



**Olang v County Government of Kwale & 3 others (Environment & Land
Case 165 of 2021) [2023] KEELC 19327 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19327 (KLR)

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

**AE DENA, J
JULY 31, 2023**

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. This ruling is subject of two preliminary objections dated February 22, 2023 and April 22, 2022.
2. The preliminary objection dated February 22, 2023 is by the 1st defendant, that the entire suit contravenes the provisions of Article 186 of the *Constitution* of Kenya 2010 as read together with section 5[2] [c] of the *County Governments Act 2012*, thereby rendering the suit herein a nullity in law.
3. The preliminary objection dated April 27, 2022 is by the 4th defendant that this court lacks jurisdiction to hear and determine the suit as against the 4th defendant as it offends the provisions of sections 3[1],10,11[e][f][k] & [l];23;24;36;40;42 and 224[2] [e] of the Energy Act 2019 together with regulations 2,4,7 and 9 of the *Energy [Complainants And Disputes Resolution]Regulations 2012* as read together with Article 159[2][2][c] and 169[1][d] and [2] of the *Constitution* of Kenya 2010 and sections 9[2] and [3] of the *Fair Administration Act,2015*.
4. The preliminary objections were dispensed by way written submissions which parties filed and exchanged. The Attorney General did not participate.



1st Defendants Submissions

5. The 1st defendants' submissions, were filed on March 15, 2023 by the firm of Madzayo Mrima & Jadi Advocates. It is submitted that the Constitution established the counties under article 6[2] and provides that governments at the national and county levels are distinct and inter dependent and are required to conduct their relations on the basis of consultation and cooperation.
6. It is submitted that the construction of the primary school on the plaintiff's land is in light of the provisions of article 186[1]. That under the Constitution the building of primary schools is a function reserved for the national government. The court is urged to find that building of primary schools is *ultra vires* the functions of county government and the suit is therefore wrongly brought against the 1st defendant and as such the same should be struck out with costs to the 1st defendant.

4th Defendant's Submissions

7. The submissions are on the preliminary objection dated April 27, 2022. It is submitted that the issue of jurisdiction in relation to the Energy Act as against the 4th defendant has been deliberated and settled by various courts. The court is referred to the holding in the Court of Appeal Kisumu in Civil Appeal No 42 of 2021 Abidha Nicholus V Attorney General & 7 Others, National Environmental Complaints Committee [NEEC] & 5 Others [Unreported] where the court highlighted the mechanisms for handling disputes against the 4th defendant in matters enshrined under the Energy Act 2019 as follows; -
 1. The first is to raise a complaint with the Energy and Petroleum Regulatory Authority [EPRA]
 2. The second is the Energy and Petroleum Tribunal [EPT]
 3. The third is the High Court [only upon exhaustion of the appellate process before the Energy and Petroleum Tribunal.
8. The 4th defendant invoked the doctrine of exhaustion which imposes an obligation on parties to exhaust any alternative dispute resolution mechanism before embarking on a court process. The court is referred to the holding in William Odhiambo Ramogi & 3 Others Versus AG & 4 Others; Muslims for Human Rights & 2 Others [Interested Parties]2020 eKLR.
9. It is submitted that the court cannot arrogate itself jurisdiction to deal with this matter. That subject matter of the suit is on a purported installation of connection of electricity and passing of wayleaves onto the alleged parcel of land. The court is referred to Amy Kagendo Mate Versus Prime Bank Credit Reference Bureau Africa Ltd [2013] eKLR where Justice J Ngugi struck out a petition that sought injunctive reliefs against the respondents therein on account of bypassing a statutory adjudication remedy in favour of the High Court.
10. It is submitted that there is a clear dispute resolution mechanism available under the Energy Act which must be followed before a matter is brought before the court. The court is asked to refer the matter to the Energy & Petroleum Tribunal which has the jurisdiction to determine the instant dispute. The 4th defendant further seeks for the costs of the preliminary objection.

