



Kamau & another v Kenya Railways Corporation & 2 others (Environment & Land Case E23 of 2022) [2023] KEELC 22163 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E23 OF 2022
MAO ODENY, J
DECEMBER 14, 2023**

BETWEEN

CHRISTOPHER KANAI KAMAU 1ST PLAINTIFF

MARY WANGARI KANAI 2ND PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

CHINA COMMUNICATION CONSTRUCTION COMPANY LIMITED 2ND DEFENDANT

KENYA POWER & LIGHTING COMPANY 3RD DEFENDANT

RULING

1. This ruling is in respect of a Notice of Preliminary Objection dated 19th June, 2023 by the 3rd Defendant on the grounds that:
 - a. This Honourable Court lacks jurisdiction to hear and determine this dispute and suit as against the 3rd Defendant and together with all consequential orders should be struck out with costs as the same offends:
 - b. The provisions of sections 3(1), 10; 11(e), (f), (i), (k) & (1); 23; 24; 36; 40; 42 and 224(2)(e) of the *Energy Act*, 2019.
 - c. Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012.
 - d. Article 159(2) (c) and 169(1)(d) and (2) of *the Constitution* of Kenya, 2010.
 - e. Sections 9(2) and (3) of the Fair Administration Act, 2015.



3rd Defendant/Applicant's Submissions

2. Counsel for the 3rd Defendant submitted that the dispute herein relates to a wayleave complaint which should be dealt with by Energy & Petroleum Authority and the Energy & Petroleum Tribunal as this court is expressly barred by the provisions of the [Energy Act](#) 2019.
3. Counsel relied on the cases of *Adero Adero & another v Ulinzi Sacco Society Ltd* [2002] eKLR , *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR, *United Millers Limited v Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others* [2021] eKLR and *Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party) (Judicial Review E033 of 2021)* [2022] KEHC 10 (KLR) (24 January 2022) (Judgment) and submitted on the jurisdiction of the court and the need to give first priority to relevant persons, bodies, tribunals, or any other quasi – judicial authorities and organs to deal with disputes as provided for in the relevant parent statutes.
4. Counsel further relied on Article 159 (1) of [the Constitution](#) and submitted that it recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. He also cited Article 169(1) of [the Constitution](#) which makes provisions for the establishment of any other court or local tribunal by an Act of Parliament.
5. Mr. Muchai submitted that the Energy & Petroleum Authority and the Energy & Petroleum Tribunal are such creatures of Parliament through the [Energy Act](#) 2019 by powers donated by Article 169(1) (d) of [the Constitution](#). Counsel stated that tribunals and other quasi-judicial bodies are also vested with judicial authority in their respective areas.
6. Counsel enumerated the provisions of the [Energy Act](#) 2019 , the Key terms, establishment and powers of the Energy & Petroleum Regulatory Authority and submitted that the Authority has the jurisdiction to hear and determine the Plaintiff's complaints.
7. Counsel relied on the cases of *Cyrus Komo Chege v Karinga Njoroge Gachoka & 2 others* [2015] eKLR, *Republic v Energy Regulatory Commission & 2 others* [2018] eKLR, *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* [2015] eKLR and emphasized the importance of adhering to alternative dispute resolution mechanisms.
8. It was counsel's further submission that the [Energy Act](#) 2019 created an exclusive jurisdiction relating to the energy sector and gives the Tribunal original jurisdiction on any dispute as was relied on the case of *Elijah Mutahi & 10 others v Kenya Power & Lighting Company Limited* [2020] eKLR.

2nd Defendant Respondent's Case

9. Counsel for the 2nd Defendant supported the 3rd defendant's Preliminary Objection as they were also of the view that the court does not have jurisdiction to hear and determine the matter.
10. Counsel submitted that the issues raised in the Plaintiff's Complaint on the supply of electric energy on the Plaintiff's land should have been referred to the Authority for investigations. Further that the Authority has powers to issue orders to compel removal of the poles as per the Plaintiff's prayers.
11. Mr. Masila submitted that the Plaintiff could have approached the tribunal on appeal from the decision of the Authority as provided under Section 36 of the [Energy Act](#). He added that the tribunal has the original jurisdiction to grant orders of injunction and damages sought in the Plaintiff's Complaint under the said Act.
12. Counsel relied on the cases of *Ali Simbuchi Makokha (suing as a legal Attorney of) Joseph Wekesa Nabiswa V Kenya Power & Lighting Co. Ltd & Another* [2018] eKLR, *Justin Karionji Nyaga V*



Attorney General & 2 Others [2021] eKLR. Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) [2021] eKLR, Richard Etyanga v Kenya Power and Lighting Company; Rural Electrification Authority (Third Party) [2019] eKLR and urged the court to uphold the preliminary objection and strike out the suit with costs.

