



**Mochere v Kenya Power & Lighting Company Limited & 2 others (Environment and Land Appeal 4 of 2023) [2023] KEELC 20775 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20775 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL 4 OF 2023**

**M SILA, J**

**OCTOBER 19, 2023**

**BETWEEN**

**CHARLES MORIRA MOCHERE ..... PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**RWATHIA DISTRIBUTORS COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**TIMOTHY ERICK ONYONKA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the decision of Hon. C.A Ocharo, Senior Principal Magistrate, Kisii, in the suit Kisii CMCC (ELC) No. 242 of 2018, delivered on 6 April 2022)*

**JUDGMENT**

1. This is an appeal arising out of the ruling of the Magistrate's Court wherein the court allowed a preliminary objection on jurisdiction. Aggrieved with that ruling, the plaintiff lodged this appeal and wishes to have the suit referred back to the Magistrate's Court for trial.
2. To put matters into perspective, the suit before the Magistrate's Court was commenced by way of a plaint filed on 22 October 2018. The appellant pleaded that he owns the Plots No. 18B and 35 located in Mosoch market. He complained that on 15 October 2018, the respondents offloaded or laid electricity poles on his two plots without his consent. He contended that the respondents were thus guilty of trespass. In the suit, he asked for the following orders (paraphrased for there are obvious typographical errors):-
  - a. A permanent injunction against the defendants to bar them from trespassing into the Plots No. 18B and 35, Mosoch Market.
  - b. The defendants be compelled to remove their electricity poles from the two plots at their own costs.



- c. The defendants be compelled to pay general damages for trespass, non-use of the plots and wastage.
  - d. Exemplary damages.
  - e. Costs.
  - f. Interest
  - g. Any other relief deemed fit to grant.
3. The 1<sup>st</sup> and 3<sup>rd</sup> respondent entered appearance and filed defence through separate counsel but no appearance was entered on behalf of the 2<sup>nd</sup> respondent.
  4. The 1st respondent's statement of defence was really nothing more than a general denial. The 1st respondent denied offloading electricity poles on the Plots No. 18B and 35 Mosocho and pleaded to be a stranger to the other contents of the plaint. It also pleaded that there were other suits pending though no particulars were provided.
  5. The 3<sup>rd</sup> respondent filed a defence where he pleaded that the poles were not deposited on the Plots No. 18B and 35 Mosocho Market, but on the land parcel West Kitutu/Bogusero/3894 which was their family land registered in name of his mother, Beatrice Mghamba Onyonka. He pleaded that this land parcel West Kitutu/Bogusero/3894 was given by his mother after litigation in the Mosocho Land Disputes Tribunal, Case No. 2 of 2005. He pleaded that his family even had a dairy farm on this land. He contended that his mother was entitled to hold, use and enjoy the land of which the family had been in open and physical possession of. He pleaded that it was first necessary to find out where on the ground the poles were located before any orders could be made. He thought the matter to be a boundary dispute for which the court lacked jurisdiction.
  6. The 1<sup>st</sup> respondent did file an application dated 22 July 2019 to have the suit against her struck out for misjoinder. The grounds raised were that she did not own the electricity poles offloaded on the suit land; that she never instructed anyone to deposit the material on the land; that the poles belonged to RKS Consortium a last mile contractor who was contracted by the 2<sup>nd</sup> respondent to deliver the poles; that the said contractor works independently and his acts and/or omissions cannot be attributable to the 1<sup>st</sup> respondent; and that she cannot be held vicariously liable for the acts and/or omissions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. This application was dismissed in a ruling delivered on 28 January 2020, on the reasoning that all these claims of the 1<sup>st</sup> respondent required evidence which could only be availed during the hearing of the suit.
  7. The 1<sup>st</sup> respondent subsequently filed a Preliminary Objection dated 21 January 2022. The preliminary objection was drawn as follows :-

This Honourable Court lacks jurisdiction to entertain this claim as it offends the provisions of Sections 4, 6, 25, 26 and 61 (3) of the [Energy Act](#), 2006 (now repealed); Section 3 (1), 10, 11(a), (f), (i), (k), and (l), 23, 24, 36, 40, 42 and 224 (2) of the [Energy Act](#), 2019 as read together with Regulations 2, 4, 7 and 9 of the [Energy \(Complaints and Disputes Resolution\) Regulations](#) 2012 as read together with Article 157 (2) (c) and 169 (1) (d) and 2 of the [Constitution](#) of Kenya, 2010 and Section 9 (1) and (3) of the [Fair Administration Act](#), 2015.