Plaintiff's Submissions

11. It was submitted that the suit preceded the setting up of the county government and cannot be knocked out on the basis of the County Government Act No 17 of 2012 and the Constitution 2010. That the 1st defendant's preliminary objection was based on section 5[2][c] of the said Act which was passed



on July 24, 2012 while the suit was filed in September 2012 before devolution. That as at that time it was the Kwale County Council that was being sued. Reliance is placed on the holding in *Wachira Nderitu Ngugi & Co Versus Town Clerk City Council of Nairobi* [2016] eKLR and in *Republic Versus Town Clerk of Webuye County Council & Another* HCCC 448 of 2006

- 12 On the 4th defendant's preliminary objection, it is submitted that despite the electric wire lines passing on the plaintiff's parcel of land, the same does not entail a dispute between a consumer and retailer of power. That the 1st and 2nd defendants authorized the 4th defendant to lay power lines in the plaintiff's land without the consent of the Plaintiff. That the defendants are jointly liable and hence the suit cannot be lodged against the 4th defendant alone.
- 13 Further that the dispute involves the use of land as it entails encroachment and building of classrooms on the plaintiff's land without consent and which led to the connection of electricity. The suit is referred to as a mixed grill and it is submitted that the ELC court is the only forum to handle the dispute. The court is referred several authorities including the holding in *Karisa Chengo & 2 Others V R* [2015] on the jurisdiction of the court in handling disputes relating to Section 13 of the ELC Act. The court was lastly referred to the holding in *Aydem Company Limited Versus Kenya Power & Lighting Company Limited* [2017] eKLR where B.N. Olao J held that the court had jurisdiction since the defendants like in the instance case had not complied with section 46 of the Energy Act which required notice to an owner of the land before a dispute can be brought within the purview of the said Act.

ANALYSIS AND DETERMINATION

- 14 I have considered the objections and the submissions in support and against them. The main issue for determination is whether the said objections are merited. I will start with whether the suit contravenes Article 186 of the *Constitution* and section 5[2] [c] of the *County Governments Act* 2012.
- 15 In the case of *Nitin Properties Ltd v Singh Kalsi & Another* [1995] eKLR a preliminary objection was defined as an objection that raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It was stated that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd* (1969) EA 696 it was defined to mean an objection that 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 may dispose of the suit. These could cover *inter alia* jurisdiction and limitation.
- 16 Applying the above test to the instant case it is not disputed that the plaintiff is the registered owner of parcel no Kwale/Gandini/108 as per the copy of title deed attached. It is also true that there has been erected a building on the said parcel being a primary school the 2nd defendant and it is also not disputed that the 4th defendant has connected electricity on the suit parcel. It is also not in dispute that the suit was filed against the Kwale County Council which is defunct. That latter the suit was amended to replace it with the County Government of Kwale. I'm satisfied that the preliminary objections meet the test.
- 17 I will start with whether the suit contravenes Article 186 of the *Constitution* and section 5[2] [c] of the *County Governments Act* 2012. Article 186 states; -
186. Respective functions and powers of national and county governments



- (1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.
- (2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.
- (3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

18 What then are the functions set out in the 4th schedule in respect of construction of schools. For the National Government Part 1 (15) the following are stipulated; -

15. Education policy, standards, curricula, examinations and the granting of university charters and higher learning and primary schools, special education, secondary schools and special education institutions.

19 The objection is premised on the ground that education is not devolved and the building of primary schools is a function reserved for the national government. That the arrangements and meetings herein were purely a national government affair and as such the 1st defendant has been wrongly sued. According to the 1st defendant, the county government is not the government as referred to under article 186 of the *constitution*. It is the defunct County Council of Kwale that first engaged the plaintiff in the negotiations for exchange of the plots on which the 2nd defendant now stands. As such they are responsible for the said construction of the school on the Plaintiff's parcel.

20 This suit was filed on September 24, 2012 and the claim is grounded on the deliberations of a meeting allegedly held on June 30, 2011 between the plaintiff and County Council of Kwale where certain conclusions were drawn in favor of the plaintiff and exchange with land agreed. While it is of importance to note that devolution did not kick in immediately as pointed by Mr. Jengo counsel for the plaintiff, for me the critical issue is the transition and who takes over the functions of the defunct county councils. This would then go with any alleged liabilities or claims that may have mutated into litigation. It does not matter the functions as set out under Schedule 4 because what is in dispute already happened under the auspices of the previous regime. The issue is who should take over the litigation, defend the suit and bear the burden of the judgement whatever the outcome. In the case of *Dr J. A. S. Kumenda and Another v The Clerk, Municipal Council of Kisii and Others*, Kisii HC ELC Misc. App. No. 3 of 2013 [2013]eKLR S. Okongo J when faced with the proposition that the Transition Authority should have in a way stepped in, had this to say;-

I don't think that it was the intention of Parliament having regard to the temporary nature of the life of the Transition Authority as an institution to give it power to continue with or defend suits pending by or against local authorities that were constituted under the repealed Local Government Act. If that was the intention of the legislature, it would have been stated expressly in the said section of the *County Governments Act*."

