



Sombo & 2 others v Ketraco & 3 others (Environment & Land Case E021 of 2022) [2023] KEELC 21061 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21061 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E021 OF 2022**

AE DENA, J

OCTOBER 25, 2023

BETWEEN

SOMBO K SOMBO 1ST PLAINTIFF

DZOMBO M KOMBO 2ND PLAINTIFF

KOMBO W MWAMUMBO 3RD PLAINTIFF

AND

KETRACO 1ST DEFENDANT

DEVKI STEEL MILLS LIMITED 2ND DEFENDANT

ELEMECH ENGINEERING [KENYA] LIMITED 3RD DEFENDANT

KENYA POWER & LIGHTING CO LTD 4TH DEFENDANT

RULING

1. The court is tasked with determining the 4th Defendant’s preliminary objection dated 5/12/2022 and the Notice of Motion dated 10/2/2023 by the 2nd Defendant.

The Preliminary objection

2. The preliminary objection questions the court jurisdiction to hear and determine this dispute as against Kenya Power & Lighting Ltd. It is stated that the suit should be struck out for offending the provisions of Section 11 of the *Civil Procedure Act*, Sections 3[1],10,11[e],[f] [i] [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[Complaints and Disputes Resolution] Regulations 2012 as read together with Article 159[2][c] and 169[1][d] and [2] of *the Constitution* of Kenya 2010 and Sections 9[2] and [3] of the *Fair Administrative Action Act* 2015.



3. The PO is supported by the 1st and 2nd defendants. The 3rd defendant never entered appearance. It is opposed by the plaintiffs. The grounds upon which the preliminary objection is raised are discussed elsewhere in this ruling.

The Notice of Motion

4. The Notice of Motion is brought under the provisions of sections 1A,1B and 3A of the Civil Procedure Act, Order 2 Rule 15, Order 4 Rule 1[3] & [6] and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. it is prayed that;
 1. Spent.
 2. Spent
 3. That this honourable court be pleased to strike out the Plaintiffs suit against the 2nd Defendant.
 4. That in the alternative to prayer [3] hereinabove, the 2nd Defendant be discharged from the suit and these proceedings altogether.
 5. That costs of this application be provided for.
5. The application is premised upon grounds on its face and the supporting affidavit of Dennis K Wambua Advocate acting on behalf of the 2nd Defendant. According to the deponent, the Plaintiffs have failed to outline specific details as to how the Defendants have dug holes on the suit property and are in the process of installing electricity transmission lines. That the 2nd Defendant's have not been directly accused of trespass against the Plaintiffs and what have been made are mere allegations. The 2nd Defendant states that it is a private company not in anyway involved in the activities of generating, transmitting, distribution and supply of electrical energy and could have not in anyway trespassed on the suit property as alleged.
6. It is stated that for the above reason the suit fails to disclose a reasonable cause of action against the 2nd Defendant. Further that the Plaintiffs lack locus standi as they do not own the suit property and have failed to file consent or authorization from Samburu South Group who own the same, to file and prosecute this suit as required under Order 9 Rule 2 of the Civil Procedure Rules 2010. That allowing a suit with no reasonable cause of action to proceed will be prejudicial to the 2nd Defendant and a violation to its right to a fair hearing as provided for in the Constitution. The court is urged in the interest of justice to allow the application as prayed.

Response

7. In response to the application the Plaintiffs filed a replying affidavit sworn by Sombo K Sombo. It is stated that the application is bad in law as it is made out of unfounded legal basis and concealment of material facts. That on 12/8/2016 the officials of Samburu South Group Ranch acknowledged that Mwanyota Clan family members and the Plaintiff are the bonafide ancestral land owners of the property. That the suit is brought on behalf of Samburu South Group as the Plaintiff are the representatives of Mwanyota/Bekalimbo Clan who are registered proprietors /beneficial / legal owners of the land held under title as Samburu South Group Ranch 113 the suit property. That for that reason the Plaintiffs are authorized to transact any business in relation to the suit property.
8. The deponent denies the allegation that the suit property does not raise any cause of action and states that at paragraph 5 of the Further Amended Plaint they have in specific terms particularized and



disclosed the cause of action pointing the defendants illegally invaded the suit property, dug holes and erected electricity poles. That it has been demonstrated at paragraphs 5,7 and 8 of the said pleading that the defendants without any legal basis invaded the suit property and started using the same without the Plaintiffs consent. That the right to a fair hearing as envisaged in *the Constitution* should be balanced by having cases heard and determined on merit. The court is urged to dismiss the 2nd Defendant's application herein with costs.

