



Ramogo v Kenya Power & Lighting Company Ltd (Environment and Land Case Civil Suit E034 of 2022) [2023] KEELC 21659 (KLR) (20 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E034 OF 2022
SO OKONG'O, J
NOVEMBER 20, 2023**

BETWEEN

DR. JOEL ADUMA RAMOGO PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LTD DEFENDANT

RULING

1. The Plaintiff brought this suit against the Defendant by way of a plaint dated 13th December 2022. The Plaintiff averred that at all material times to this suit, the Plaintiff and one, Mary Atieno Ondoro were the freehold proprietors of all those parcels of land known as Title Nos. Kisumu/Muhoroni 183, 184, 583 and 584 situated within Muhoroni, Kisumu County (hereinafter referred to as “the suit properties”). The Plaintiff averred that they acquired the suit properties for farming activities when there were no electric supply lines in existence on the properties. The Plaintiff averred that there were also no rights of way or wayleave in favour of the Defendant registered against the titles of the suit properties. The Plaintiff averred that around June 2021, the Defendant entered the suit properties without the consent of the Plaintiff, cleared trees, dug trenches and erected electric supply lines traversing the suit properties. The Plaintiff averred that the Defendant also installed an electricity transformer on the property.
2. The Plaintiff averred that the said electric supply lines were not erected within the wayleave trace and as such the same had rendered a large portion of the suit property unusable. The Plaintiff averred that the electric supply lines were installed in the middle of the suit properties making it impossible to carry out farming activities on the properties. The Plaintiff averred that the Defendant having entered the suit properties without the Plaintiff’s consent, the Defendant was a trespasser on the suit properties. The Plaintiff averred that he had suffered loss and damage as a result of the acts of the Defendant complained of due to the diminution of value of the suit properties.



3. The Plaintiff averred that he had suffered special damages in the sum of Kshs. 10,000,000/-. The Plaintiff averred that despite demand and notice of intention to sue, the Defendant had ignored to make good the Plaintiff's claim. The Plaintiff prayed for Judgment against the Defendant for:
 - a) An order directing the Defendant, their servants, licensees, agents or any other persons acting on their behalf to immediately relocate the electric supply lines traversing Title Nos. Kisumu/ Muhoroni/ 183,184,583 and 584 and remove the poles therefrom.
 - b) An order of injunction restraining the Defendant, their servants, licensees, agents or any other persons acting on their behalf from howsoever trespassing, occupying, traversing, putting up more electric supply lines, entering, remaining and/or in any way interfering with the plaintiff's right of ownership and occupation Title Nos. Kisumu/Muhoroni/ 183,184,583 and 584.
 - c) Special damages.
 - d) General damages for trespass and unlawful activities.
 - e) Cost of the suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit and just to grant.
 - f) Such other or further relief that this honourable court may deem fit to grant.
4. Together with the plaint, the Plaintiff brought an application by way of a Notice of Motion dated 13th December 2022 under Sections 1A, 3, and 3A of the *Civil Procedure Act*, Order 40 Rule 1 and 2 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Section 3 of the *Trespass Act* Chapter 294, and Sections 171 and 173 of the *Energy Act* 2019. The Plaintiff sought an order directing the Defendant, its servants, licensees, agents or any other persons acting on its behalf to immediately remove the electric supply lines traversing the suit properties and relocate them pending the hearing and determination of the suit, and an order of injunction restraining the Defendant, its servants, licensees, agents or any other persons acting on its behalf from howsoever trespassing, occupying, traversing, putting up more electric supply lines, entering, remaining on and/or in any way interfering with the Plaintiff's right of ownership and occupation of the suit properties pending the hearing and determination of the suit.
5. The Plaintiff's application was based on grounds set out of the face thereof and on the supporting affidavit sworn by the Plaintiff on 13th December 2022. The Plaintiff averred that the Plaintiff and one, Mary Atieno Ondoro were the registered and freehold owners of the suit properties on which the Defendant had erected high voltage electric supply lines in 2021 without their consent. The Plaintiff averred that the Defendant's failure to seek their consent before erecting thereon the said electric supply lines contravened the provisions of Sections 171 and 173 of the *Energy Act*, 2019 as read with Section 3 of the *Trespass Act*. The Plaintiff averred that the Defendant's said acts of trespass were continuing. The Plaintiff averred that they were unable to make optimum use of or to sell the suit properties because of said electric supply lines. The Plaintiff averred that they stood to suffer irreparable damage if the orders sought were not granted. The Plaintiff averred that it was just, equitable and proper that the orders sought be granted.
6. The Plaintiff annexed to his supporting affidavit copies of the title deeds for the suit properties, photographs of the suit properties showing the electric supply lines complained of and correspondence exchanged with the Defendant prior to the filing of the suit.
7. The Defendant filed a statement of defence dated 14th February 2023 in which it denied each and every allegation made by the Plaintiff in the plaint. The Defendant averred that this suit was filed prematurely since the Plaintiff had not exhausted all the available dispute resolution mechanisms. The Defendant



