filed a statement of defence dated July 24, 2021 denying the averments in the plaint and averred that the bulk of assertions in the Plaintiff's pleadings are unrelated to the loan agreement between the Plaintiff and the 1st Defendant and the suit is a plot to frustrate the 1st Defendant's initiative to exercise its statutory power of sale.
 4. The 3rd Defendant equally filed a statement of defence denying the key averments in the plaint. The said Defendant also filed a notice of preliminary objection dated August 29, 2021 challenging the court's jurisdiction to hear and determine the claim against the 3rd Defendant said to offend the provisions of the *Energy Act* 2019 as read together with the *Energy (Complaints and Dispute Resolution) Regulations* 2012, Article 159(2)(c) and 169(1)(d) & (2) of the *Constitution* of Kenya and Section 9(2) & (3) of the *Fair Administration Action Act*.
 5. The parties canvassed the preliminary objection by way of written submissions. Counsel for the 3rd Defendant anchored his submissions on the decisions in *Adero Adero & Another v Ulinzi Sacco Society Limited* [2002] eKLR, *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* [2019] eKLR and *United Millers Ltd v Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 Others* [2021] eKLR to assert that the present dispute falls within the jurisdiction of Energy & Petroleum Authority and the Energy & Petroleum Tribunal pursuant to the provisions of the *Energy Act*.
 6. Further citing several decisions including in *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR, *Kenya Ports Authority v Modern Holdings E.A Ltd* [2017] eKLR, *Owners of Motor Vessel "Lillian S" v Caltex Oil (K) Ltd* [1989] KLR, and *John Musakali v Speaker County Assembly of Bungoma & 4 Others* [2015] eKLR he submitted that under Section 5 of the *Civil Procedure Act* this court lacks jurisdiction to entertain the instant suit which ought to have been referred to the Energy & Petroleum Authority and the Energy & Petroleum Tribunal being a specialized tribunal established pursuant Article 162 & 169(1)(d) of the *Constitution*. For this proposition he relied on the decision in *Law Society of Kenya v Centre for Human Rights and Democracy & 13 Others* [2013] eKLR inter alia.
 7. Restating the provisions of the *Energy Act* 2019, *Energy (Complaints and Disputes Resolution) Regulations* 2012, and dicta in *Abidha Nicholus v Attorney General & 7 Others, Speaker of the National Assembly v Njenga Karume* [1992] 1 KLR 425 and *Cyrus Komo Njoroge v Kiringa Njoroge Gachoka & 2 Others* [2015] eKLR counsel stated that the Energy & Petroleum Regulatory Authority is empowered to investigate and determine complaints or disputes between parties and grant equitable reliefs and that the alternative judicial forum with jurisdiction to determine the Plaintiff's grievance was the Energy and Petroleum Tribunal.
 8. Counsel took the position that the Plaintiff had failed to exhaust available alternative dispute resolution mechanisms and prematurely invoked this court's jurisdiction which action renders his suit an abuse of the court process. He invoked the provisions of Section 9 of the *Fair Administration Action Act*, and precedents including *Republic v Energy Regulatory Commission & 2 Others* [2018] eKLR, *Abidha Nicholus (supra)*, *Mutanga Tea & Company Ltd v Shikara Limited & Another* [2015] eKLR, *Republic v Procurement Administrative Review Board & Energy Sectors Contractors Association*, and *Josiah Tatiya Kipelian v Dr. David Ole Nkadienye & 2 Others* [2014] eKLR to support the view.
 9. Counsel submitted that this court ought to allow the relevant statutory bodies to exercise their jurisdiction with respect to the instant suit in order to promote alternative forms of dispute resolution. A host of authorities were cited in that regard. These include Kenya Power & Lighting Co. Ltd v



George Orina Oganga [2020] eKLR, Kenya Power & Lighting Co. Ltd v Samuel Mandere Ogeto [2018] eKLR, Bernard Nyakundi Osugo v Kenya Power & Lighting Co. Ltd [2021] eKLR, Mount Kenya Safari Club Ltd v Kenya Power & Lighting Co. Ltd [2021] eKLR, Joseph Nzyoki Mwanthi v Kenya Power & Lighting Co. Ltd [2017] eKLR, and Nedbank Swaziland Ltd v Sandile Dlamini No. (144/2010) 2012 SZHC 30 as cited in Party Independent Candidate Kenya v Mutula Kilonzo & 2 Others [2013] eKLR. The court was urged to allow the preliminary objection and to dismiss the suit with costs to the 3rd Defendant.