Submissions

9. By consent of the parties the application and PO were dispensed by way of written submissions. Parties were given an opportunity to highlight on the submissions on 26/06/23. Mr. Wambua counsel for the 2nd defendant supported the preliminary objection. On the application the 2nd defendant submitted that the plaintiff lacked locus standi and it was not clear if they could legally bind the Samburu South Group or they are proper agents of the ranch to bind them on any judgement since they did not file authority to act. Further that they could not sustain a claim for trespass since they had not produced title. Counsel urged that the 2nd defendant should be released from the burden of defending the suit.
10. The 1st defendant urged that pursuant to section 24(1) of the *Energy Act* anybody who is not satisfied with the decision of the Authority has a right to appeal to the Energy Tribunal. That section 36(4) and section 40 of the *Energy Act* grants the Tribunal appellate jurisdiction over appeals arising from the decisions of the Authority and thereafter appeals lies to the High Court pursuant to section 37(3). It is stated that the ELC under section 13(4) has jurisdiction to hear appeals arising from the Energy Tribunal touching on wayleave compensation. The instant arising from an alleged construction of a transmission line within the suit property should have been first lodged at the Authority. Further reference is made to article 159(2) of *the Constitution* and the *Fair Administrative Action Act*. It is submitted that the jurisdiction of this court has not been procedurally invoked. The Court of Appeal decision in Civil Appeal No 42 of 2021 Abidha Nicholus V Kenya Power & Lighting Company Ltd and 13 others is referred to buttress this proposition.
11. The 1st defendant also states that the plaintiff lacks locus for failure to demonstrate their interest in the suit property in the absence of a title in their name pursuant to section 26(1) of the *Land Registration Act*.
12. The 4th Defendant submitted that the suit is a wayleave issue as illustrated by paragraphs 5,7,8,9,10 and 11 of the Further Amended Plaint. Citing various sections of the *Energy Act* 2019 it is submitted that jurisdiction lies with the Energy & Petroleum Regulatory Authority and Petroleum Tribunal. That Authority also has powers to investigate and determine claims such as the present one. That the court has no powers to transfer the suit to the forum of competent jurisdiction. It is submitted that the *Energy Act* and the Energy (Complaints and Dispute Resolution) Regulations 2012 have set out clear dispute resolution mechanisms which must be followed. That the plaintiff having not exhausted the dispute resolution mechanism the remedy is to withdraw the suit and file the same before the tribunal which has wide powers to give equitable reliefs. The court is urged to afford opportunity to the statutory bodies to exercise their jurisdiction with respect to the matter as envisaged under article 159 of *the Constitution*. Numerous authorities have been cited to buttress the preliminary objection which have been noted by this court.
13. Mr. Ondabu reiterating the plaintiff's submissions filed in court, pointed out that the issue of capacity is a point of fact not law. That the letter dated 12/8/2016 demonstrates the land is owned by the clan and thus the plaintiff's interest. That the ELC has both original and appellate jurisdiction to hear all matters relating to land use and acquisition pursuant to Article 162. The defendants were sued because none of them admit trespassing into the suit property and don't recognize the plaintiffs



making it impossible to approach the tribunal. That on the ground the electricity line runs into the 2nd defendant's property a private property and which is a clear case of trespass. That under the Act the Commission can only hear billing disputes between the 4th defendants and its customers which is not applicable in the present case. The plaintiffs are not the end users and are not interested in compensation but the denial of the use of their land.

Analysis And Determination

14. The issues that emerge for determination are;
- a. Whether the Preliminary objection is properly before court and if yes,
 - b. Whether this court has the requisite jurisdiction to determine this suit,
 - c. Whether the suit should be struck out against the 2nd Defendant for failure to raise a reasonable cause of action.

It is important to note that determination of issue (c) above will depend upon the finding in (b) since should the court find it has no jurisdiction, then it will not be necessary to deal with the issue.

15. Firstly the court must satisfy itself that the preliminary objection is properly before court. In the case of *Nitin Properties Ltd Vs 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. The gist of this suit is that the Defendants by themselves, servants and agents invaded the Plaintiffs property, dug holes and erected electricity poles with the intention of fitting them with electric wires for electricity transmission. The Defendants and more particularly the 4th Defendant states that this court does not have the requisite jurisdiction to determine the dispute between the parties herein and have cited the relevant statutory provisions. I have considered the preliminary objection raised by the 4th Defendant and do find that it is premised on the [Energy Act 2019](#). Jurisdiction is purely an issue of law. On this point and I'm satisfied that the preliminary objection meets the test.