averred that the electric supply lines complained of by the Plaintiff were installed in 1964 before the Plaintiff acquired the suit properties. The Defendant denied that the said electric supply lines were installed in 2021 as claimed by the Plaintiff. The Defendant averred that when installing the said electric supply lines complained of by the Plaintiff, they obtained the necessary grant of easements from the previous owners of the said properties which easements were valid and binding upon the Plaintiff non-registration thereof notwithstanding. The Defendant averred that since the Plaintiff acquired the suit properties with the electric supply lines already in existence, in case the Plaintiff wished to have the same relocated, the plaintiff should make an application to the Defendant for such exercise to be carried out at his cost.

8. In response to the Plaintiff's application for injunction, the Defendant filed Grounds of Opposition dated 31st January 2023, Notice of Preliminary Objection dated 31st January 2023 and a replying affidavit sworn by Dennis Namisi on 15th February 2023. In its Grounds of Opposition, the Defendant contended that this court lacks jurisdiction to hear and determine the dispute brought before it by the Plaintiff. The Defendant contended that the application was misconceived and had no merit. In its Notice of Preliminary Objection, the Defendant reiterated that this court had no jurisdiction to entertain the Plaintiff's suit. The Defendant contended that the Plaintiff's suit offended the provisions of Sections 3(1), 10;11(e), (f), (i), (k) and (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 Administration Act*, 2015. The Defendant averred that this court lacked original jurisdiction to hear the matter, and should dismiss the same with costs by virtue of the appellate jurisdiction vested on the court through Section 37(3) of the *Energy Act*, 2019 and Regulations 21 of the *Energy (Complaints and Disputes Resolution) Regulations*,2012.
9. The Defendant spent the better part of its lengthy replying affidavit running into 49 paragraphs arguing the application. This practice of making submissions and citing authorities in an affidavit must be discouraged. An affidavit should be confined to factual issues. I will not go into the arguments and submissions made in the Defendant's affidavit as the same are repeated in its written submissions. The Defendant averred that all the averments in the Plaintiff's application were untrue. The Defendant averred that it is a public utility company with the mandate to engage in the bulk purchase, transmission, distribution and retail supply of electricity to its over 9 million customers. The Defendant averred that it is by law authorised to erect poles and/or lay electricity supply lines on land, over, under, or across public streets, roads, railways, and other passageways. The Defendant averred that it meets its primary objectives of provision and distribution of electricity by legally acquiring and making use of wayleaves/rights of way to mount or erect its electricity infrastructure. The Defendant averred that the principal legislative framework governing the operations of the Defendant is the *Energy Act*, 2019 (hereinafter referred to only as "the *Act*"). The Defendant averred that the *Energy Act*, 2019 repealed the *Energy Act*, 2006 which repealed the *Electric Power Act*, 1997. The Defendant averred that the *Electric Power Act*,1997 repealed the *Electric Power Act*, Chapter 314 Laws of Kenya.
10. The Defendant averred that the legal framework for resolution of complaints and disputes in the energy sector are set out in the *Energy (Complaints and Disputes Resolution) Regulations*, 2012 [L.N. No. 42 of 2012 dated 25th May 2012] (hereinafter referred to only as "the Regulations") and the *Energy Tribunal Rules*, 2008 [G.N.No.9163 Kenya Gazette Vol CX-No. 78 dated 26th September 2008] (hereinafter referred to only as "the Rules").
11. The Defendant averred that the *Energy Act*, 2019(the Act) established the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal under Sections 9 and 25 of the *Act* respectively. The Defendants averred that the Energy and Petroleum Regulatory Authority and the