21 The 1st defendant did not make any reference to case law in support of their quest to have the suit struck out. Counsel for the plaintiff referred the court to the case of *Wachira Nderitu Ngugi & Co. Advocates vs. Town Clerk City Council of Nairobi* (2016) eKLR where Odunga J as he then was cited a number of decisions which he concurred with and which all point to the position that the County Governments are the natural predecessors and legal successors of the defunct local authorities. The learned judge



quoted with approval the decision of Majanja J in *Republic Vs. Town Clerk of Webuye County Council & Another* HCCC 448 of 2006 which I have also read. I picked the following insights by Majanja J;-

- 14 Despite the statutory lacuna's in the County Government Act and the *Urban Areas and Cities Act*, the rights accrued as a result of the litigation are preserved upon repeal of the Local Government Act by the *Constitution*. Section 33 of the Sixth Schedule to the *Constitution* provides for succession of institutions upon promulgation. It states that, "An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name."
15. In my view and taking into account the legal provisions I have cited, the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment.'
- 22 While the above related to the enforcement of a judgement that had already accrued in my view it applies on all force to the present case except that in the present case the matter is yet to be decided on merits.
- 23 Based on the foregoing I find that the 1st defendants' objection is not sustainable. This then takes me to the preliminary objection raised by the 4th defendant Kenya Power & Lighting Company Limited.
- 24 The 4th defendant's objection is premised upon the principle of exhaustion and whose rationale is that where there is a special procedure for redress of grievance set under the *Constitution* or an Act of parliament the same must be strictly adhered to. The court is invited to first surmount the hurdle of jurisdiction before it embarks on hearing and determining this matter and several Court of Appeal decisions and Superior courts were brought to this court's attention and which I considered.
- 25 The court has been referred by counsel for the 4th defendant to several provisions namely, sections 3,10,11(e), (f), (i), (k) & (l);23,24,36,40;42;167 and 224 (2) (e) of the Energy Act. Regulations 2,4,7 and 9 of the *Energy (Complaints and Disputes Resolution Regulations)* 2012; The Energy Tribunal Rules, 2008; Article 159(2) (c) of the *Constitution* of Kenya 2010 and section 9(2)(3) of the Fair Administrative Actions Act 2015. According to the 4th defendant, the plaintiff's case is purely about wayleaves and easements as set out in the Energy Act (herein the Act). I have also considered the comprehensive analysis of these legal provisions by counsel for the 4th defendant as they relate to the present case and in cementing the 4th defendants proposition that the claim herein is one that exclusively falls under the jurisdiction of the Energy & Petroleum Regulatory Authority or in the alternative the Energy & Petroleum Tribunal.
- 26 I have considered the plaintiffs pleadings. When this suit was commenced by way of the plaint dated November 20, 2012, the claim was to enforce the arrangements that had been agreed on compensation for 'compulsory acquisition' of the plaintiff's land. However thereafter the suit was amended to firstly substitute the Kwale County Council and further amended to incorporate the 4th defendant as stated in paragraph 5(b) of the Further Amended Plaint filed on March 25, 2022. I find it necessary at this early opportunity to point that before the further amendment jurisdiction was not an issue. It cannot have been an issue to the extend that the 4th defendant was not yet in the picture and the suit was properly before the court. With due respect to counsel for the 4th defendant it would be improper to call for the dismissal of the entire suit on the basis of the objections related to Energy Act herein.



27 I will then address the contention that the suit does not fall under the Energy Act since according to the plaintiff, her case is of trespass by the 4th defendant. It is stated in paragraph 5(b) of the Further Amended Plaintiff filed on March 25, 2022 that the 4th defendant did subsequently to the filing of this suit connect electricity and passed a wayleave onto the aforesaid parcel of land without the plaintiff's consent as the registered owner. The plaintiff claims damages for trespass to property. Upto to this point the alleged absence of consent for the entry into the plaintiff's land by the 4th defendant clearly makes the claim one of trespass as envisaged under section 3 (1) of the Trespass Act, Cap 294. This being the case then this court is seized of jurisdiction to hear and determine claims for trespass over another's land pursuant to the provisions of section 13 of the Environment & Land Act court Act which stipulates as follows:

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

28 It is further stated at paragraph 8 (c) of the Further amended plaintiff that as a consequence of the 4th defendant's acts in the plaintiff's land passing the wayleave the plaintiff has lost use of a substantial portion of his land as per the valuation report provided including the fees for preparation of the valuation. My understanding of this part is that the plaintiff has lost the use of part of her land and which is a claim within the jurisdiction of this court by dint of section 13 above.

