



REPUBLIC OF KENYA



Kibira & another v Kenya Power & Lighting Company Limited (Environment & Land Case 8 of 2021) [2022] KEELC 2701 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 8 OF 2021**

**JO OLOLA, J
MAY 19, 2022**

BETWEEN

CHARLES MUYA KIBIRA 1ST PLAINTIFF

LUCY NJUNJU MUYA 2ND PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. By their Plaint dated 20th May 2021 Charles Muya Kabira and Lucy Ngunju Muya (the Plaintiffs) pray for Judgment against the Defendant – Kenya Power & Lighting Company Limited for:
 - (a) A sum of Kshs.71,726,875/-;
 - (b) An order compelling the Defendant to remove the offending posts and electric cables from land parcel Mweiga/Thungare/Block 1/Kamiru/193;
 - (c) General damages for trespass.
 - (d) Interest on (a) and (c) above; and
 - (e) Any other further or better relief that the Honourable Court may deem fit to grant.
2. Those prayers arise from the Plaintiffs’ contention that they did purchase the suit property for the purpose of constructing executive and affordable residential houses. However while they were still in the process of finalizing the architectural drawings, the Defendant trespassed onto the suit property and haphazardly erected posts and live electric cables thereon making it impossible for the Plaintiffs to proceed with their intended project.
3. It is the Plaintiffs’ case that the Defendant has despite demand refused to remove the said power cables and that as a result they have suffered loss and damage.



4. But in their statement of Defence dated 29th June, 2021 and filed herein on 2nd July 2021, the Defendant Company denies that the Plaintiff purchased the suit property for the said purpose and/or that it has trespassed thereon as stated or at all.
5. It is further the Defendant's case that the suit as filed is premature as the Plaintiffs have not exhausted the laid down statutory procedures for addressing and ventilating such disputes.
6. By a Notice of Preliminary Objection dated the same 29th day of June, 2021 and filed alongside the Statement of Defence, the Defendant raises a Preliminary Objection to the effect that this Court lacks jurisdiction to hear and determine this dispute and that the suit should be struck out as the same offends the provisions of Sections 3(1); 10; 11(e); (f); (i); (k) and (l); 23; 24; 36; 40; 42 and 224(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.
7. By directions given herein on 12th October 2021, the parties agreed to dispose of the Preliminary Objection by way of written submissions. I have accordingly carefully perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.
8. It is the Defendant's submission that this case is purely concerned with wayleaves and that the issues raised by the Plaintiffs are matters that ought to be dealt with under the Energy Act, 2019 in the first instance.
9. The Defendant further submits that under Section 9 of the Energy Act 2019, there is established the Energy and Petroleum Regulatory Authority and that the said Authority has powers under Section 11 of the Act to deal with the complaints in the nature of the issues raised herein by the Plaintiffs.
10. The Defendant asserts that where there was a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament the procedure should be strictly adhered to.
11. I have gone through the fifteen Sections and Sub-Sections of the Energy Act as well as Articles 159 and 169 of the Constitution. I have also read Sections 9(2) and (3) of the Fair Administrative Action Act 2015. While the Defendant submits that the suit as filed herein offends the said provisions, I was unable to find any nexus between the cited provisions and the subject matter of this suit.
12. While the Energy Regulations Authority certainly has powers to investigate and determine complaints or disputes between parties and to grant certain equitable reliefs, there was nothing placed before as at this stage to demonstrate that this is a dispute that ought to be taken before the Authority for determination.
13. Section 3(1) of the Energy Act cited by the Defendant for instance states thus:
 - “3(1) If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters –
 - (a) The importation, exportation, generation, transmission, distribution, supply or use of electoral energy.
 - (b) The exploration, productions, transportation, distribution, and support of any other form of energy.
 - (c) All works and apparatus for any or all of these purposes.”



14. While the Defendants in their elaborate submissions cite the above as one of the Sections offended by this suit, it was clear to me that the above provisions only apply where there is a transaction relating to supply of electricity or a dispute between licensees. The Defendants have not however placed anything before me to demonstrate that the Plaintiffs and the Defendant before me were in such a relationship.
15. Again while 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, absolutely nothing was placed before me to demonstrate that this is a dispute falling within the Energy Act 2019.
16. The preamble to the Energy Act, 2019 provides that it is:

“An Act of Parliament to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation or midstream and downstream petroleum and coal activities; regulations, production, supply and use of electricity and other energy forms; and for connected purposes.”
17. My perusal of the preamble to the Act and the provisions cited by the Defendants in the Preliminary Objection did not reveal anywhere wherein the jurisdiction of the Environment and Land Court to deal with a claim for trespass is either expressly or impliedly excluded.
18. As Law J A stated in the oft-cited case of *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Limited* 1969 EA 696:

“So far as I am aware, a Preliminary Objection consists of a pure 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.”
19. Speaking on the same issue in the same Mukisa Biscuits case (*supra*), Newbold P observed as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
20. In the matter before me, it was clear to me from the citation of all sorts of provisions that the Defendant was merely engaging in a fishing expedition in the hope that the Court may find that one of them had been offended by this claim.
21. Having read the submissions in support thereof I was more than persuaded that the Preliminary Objection was merely speculative and misconceived. It is dismissed with costs to the Plaintiffs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 19TH DAY OF MAY, 2022.

In the presence of:

Ms Mwai Lucy for the Plaintiffs



No appearance for the Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