- Energy and Petroleum Tribunal are the successors to the Energy Regulatory Commission and the Energy Tribunal respectively established under the repealed [Energy Act](#), 2006. The Defendant averred that under Sections 3(1), 10; 11(e), (d), (i), (k) & (1); 23;24, 37(3) and 224(2)(e) of the [Act](#) and Regulations 2, 4,7,9 and 21 of the [Regulations](#) the Energy and Petroleum Regulatory Authority is clothed with jurisdiction to hear and determine complaints and disputes in the energy sector.
12. The Defendant averred that Sections 24, 36, 40, 42 and 224(2)(e) of the [Act](#) and the [Energy Tribunal Rules](#), 2008 have also clothed the Energy and Petroleum Tribunal with jurisdiction to hear and determine complaints and disputes. The Defendant averred that it was public knowledge that the suit properties were part of a settlement scheme owned by the Government of Kenya. The Defendant reiterated that the electric supply lines on the suit properties were installed in 1964 pursuant to grant of wayleaves by the Government of Kenya to the Defendant (formerly known as East African Power & Lighting Company Limited). The Defendant averred that the subsequent owners of the suit properties upon application for electricity supply connection, also granted wayleaves for the said electricity supply lines. The Defendant averred that the electric supply lines in contention were within the wayleave trace and had not in any way interfered with the use of the suit properties. The Defendant averred that the Plaintiff was at liberty to use the suit properties and to dispose of the same so long as the Defendant's electric supply lines' wayleave corridors were maintained by the Plaintiff. The Defendant reiterated that the Plaintiff acquired the suit properties with the electric supply lines already in existence and that if the electric supply lines were to be relocated, the Plaintiff should make an application to the Defendant for the exercise to be carried out at the Plaintiff's own cost. The Defendant denied that it trespassed on the suit properties. The Defendant averred that the electric supply lines complained of by the Plaintiff supplies electricity to huge load centers around Chemelil-Muhuroni-Koru area such that any interference with the same by the Plaintiff would cause serious power interruption and inconvenience to the consumers being supplied. The Defendant averred that public interest should take precedence over individual interest.
 13. The Defendant averred that while no cause of action had been established against the Defendant, the Plaintiff had in any event not exhausted all the available remedies under the [Energy Act](#), 2019 before moving this court for redress. The Defendant averred that the Plaintiff did not invoke the provisions of section 3(1), 10; 11(e), (f), (i), (k) and (l); 23; 24; 36; 40; 42 and 224(2)(e) of the [Act](#) and Regulations 2, 4, 7 and 9 of the [Regulations](#), 2012 which provides that complaints and disputes brought up against the Defendant should be lodged with the Energy and Petroleum Regulatory Authority or alternatively with the Energy and Petroleum Tribunal in the first instance. The Defendant urged the court to down its tools and dismiss the Plaintiff's application.
 14. The Plaintiff's application and the Defendant's Notice of Preliminary Objection were heard together by way of written submissions. The Plaintiff filed his submissions on 13th June 2023 while the Defendant filed its submissions dated 26th June 2023. On the preliminary objection, the Plaintiff submitted that the Defendant's preliminary objection did not meet the threshold of a preliminary objection. The Plaintiff submitted that the determination of the objection would require the court to delve into factual issues. The Plaintiff admitted that under Section 36(3) of the [Energy Act](#) (the Act), the Energy and Petroleum Tribunal (the tribunal) has the power to determine disputes between the Defendant and a third party. The Plaintiff contended however that the tribunal had no power to grant some of the reliefs sought by the Plaintiff like special and general damages, costs and interest. The Plaintiff submitted that even if the tribunal had the power to grant the reliefs sought, the much the court could do was to stay this suit pending determination of the dispute by the tribunal.
 15. On the merit of the application, the Plaintiff submitted that the Plaintiff had met the threshold for granting the mandatory and prohibitory injunctive reliefs sought. The Plaintiff cited several authorities



in support of his submission on this issue which I have considered. The Plaintiff urged the court to dismiss the Defendant's preliminary objection and to allow the application with costs.

16. In its submissions in reply, the Defendant submitted that the Plaintiff's complaint against the Defendant concerned wayleaves, easements or rights of way in relation to the distribution of electrical energy. The Defendant submitted that the dispute between the Plaintiff and the Defendant should have been taken to the Energy and Petroleum Regulatory Authority established under Section 9 of the [Act](#) in the first instance.

Analysis and determination

17. I have considered the Plaintiff's application together with the supporting affidavit. I have also considered the Grounds of Opposition, Notice of Preliminary Objection and the Replying Affidavit filed by the Defendant in opposition to the application. Finally, I have considered the written submissions by the advocates for the parties. As mentioned earlier, the Defendant's preliminary objection and the Plaintiff's application were heard together. I will deal first with the Defendant's preliminary objection because if it succeeds, it will not be necessary to consider the application on merit.