29 What about the import of failure to issue notice to the owner of the land as urged by the plaintiff. Sections 46 and 47 of the Energy Act provide as follows:

- 46 (1) "No person shall enter upon any land, other than his own –
- (a) to lay or connect an electric supply line or
 - (b) to carry out a survey of the land for the purposes of paragraph (a) except with the prior permission of the owner of such land



(2) “The permission sought in sub-section (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry”

47 (1) “Any owner, after receipt of the notice and statement of particulars under Section 46 may assent in writing to the construction of the electric supply line upon being paid such compensation as may be agreed and any assent so given shall be binding on all parties being an interest in the land, subject to the following provisions –

.....

30 I have read the decision of *Aydem Company Limited Versus Kenya Power & Lighting Company Limited* [2017] eKLR where B.N. Olao J made a finding that failure by the respondent therein to comply with the provisions of the *Energy Act* (2006) took this dispute out of the purview of the Commission as envisaged under the provisions of Sections 48, 49 and 50 of the *Energy Act*. The court found that this court’s jurisdiction was properly invoked following failure to serve notice on the owner and who had no opportunity to accept or decline. I associate with this finding for the reason that it was never denied by the 4th defendant that the plaintiff was never notified.

31 Assuming I were to be found wrong on the above, my view is that this issue is best handled under the mixed grill doctrine. Every case is decided upon its own facts and circumstances. This is because there can be no one jacket fits all. I have reviewed the facts as stated in the pleadings. The plaintiff does not only raise the issue of 4th defendant having connected electricity and passed a wayleave on the suit parcel without her consent but further prays for judgement against the defendants for exchange of land as earlier agreed between parties. The plaintiff also prays for removal of structures on the land in the event that the said exchange does not take place and for damages for trespass and special damages.

32 I have already observed earlier in this ruling what the claim pertained before the further amendments and the purpose of the same. The claimant then finds itself in a situation where during the pendency of proceedings wayleaves are erected arising out of the same facts and cause of action. However, it is stated the plaintiff cannot bring the same within the ambit of the existing suit. From the preliminary objection it is expected her first port of call would have been the Commission. I think this cannot have been the intention of the legislature to delink issues when a matter is already filed before a court of competent jurisdiction where all issues can be looked at wholesomely. And this is the dilemma and uniqueness of this case. I am also guided by the dictum in *Nancy Makokha Baraza vs Judicial Service Commission & 9 Others* [2012] eKLR where the Court expressed itself *inter alia* as follows:

The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises.”

33 It would then be important to look at the views our courts have taken on the question of mixed grill cases. In *Tasmac Ltd vs Roberto Marci & 2 Others* [2013] eKLR the Environment and Land Court in Malindi held the view that where the claim cannot be severed, the matter can be heard in either of the courts that have jurisdiction in one of the matters in issue. In the case of *Taib Investment Ltd vs Fahim Salim Said & 5 Others* [2016] eKLR O. Angote J held that: -

Where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous Tribunals or bodies, and where those issues cannot be dealt with separately, it is only this court, pursuant to the provisions of Article 162(2)(b) of the *Constitution*, that can deal with all those issues”



34 Also see justice J.Ngugis exposition of the concept of mixed grill and the Pre-dominant Purpose Test in the case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR. In the instant suit the main issue is the land exchange issue as well as trespass.

35 I do not see how the issues can be severed because they are dependent upon the other. I would agree with the plaintiff's submissions that the dispute between the plaintiff and the 4th defendant is so intertwined with that between the plaintiff and the other defendants and cannot be resolved between the plaintiff and one defendant separately. It would also defeat the very essence of the objectives of the *Civil Procedure Act* which are also echoed in the Environment & Land Court Act. I therefore make a finding that this court has the requisite jurisdiction to determine this suit.

34 The upshot is that the objections dated April 22, 2022 and February 22, 2023 are not merited and are hereby dismissed. Costs shall follow the event.

It is so ordered.

DELIVERED AND DATED AT THIS 31ST DAY OF JULY ,2023.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Jengo for the Plaintiff

Ms. Muronji for the 1st Defendant

N/A for 2nd and 3rd defendants

Mr. Ododa for the 4th Defendant

Court assistant: Disii

.