10. On behalf of the Plaintiff, counsel called to aid the decisions in Mukisa Biscuit Manufacturers Co. Ltd v West End Distributors Ltd (1969) EA 969, Litein Tea Factory Co. Ltd & Another v Davis Kiplangat Mutai & 5 Others [2015] eKLR and AKN v JNM [2014] eKLR to submit that the objection raises factual questions that require the court's examination and determination. He advanced the view that the 3rd Defendant having acquiesced to the court's jurisdiction by entering appearance and filing pleadings was estopped from raising a jurisdictional challenge. Counsel urged the court to dismiss the preliminary objection and allow the matter to proceed on the merits.
11. The court has considered the parties' respective pleadings, the submissions, and authorities. The Defendant's preliminary objection (PO) is fundamentally premised on provisions of the Energy Act, 2019 as read together with the provisions of the Energy (Complaints and Disputes Resolutions) Regulations, 2012 and Section 9(2) & (3) of the Fair Administration Act. Does the objection qualify as a pure point of law that is well grounded?
12. Concerning the nature of a preliminary objection, the law is settled. In Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J. A. stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

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 preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

13. In the case of Oraro v Mbaja [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and



it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

14. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR where the latter court emphasized that: -

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).”

15. And in *Mulemi v Angwenye & Another* (Civil Appeal 170 of 2016) [2021] KECA 214 the same court further distilled the ingredients of a preliminary objection as elucidated in *Mukisa Biscuits* (supra) by stating as follows:-

“.....a preliminary objection may be distilled as follows:

- i) It must be a pure point of law;
- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
- iii) If argued as a pure point of law, it may dispose of the suit;
- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion” .

16. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi. JA (as he then was) famously stated:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. The Supreme Court *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR on its part further observed on the question of jurisdiction that; -

“(68) A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of*



the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...”

18. The High Court draws its original jurisdiction to entertain disputes from Article 165 (3) of the Constitution. The 3rd Defendant’s objection is premised on the provisions of Sections 10, 11(e), (f), (i), (k), & (l); 23; 24; 36; 40; 42; 159(3); 160(3) and 224(2)(e) of the Energy Act 2019 as read together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations 2012. It is the 3rd Defendant’s view that the Plaintiff’s first port of call in seeking redress for the grievances raised in his suit against the 3rd Defendant is the Energy & Petroleum Regulatory Authority from which an appeal lies to the Energy Petroleum Tribunal and finally to this Court.
19. A cursory review of the plaint herein reveals that the Plaintiff has presented a multi-faceted cause of action against the Defendants. The cause of action against the 1st Defendant is based on a financing facility between the parties whereas the 2nd Defendant is an agent of the 1st Defendant appointed for purposes of realization of the security apparently in respect of the pleaded accumulated arrears amounting to Kes.35,109,582.00/-. The key relief sought against the 1st and 2nd Defendants is; -

“A permanent injunction, restraining them from jointly and severally, by themselves, their agents, employees and appointees from interfering with the Plaintiff’s quiet possession of all that property known as L.R No. 10118/8 (I.R No. 78736)”.
20. On the other hand, the 3rd Defendant is sued in its capacity as a utility supplier and or distributor of electricity. It is pleaded against the said Defendant that by reason of its negligence and failure to supply reliable electricity and in breach of the Plaintiff’s legitimate expectation to dependable electricity, the Plaintiff defaulted on his payments in respect of the financial facility advanced by the 1st Defendant. Thus, the reliefs sought against the 3rd Defendant include: -
 - a. Special damages of Kshs. 35,109,582.00/- as would be payable to the 1st Defendant.
 - b. General damage
 - c. Costs of the suit”.
21. Simply put, it is the Plaintiff’s pleaded case that he defaulted on his commitment on the financial facility advanced to him by the 1st and 2nd Defendant due to the 3rd Defendant’s negligence in rendering services and hence the 3rd Defendant ought to settle the resultant arrears accruing on the facility as special damages. Thus, the foundation of the Plaintiff’s pleaded case is easily discerned from his pleadings, and requires no further examination. The objection raises a pure point of law.
22. One of the objects of the Energy Act 2019 is to provide a legal framework for the regulation, production, supply, and use of electricity and for connected purposes. The functions of the Energy and Petroleum Regulatory Authority (hereafter the Authority), created under section 9 of the Energy Act 2019 include the regulation of transmission, distribution , supply and use of electrical energy. The Authority’s powers under the Act include the power to make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under the Act; to issue orders in writing requiring acts or things to be performed or done; to prohibit acts or things from being performed or done and to prescribe periods or dates upon, within or before which such acts or things



shall be performed or done or such conditions shall be fulfilled; and to issue orders or directions to ensure compliance with the Act.