Plaintiff/Respondent's Submissions

13. Counsel for the Plaintiff filed submissions and relied on the replying affidavit sworn on 17th November, 2023 where the Respondent deponed that the preliminary objection is grounded on misinterpretation of the law and that the 3rd Defendant seeks to circumvent the wheels of justice for a second time in the instant suit.
14. Counsel submitted that the Plaintiffs cannot sustain a claim against the 1st Defendant and its contractor in the tribunal established under the Energy Act 2019 since neither the 1st Defendant and its contractor nor the plaintiffs are licensees under the said Act. That a wayleave is a creation of the law under the Land Act 2012 thus the process was never invoked with respect to the power line in question.
15. Mr. Omulanya submitted that the Plaintiffs' claim is for trespass and the consequent continued violation of the Plaintiffs' constitutional proprietary rights with respect to the occupation and use of their parcels of land by the Defendants jointly and severally. Further that the actual trespass complained of is the arbitrary construction of the High Voltage Power Lines across the Plaintiffs' parcels of land known as Longonotkijabe Block 6/811 (kiambu Nyakinyua) and Longonot/Kijabe Block 6/812 (kiambu Nyakinyua), the trespass of which is continuing to date.
16. Counsel relied on Article 162 (2) of the Constitution and Section 13 of the Environment and Land Court Act 2011 and submitted that it vests this Honourable Court with the requisite jurisdiction to hear and determine trespass and that the Plaintiffs' claim herein is for the use and occupation of land.
17. Mr. Omulanya relied on the cases of Kiragu v Kenya Power & Lighting Company (Environment and Land Case Civil Suit E047 of 2022) [2022] KEELC 13533 (KLR) (27 September 2022) and Eunice Nkirote Ringera v Kenya Power & Lighting Company 120201 eKLR where a similar notices of preliminary objections were dismissed.

Analysis and Determination

18. The main issue for determination is whether or not this court has jurisdiction to hear and determine this suit.
19. In the Supreme Court case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR the court held as follows:

“If a court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law.”
20. The preliminary objection is based on the ground that this court has no jurisdiction to hear and determine this dispute as the same should have been filed before the Energy & Petroleum Tribunal and the Energy and Petroleum Regulatory Authority.
21. The court is cognizant of the principle that where there exists an alternative remedy through statutory law, then that forum should be pursued first as was held in the case of Benard Murage -vs- Fine Serve Africa Limited & 3 others [2015] eKLR.



22. The issue to be determined is whether this dispute falls within the the Energy & Petroleum Tribunal and the Energy and Petroleum Regulatory Authority as provided for under the [Energy Act](#) 2019.
23. A reading of the Plaintiffs' pleadings indicate that the claim is for trespass by the defendants without their consent and the erection of high voltage power lines. The Plaintiffs also pray for general and compensatory for trespass , permanent and mandatory injunction against the defendants. The Plaintiffs also claimed that due to the continuous trespass they are unable to use their property as desired.
24. The Energy and Petroleum Tribunal created under Sections 25 of the [Energy Act](#) has power under Section 36 of the Act to deal with certain complaints relating to energy and arising between a licensee and a third party or between licensees.
25. The dispute as it is, is not between the Defendants and licensees and therefore it is a dispute on the use and occupation of land and more specifically trespass to land. Article 162 of [the Constitution](#) and Section 13 of the [Environment and Land Court Act](#), 2011 confers upon this court original and appellate jurisdiction to hear and determine disputes relating to the environment and land use.
26. Section 13 of the [Environment and Land Court Act](#) provides as follows:

Jurisdiction of the Court

- 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 land administration and management;
 - 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
27. In the case of *Rosewa Agencies Limited v Kenya Power & Lighting Company Limited* [2022] eKLR the court faced with a similar preliminary objection on jurisdiction held that:

“In light of the broad jurisdictional framework set out in Article 162 of [the Constitution](#) and the elaboration spelt out under Section 13 of the [Environment and Land Court Act](#), I do not agree with the defendant's contention that this court lacks jurisdiction to hear a dispute relating to entry onto and use of land for the purpose of supplying electric power.”

28. Similarly in the case of *John Kiragu Kimani vs. Rural Electrification Authority* (2018) eKLR the Court held that:

“Following that evidence. it is clear from the record that no consent, authority or permission of the Plaintiff was ever sought and/or obtained. No notice was given to him of the



impending project as contemplated by section 46 of the Energy Act. The irresistible conclusion is that the Defendant is guilty of trespass."

29. Counsel submitted that the Plaintiff in the replying affidavit deponed that such consent was never sought or obtained by the defendants and further that the 3rd Defendant as the body vested with the primary and statutory mandate of power distribution and supply in a letter dated 12th November 2021 acknowledged the existence of the subject power lines in the Plaintiffs' parcels of land but denied involvement stating that the same were done by a contractor of the 1st Defendant.
30. Counsel for the 3rd defendant also raised the doctrine of exhaustion that the Plaintiff should have exhausted the remedies provided for under the Energy Act before moving to this court. In the case of Geoffrey Muthinja & Another Vs Samuel Muguna Henry & 1756 others (2015) eKLR the court held that ;

‘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 mechanism in place for resolution outside of courts.’
31. The court is of the view that the doctrine of exhaustion does not apply in this case as the court has jurisdiction to hear and determine an action for trespass which is in respect of use and occupation of land as provided for under Section 13 of the Environment and Land Court Act.
32. The upshot is that the preliminary Objection lacks merit and is therefore dismissed with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF DECEMBER 2023.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