As to locus standi this court respectfully agrees with the Plaintiffs submission that the issue of locus is not a pure point of law. It is arguable based on the evidence and facts presented.

17. The 4th Defendant avers that the Plaintiffs have failed to exhaust the available remedies outlined by statute in resolution of disputes of this nature before approaching the court in the instant suit. This position is supported by the 1st defendant and 2nd defendant. The 4th defendant cites the provisions of the [Energy Act](#) and the Energy [Complaints and Disputes Resolution] Regulations 2012 which provide for the channels/quasi-judicial organs that are clothed with the mandate to resolve disputes that arise from any nature or transaction within the spheres of the [Energy Act](#). The Court task is to determine if there is anything in the [Energy Act 2019](#) barring the suit.

18. The provisions quoted to buttress the preliminary objection are cited as Section 11 of the [Civil Procedure Act](#), Sections 3[1],10,11[e],[f] [i] [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[Complaints and Disputes



Resolution] Regulations 2012 as read together with Article 159[2][c] and 169[1][d] and [2] of *the Constitution* of Kenya 2010 and Sections 9[2] and [3] of the *Fair Administrative Action Act* 2015. These provisions of the law are highlighted here below seriatim.

19. Section 11 of the *Civil Procedure Act* is to the effect that suits shall be instituted in the court of lowest grade competent to try it. In my view I do not find this relevant because it does not deal with tribunals or other dispute resolution forums but the Magistrates courts.
 1. Section 3(1) of the *Energy Act* 2019 states that in the event of a conflict between the Act and another Act, the *Energy Act* shall prevail on matters interalia of the importation, exportation, generation, transmission, distribution, supply or use of electrical energy and all works and apparatus for any or all of these purposes.
 2. Section 10 is on the functions of the Energy and Petroleum Regulatory Authority. 10 (a)(i) gives one of the functions as regulating generation, importation, exportation, transmission, distribution, supply and use of electrical energy with the exception of licensing facilities
 3. Section 11 is on powers of the Energy and Petroleum Regulatory Authority. Under section 11(e) is the power to make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under this Act. 11(f) is the power to issue orders in writing requiring acts or things to be performed or done prohibiting acts or things from being performed or done.
 4. Section 23 is on decisions of the Authority, timelines for determination, communication and remedy where no decision is made.
 5. Section 24 is on appeals of the decisions of the Authority which lie to the Energy and Petroleum Tribunal.
 6. Section 36 deals with the Jurisdiction of the Tribunal key among them power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific Performance.
 7. Section 40 is on Appeals from decisions of the Authority and is to the effect that all appeals shall be made to the Tribunal, in accordance with the provisions of this Act.
 8. Section 224 is on repeals and savings provisions and 224(2) (e) reserves any subsidiary legislation issued before commencement of the *Energy Act* 2019 not revoked or repealed and which shall be deemed to have been made under this Act. This is relevant to the Energy (Complaints and Dispute Resolution) Regulations 2012 and which I will discuss later in this ruling.
20. I have set out a brief outline of the provisions cited in support of the preliminary objection for the reasons that it is contended by counsel for plaintiff that the same have been misconstrued. My finding in this regard is that except for section 11 of the *Civil Procedure Act* and section 11(i) the rest of the provisions are relevant and speak for themselves as set out above.



21. Section 3(1) of the [Energy Act](#) 2019 is to the effect that the said Act takes precedence in the event of a conflict with another act on matters of the importation, exportation, generation, transmission, distribution, supply or use of electrical energy and all works and apparatus for any or all of these purposes. The gist of the plaintiffs' case is at paragraph 5 of Further Amended plaint filed on 7th November 2022 thus; -

‘On or about 1st April 2022 the Defendant by itself, servants and agents invaded the Plaintiffs property, dug holes and erected electricity poles with the intention of fitting them with electric wires for electricity transmission.’

Indeed, the main prayer sought is for a permanent injunction restraining the Defendant from the above actions. The Plaintiffs also want the poles and transmission lines removed. Indeed Mr. Ondabu counsel for the plaintiffs while highlighting submissions stated that the reason they have sued is because none of the defendants admits they have trespassed. He further stated that KETRACO had intimated that they did compensate land owners. Let me state that this cannot be a basis for determining the forum where to file the dispute. In fact, the submissions in my view cement the fact that these are way leave issues and point to compensation. All these are issues that can be determined under the mechanisms set in the [Energy Act](#).