23. The Energy (Complaints and Dispute Resolution) Regulations, 2012 (hereafter the Regulations) enacted under the Energy Act 2006 remain in force pursuant to the provisions of section 224 (1) (e) of the Energy Act 2019. The Regulations provide inter alia that: -

“

“2. These regulations shall apply to any person who has a complaint or a dispute regarding any license, permit, contract, code, conduct, practice, or operation of any party of any matter regulated under the Act.

.....

4. These regulations shall apply to complaints and disputes in the following areas

–

(a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of services, quality of supply, tariffs, way leaves, easements or right-of-ways in relation to the generation, transmission, distribution, supply and use of electrical energy.

(b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

(c) any other activity and or matter regulated under the Act”.

24. The Plaintiff's grievance against the 3rd Defendant hinges on negligence and legitimate expectation as pleaded in paragraph 22 of the plaint which states;-

“22. Due to breach in the legitimate expectation, and the negligence occasioned by the 3rd Defendant in carrying out its duty to supply and provide electricity to the people of Kenya, the Plaintiff is in default of loan payments payable to the 1st Defendant.” (sic)

25. Consequently, pursuant to sections 11,23, and 24 of the Energy Act 2019 as read with Regulations 2 and 4 of the Regulations and applying the dicta in Speaker of National Assembly (supra) there is a clear procedure prescribed for processing a dispute of the kind pleaded by the Plaintiff against the 3rd Defendant in this case. Under the Energy Act 2019, the initial jurisdiction for entertaining the Plaintiff's grievance lies with the Authority, and if aggrieved by the Authority's decision, the Plaintiff's next recourse lies in an appeal to the Energy and Petroleum Tribunal and finally to this Court.

26. The foregoing represents the settled jurisprudence to be found in the decisions cited by the 3rd Defendant, namely Kenya Power & Lighting Co. Ltd v George Orina Oganga [2020] eKLR, Kenya Power & Lighting Co. Ltd v Samuel Mandere Ogeto [2018] eKLR, Bernard Nyakundi Osugo v Kenya Power & Lighting Co. Ltd [2021] eKLR, Mount Kenya Safari Club Ltd v Kenya Power & Lighting Co. Ltd [2021] eKLR, Joseph Nzyoki Mwanthi v Kenya Power & Lighting Co. Ltd [2017] eKLR. The question of acquiescence or submission of the 3rd Defendant to the jurisdiction of this court, raised



by the Plaintiff in deflecting the preliminary objection is to no avail. The procedure for redressing a grievance is prescribed and jurisdiction conferred by the Constitution and statute.

27. The rationale behind the line of authorities above was spelt out by the Court of Appeal in the case of *Mutanga Tea and Coffee* (supra). The Plaintiff therein was aggrieved by decisions made inter alia by a local authority under the Physical Planning Act, in connection with a development it was opposed to. Eschewing the mechanism for redress stipulated in Section 29 of the Physical Planning Act, the aggrieved party filed an action in the High Court. The action was struck out in limine on account of a jurisdictional challenge raised by the defendants by way of a preliminary objection. The Court of Appeal dismissed the appeal brought by the aggrieved party, observing that the Physical Planning Act did not envisage the possibility that some aggrieved parties could sidestep the dispute resolution mechanism under the Act to bring their grievances directly to the High Court.

28. I find it useful to quote in extenso the reasoning of the Court of Appeal in that case:

“The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance.

This Court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. *Speaker Of The National Assembly v. Karume* (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

“[W]here 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.”

(See also *Kones v. Republic & Another Ex Parte Kimani Wa Nyoike & 4 Others* (2008) 3 KLR (ER) 296).

It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word “including” leaves no doubt that Article (159)(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.



Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In *Rich Productions Ltd. v. Kenya Pipeline Company & Another*, Petition No. 173 Of 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

“The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.”

29. The omnibus nature, whether deliberate or not, of the pleadings filed by the Plaintiff conflated what appear to be two distinct causes of action against different parties, each calling for a different avenue for redress. I dare say that ex facie, the nexus between the two causes appears tenuous. The Supreme Court recently stated in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR that: -

“In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute”

.....To give a prescriptive answer to the jurisdictional question, the first port of call is to determine the nature of the dispute.”

30. I think I have said enough to demonstrate that the preliminary objection by the 3rd Defendant is well grounded. The objection is upheld. Consequently, the Plaintiff's claim against the 3rd Defendant is hereby struck out with costs to the 3rd Defendant. To obviate future confusion regarding the parties to and nature of the dispute herein, the court directs, and grants leave to the Plaintiff to amend his plaint accordingly within 14 days of today's date.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Rabala

For the 1st and 2nd Defendant: Ms. Mutsili h/b for Mr. Mabonga

For the 3rd Defendant: Mr. Ododa h/b for Mr. Ochieng