8. The preliminary objection was canvassed through written submissions. The submissions of the 1<sup>st</sup> respondent made overt reference to the [Energy Act](#), 2019, and urged that the matter ought to first be brought before the 'Energy Authority' and thereafter appeal to the Energy Tribunal before invoking



the jurisdiction of the Court. It was also submitted that there was no dispute relating to land ownership and title, and that the only complaint was on the poles laid on the plots. The position of the appellant (as plaintiff) was that the preliminary objection was raised to delay delivery of justice and that the gist of the suit was trespass to land for which the court had jurisdiction. It was also submitted that the Energy Act, 2019 dealt with supply of electricity disputes between the electricity supplier and other parties. It was submitted that the plaintiff had no dispute with the 1<sup>st</sup> defendant's electricity supply or connection of power to her customers but only raised the issue of trespass to his two plots.

9. In a ruling delivered on 6 April 2022, the trial Magistrate upheld the preliminary objection. This appeal was then preferred, and although nine grounds are presented, essentially the appellant contends that the issue was one of trespass and that the appellant had no contract with the 1<sup>st</sup> respondent so as to have any dispute referred to the Energy Tribunal.
10. The appeal was argued through written submissions and I have taken note of the submissions of Mr. Okemwa, learned counsel for the appellant, and of Mr. Kirui, learned counsel for the 1<sup>st</sup> respondent. The 3<sup>rd</sup> respondent did not participate in the appeal. I have taken note of these before arriving at my decision.
11. Before we go too far, we have to put the dispute into context. It should be recalled that the suit itself was commenced on 22 October 2018. It was raised in the preliminary objection that the suit was barred by dint of provisions of the Energy Act, 2019 and indeed much of the submissions quoted several sections of the Energy Act, 2019. The Energy Act, 2019 was assented to on 12 March 2019 and commenced, i.e. came into operation, on 28 March 2019. It inter alia repealed the Energy Act, 2006, which was hitherto the operative law. Thus, when the suit was filed in 2018, the Energy Act, 2019 was not there, and it cannot be argued that the appellant needed to comply with its provisions. Simply, it was not there to be complied with. The only argument that could have been raised is that at the time of filing suit, the appellant failed to comply with the provisions of the Energy Act, 2006. If there was nothing in that statute barring the suit, then the provisions of the Energy Act, 2019 could not be invoked.
12. It was erroneous, in my view, for the 1<sup>st</sup> respondent to complain about the suit offending the provisions of the Energy Act, 2019 unless she could show that there was some retrospective application of the said statute that ought to have applied in this case and none was shown.
13. Unfortunately, even in this appeal, neither Mr. Okemwa nor Mr. Kirui addressed me on this important issue and no counsel made submissions on the prevailing law in the year 2018 and whether it was followed. Mr. Kirui, in his submissions still made reference to the Energy Act, 2019 as having been violated, but I will repeat for the umpteenth time that whatever mechanism is there in the Energy Act, 2019 was not there in 2018 when this suit was filed. What we need to look at is what the Energy Act, 2006, provided in relation to disputes, which is the task I now embark on.
14. Under Section 46 of the Energy Act, 2006 (repealed), before a person entered land to lay an electric supply line, such person needed to have permission of the owner after issue of notice to that effect. On receipt of such notice, the land owner could assent to the proposal (Section 47) in which case there would be no issue and no dispute. Alternatively, he could object to the proposal, as provided under Section 48, in which event the matter could proceed to the Energy Regulatory Commission (hereinafter simply referred to as 'the Commission') established under Section 4 of the Act for determination. Section 48 was drawn as follows :-

