



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

ELC NO. 1048 OF 2014

ROSEWA AGENCIES LIMITED.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 1/07/2021 as well as a Notice of Preliminary Objection dated 22/10/21.

2. In the Suit herein, as per the Amended Plaint dated 01/07/2021, the Plaintiff is seeking the following reliefs against the Defendant: -

a. A permanent injunction restraining the Defendant by itself, its employees, servants and agents and any other persons whomsoever from encroaching upon, trespassing onto remaining on, or in any way whatsoever interfering with the parcels of land known as LR18697/4 containing by measurement Four Three decimal Two Three (43.23) Hectares (107 acres) situated within Juja Town of Kiambu County (hereinafter called the Suit Property)

b. An Order of Mandatory Injunction compelling the defendant to remove all the electricity poles and the power lines, back fill the excavated holes and remove any other unlawful development it has carried out without the Plaintiff express authority in any part of all that parcel of land in Juja Estate, Thika District within the Kiambu County of the Republic of Kenya, known as Land Reference' Number 18697/4.

c. In the alternative to payers (a) and (b) above, payment of a

sum of Kshs. 82,528,875.00 being the cost for compulsory acquisition of the 1.14 Hectare portion of the Plaintiffs Land currently occupied by the Defendant.

d. Statutory interest on (c) above under Section 117 of the Land Act, from the date of occupation/possession in June 2014 to the date of full payment for the compulsorily acquired land.

e. General damages for trespass and injury occasioned to the said parcels of land.

f. Mesne profits from June 2014 to the date the Defendant removes the power line or compensates the Plaintiff for the occupied portion of the land.

g. Costs of this suit

3. The application is supported by an affidavit sworn by one Joseph Watua Kigwe.

4. The application is however opposed by the defendant who has filed a statement of defence.

5. The Preliminary Objection dated 22/10/2021 seeking for the following Orders:

a. THAT this Honourable Court lacks jurisdiction to hear and determine the suit herein pursuant to the provisions of section 9,10,25,36,37 and 160 of the Energy Act No. 1 of 2019

b. THAT the suit herein offends the provision of Regulations 4, 7 and 8 of the Energy (Complaints and Disputes Resolution) Regulations, 2012. (LN42/2021)

6. The Preliminary Objection was canvassed by way of written submissions. The parties submitted and a Ruling date was scheduled.
7. I have looked at the pleadings generally, the preliminary objection as raised and the rival submissions. I have had time to analyze the emerging issues therein. The main issue for determination is whether this court has jurisdiction to hear and determine this matter.
8. The issue of jurisdiction has substantially been dealt with in court of Appeal in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR* where it was stated as follows on the question of jurisdiction of a Court of law.

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

9. That is why the issues of jurisdiction are usually raised at the earliest stage of the proceedings because without jurisdiction, the Court must down its tools.
10. It is the defendant’s case that under the Energy Act, 2019, disputes listed under Sections 9, 10, 25, 36, 37 and 160 of the Energy Act No. 1 2019 and regulations 4, 7 and 8 of the Energy (complaints and Disputes Resolution) Regulation 2012 become a matter to be determined by the Energy and Petroleum Regulatory Authority (“the Authority”) under the Complaints and Disputes Resolutions as provided for by Regulations.
11. From the pleadings herein, the plaintiff’s complaint is basically that the defendant, has laid electricity poles and the power lines, plus excavated holes on his property LR No. 18697/4 measuring 43.23 hectares without seeking permission and this is tantamount to compulsory acquisition. Therefore, the defendants should be barred through a permanent injunction and compelled to remove the poles and lines and fill up the holes through a mandatory injunction.
12. That the defendants are trespassers on his land.
13. The key ground of preliminary objection is about the jurisdiction of this court to entertain this dispute. The preliminary object raises a key jurisdictional question. The question is whether the dispute in this suit falls outside this court’s jurisdictional purview as donated by Article 162 of the Constitution and Section 13 of the Environment and Land Court Act.
14. It is noted that the plaintiffs’ gravamen is that the defendant unlawfully entered into the suit properties without their consent and erected thereon electric power supply lines, excavated the land in essence this to the plaintiff is tantamount to compulsorily acquiring the suit property. Therefore, the plaintiff is seeking compensation for the illegal entry into its land and putting up unlawful developments on the suit properties. I understand this to be a grievance relating to alleged illegal entry onto and illegal use of land for the purpose of supplying electric power which trespass. In my view, this is a dispute relating to occupation and use of land and one which consequently falls within the broad jurisdiction donated to this Court under Article 62 (2) (b) of the Constitution. Article 162 of the Constitution provides thus:

162. *System of courts*

1. *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*
2. *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*
 - a) *employment and labour relations; and*
 - b) *the environment and the use and occupation of, and title to, land.*
3. *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).*
4. *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

15. Similarly, Section 13 (1) and (2) of the Environment and Land Court Act confers upon this court jurisdiction to adjudicate all disputes relating to land. It provides thus:

13. *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

16. 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.

17. It is however clear from the pleadings that the plaintiff is also seeking in the alternative for compensation both in general damages and mesne profits. This are matters of fact that will be deliberated at the hearing. This has been expressly stated and prayed for under order (c) and (d) in the Amended Plaint. It is the court's view that the Plaintiff's claim does not fall under the disputes that are a preserve of the Authority.

18. When all is considered therefore, the Objection raised cannot be upheld and the same is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2022.

MOGENI J

JUDGE

IN THE PRESENCE OF:

..... for the Plaintiff

.....for the Defendant

Vincent Owuor Court Assistant