18. The Defendant's objection to the jurisdiction of this court is based on several provisions of the [Energy Act, 2019](#) and [Energy \(Complaints and Disputes Resolution\) Regulations, 2012](#). Section 9 of the [Energy Act, 2019](#) (the Act) establishes the Energy and Petroleum Regulatory Authority (the Authority). Section 11(i) of the Act provides that the Authority's powers include:

to investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;"

19. Section 23 (1), (2) and (3) of the [Act](#) provides that the Authority shall within sixty days from the date of receipt of a request by an applicant, make its decision on any matter before it in writing and shall communicate the same to the parties within 7 days. Section 23(5) as read with Section 24(1) of the [Act](#) gives a party aggrieved with the decision of the Authority a right to appeal to the Energy and Petroleum Tribunal (the tribunal) within 30 days of receipt of the decision.

20. The tribunal is established under Section 25 of the [Act](#) for the purposes of hearing and determining disputes and appeals in accordance with the Act or any other written law. The jurisdiction of the tribunal is set out in Section 36 of the Act which provides as follows:

36.

- (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
- (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
- (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
- (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.



- (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
- (6) The Tribunal shall hear and determine matters referred to it expeditiously.”

21. Section 37(3) of the Act gives any party aggrieved by the decision of the tribunal a right to appeal to the High Court within 30 days of the date of the decision or order of the tribunal.

22. Regulation 4 of the Energy (Complaints and Disputes Resolution) Regulations 2012 (Regulations) provides that the regulations 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, easements or rights-of-way 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;
- c) and any other activity and/or matter regulated under the Act.”

23. I am in agreement with the Defendant that the dispute between the Plaintiff and the Defendant that has been brought to court by the Plaintiff relates to easements or right of way in relation to the generation, transmission, distribution, supply and use of electrical energy. Such a dispute should be referred to the tribunal in the first instance pursuant to section 36(3) of the Act. The dispute need not be taken to the Authority. From my reading of Section 11(i) and 36(4) of the Act, the Authority’s jurisdiction is limited to “complaints or disputes between parties over any matter relating to licences and licence conditions” under the Act. Since the dispute between the Plaintiff and the Defendant does not relate to a licence or licence conditions, the same can only be handled by the tribunal which has original jurisdiction to determine any dispute between a licensee and a third party. I am in agreement with the Defendant that the Plaintiff’s suit was brought to court prematurely before the Plaintiff had exhausted all the dispute resolution mechanisms that were available to him. In Speaker of the National Assembly v Karume[1992] eKLR the court stated that:

In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

24. In Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others, [2015] eKLR the court stated that:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial



consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

It is my finding that the Plaintiff's suit is bad in law under the doctrine of exhaustion and is for striking out.

25. Having found that the Plaintiff's suit is incompetent, it is not necessary for me to consider the application on merit. I wish to say however that even if I had found no merit in the preliminary objection, I would not have granted the injunction sought. As mentioned earlier, the Plaintiff has sought both mandatory and prohibitory injunction. The principles upon which the court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v. Cassman Brown & Co. Ltd.* [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

26. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal stated as follows:

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

27. For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court applies in applications for interlocutory mandatory injunction were set out in *Locabail International Finance Limited v. Agro-Export* (1988) 1 All ER 901, where the court stated that:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction."



In *Shepherd Homes Ltd. v Shandamu* [1971] 1 Ch.304, Meggry J. stated as follows:

It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

28. It is on the foregoing principles that the Plaintiff’s application falls for consideration. From the material before me, I am not satisfied that the Plaintiff has established a *prima facie* case with a probability of success against the Defendant. The Defendant has contended that the suit properties are situated in a settlement scheme and that its electric supply lines were installed in the settlement scheme in 1964. The Defendant has contended that it obtained a wayleave from the government to install the said infrastructure. The Defendant has contended that after the initial wayleave, it continued to obtain wayleaves from land owners for the subsequent power transmission through private land. The Defendant has placed evidence of the wayleave that it obtained from the government in 1964. The Defendant has also placed before the court evidence of wayleaves that it obtained from the previous owners of some of the suit properties. The Defendant has contended further that the Plaintiff purchased the suit properties after the installation of the electric supply lines he is complaining about. The Plaintiff has not rebutted these allegations by the Defendant on oath. I am not persuaded that the Plaintiff has established a *prima facie* case of trespass against the Defendant. The Plaintiff is therefore not entitled to the interlocutory injunction sought.

Conclusion

29. In conclusion, I find merit in the Defendant’s preliminary objection dated 31st January 2023 which I hereby uphold. Consequently, the Notice of Motion dated 13th December 2022 and the plaint of the same date are struck out with costs to the Defendant.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF NOVEMBER 2023

S. OKONG’O

JUDGE

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

Ms. Swaka h/b for Mr. Kirimi for the Plaintiff

Ms. Owano h/b for Mr. Ochieng for the Defendant