48. Objection to proposal

- (1) An owner shall be deemed to have assented to a proposal to construct an electric supply line on his land if he fails to notify,



in writing, the person desiring to construct an electric supply line, of his objection thereto within sixty days after the service on him of the notice required by section 46 and in the event of an objection, the Commission, on application by the licensee, shall determine—

- (a) what loss or damage, if any the proposed electric supply line will cause to the owner, or to the occupier or other person interested in the land;
  - (b) whether any loss or damage that may be caused is capable of being fully compensated for by money.
- (2) The result of a determination under subsection (1) shall be as follows—
- (a) if the Commission determines that loss or damage will be caused to the owner, occupier or other party interested in the land and that the loss or damage is —
    - (i) of a nature that may be fully compensated for by money, the Commission shall proceed to assess the compensation and to apportion it amongst the owner, occupier and other parties who may in the judgment of the Commission be entitled to compensation and on payment of the sum so assessed the person giving notice may proceed to construct or lay the proposed electric supply line;
    - (ii) not of a nature that may be fully compensated for by money the person giving notice shall not be entitled to construct or lay the proposed electric supply line;
  - (b) if the Commission determines that no loss or damage will be caused to the owner, occupier or other party interested in the land the person giving notice may forthwith proceed to construct or lay the electric supply line.

15. It will be observed from Section 48 above, that a person actually had recourse to the Commission, if he objected to the laying of electricity lines in his land. The Commission had power to determine what level of compensation was payable or alternatively direct that the electricity lines not be laid on the



land. Pursuant to Section 26 of the repealed Act, a person could appeal the decision of the Commission to the Energy Tribunal. That section provided as follows :-

26. Appeal against a decision of the Commission

A person aggrieved by a decision of the Commission may appeal to the Tribunal within thirty days of the decision:

Provided that the Tribunal may entertain an appeal after the expiry of the thirty-day period if it is satisfied that there was sufficient cause for not filing it within that period.

16. It is thus apparent that there was an alternative mechanism in the year 2018, under the Energy Act, 2006, if one felt offended that electricity lines were being laid on his land.
17. The appellant argues that what was presented to court was a claim for trespass. It may have been a claim for trespass, but it was a special type of trespass, i.e a trespass in relation to the laying of electricity poles, that was fully addressable by reference to the Commission established under the Energy Act, 2006. There was never a land claim in the plaint i.e, the plaintiff never sued any of the parties for claiming that they own the land where his two plots fall. Neither was it a boundary dispute as there was never a prayer for determination of boundaries. If he thought there was an issue related to boundaries, he could have pleaded that but he did not. Indeed, if it was purely a boundary dispute, he could as well have referred it to the Land Registrar for determination. What he wanted in his plaint was for an order to have the electricity poles removed from what he believed to be his land and for compensation for the wastage caused to his land, which are issues that the Commission had power to address.
18. It is not so much an argument that the Magistrates' Court had no jurisdiction, as the Magistrates' court does have jurisdiction to hear cases of trespass; the issue is that there was provision in law for an alternative dispute resolution mechanism. Where a law explicitly provides for an alternative dispute resolution mechanism, that mechanism needs to be followed unless it is demonstrated that it does not exist, or that it cannot be effective given the circumstances of the case. This, I am afraid was never demonstrated by the appellant. The appellant ought to have followed the dispute resolution mechanism outlined in Sections 48 and 26 of the Energy Act, 2006, that is, make a complaint to the Commission, and if not satisfied, appeal to the Energy Tribunal. Although the wrong law was cited in urging the preliminary objection, that is the Energy Act, 2019 instead of the Energy Act, 2006, ultimately the trial Magistrate arrived at the correct decision.
19. For the above reasons, I find no merit in this appeal and it is hereby dismissed with costs to the 1<sup>st</sup> respondent.

**DATED AND DELIVERED AT KISII THIS 19 DAY OF OCTOBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