22. Arising from the above it is therefore clear that the substratum of the Plaintiffs suit is the digging of the holes for purposes of laying electricity transmission poles. The trespass by its very nature arises from these acts without which there would be no trespass. The actions cannot be delinked from issues relating to wayleaves. The power lines that are allegedly intended to be set up within the suit land fall within the regulation of the Authority as transmission is a preserve of the Authority as regulated under the Act. This to me brings the dispute under the jurisdiction of the [Energy Act](#) 2019.
23. It is the Plaintiffs case that this court has jurisdiction under section 13 of the Environment & [Land Act](#) to determine this suit, the claim being for ownership and use of land. While this is true, the preliminary objection is about exhausting existing dispute resolution mechanism which courts and tribunals are required to promote under article 159(2) (c) of [the Constitution](#) of Kenya 2010.
24. I have already outlined from the provisions cited hereinbefore the structures established under the [Energy Act](#) for resolution of disputes before parties can move the court namely the Energy and Petroleum Regulatory Authority at the first instance and Energy and Petroleum Tribunal at the appellate level and thereafter to the High court. This is further buttressed by the Court of Appeal Kisumu (Tuyoit J) in Civil Appeal No 42 of 2021 Abidha Nicholus V Attorney General & 7 Others, National Environmental Complaints Committee [NEEC] & 5 Others [Unreported] who stated thus; -
37. The dispute resolution mechanism envisaged by the [Energy Act](#) is three tiered. The first is to raise a complaint with the Energy and Petroleum Regulatory Authority (EPRA), the successor of the Energy Regulatory Commission (ERC) The [Energy Act](#) 2019 repealed the



Energy Act No.12 of 2006 but notwithstanding the repeal are the transitional provisions of section 224 (2)(e) which reads; -

Notwithstanding the provisions of sub-section (1)-

- (a)
- (e) any subsidiary legislation issued before commencement of this Act shall, as long as it not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act.

38. One of the subsidiary legislations saved by these provisions is the Energy (Complaints and Dispute Resolution) Regulations 2012 which are the regulations still used by EPRA as the successor of ERC. Regulation 4(a) provides:

- 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 service, quality of supply, tariffs, way leaves, casements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.

39. Regulation 7 reads:

- (1) in the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling



procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the Commission for resource.

- (2) A party to a dispute may refer the dispute to the Commission in form s-2 as set out in the Second Schedule.
 - (3) Where a dispute has been referred to the Commission, the Commission shall appoint a mediator who shall assist the parties to reach a settlement within thirty days from the date of such appointment.
 - (4) Where the dispute-
 - (a) Is resolved through mediation in accordance with paragraph (3), the parties shall file their settlement agreement with the Commission within five days, and the agreement shall be final and binding on both parties.
 - (b) is not resolved through mediation in accordance with paragraph (3), the procedures set out in regulations 8 to 16 shall apply.
25. The learned judge of Appeal held that since the complaint as against KPLC relates to a wayleave for transmission, then the first forum for resolution of that dispute would be before EPRA and that a party dissatisfied could then invoke the second tier. The judge also held he had no doubt that the ELC (A. Ombwayo J) was correct in declining jurisdiction in respect to the grievances against KPLC.
26. It is now trite that where procedures and processes exist for resolution of disputes such processes must be exhausted first, before a party can approach court. This was stated by the Court of Appeal in *Speaker of National Assembly v. James Njenga Karume* (1992) eKLR. In *the International Centre for Policy and Conflict & 5 others vs. The Hon. Attorney General & 4 others* [2013] eKLR the Court affirmed that position thus; -
- "Where there exist sufficed and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanisms have been exhausted. In this regard,



we refer to the decision in *Re Francis Gitau Parsimei & others v. National Alliance Party and others* Nairobi Petition No. 356 of 2012 (unreported) in which the Court emphasised the principle that: “where *the Constitution* and or a statute establishes a dispute resolution procedure, then that procedure must be used.”

27. Following the above it is therefore apparent that there is alternative mechanism under the *Energy Act* if one felt offended that electricity lines were being laid on his land. These have not been exhausted and I agree that the jurisdiction of this court has not been properly invoked.
28. The upshot of the foregoing is that the preliminary objection dated 5/12/2022 is merited and allowed. The suit is hereby struck out for failure to exhaust the alternative dispute resolution mechanisms under the *Energy Act* 2019 read together with the Energy (Complaints and Dispute Resolution) Regulations 2012.
29. Having arrived at the foregoing conclusion I do not find it necessary to make a determination on the application dated 10/2/2023 the entire suit having been struck out.

It is so ordered.

RULING DATED AND DELIVERED AT KWALE THIS 25TH DAY OF OCTOBER 2023

A.E DENA

JUDGE.

