



**Mukii v Kenya Power & Lighting Company Limited (Environment & Land
Case E003 of 2022) [2022] KEELC 15686 (KLR) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 15686 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E003 OF 2022**

**EC CHERONO, J
JULY 22, 2022**

BETWEEN

FLORENCE MUKII PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. This ruling arises from a Notice of Preliminary Objection raised by the Defendant herein dated 18/02/2022. The said Notice reads as follows-;

“Take Notice that the defendant shall at the earliest opportune time raise a Preliminary Objection that this Honourable Court lacks Jurisdiction to hear and determine this dispute and suit as against the defendant and together with all consequential orders should be struck out with costs as the same offends the provisions of Sections 3(1), 10, 11(e), (f), (i), (k), & (l); 23, 24, 36, 42, and 224(2) (e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolutions, 2012 as read together with Article 159(2) (c) and 169 (1) (d) and (2) of *the Constitution* of Kenya, 2010 and Section 9(2) and (3) of the Fair Administration Act, 2015”

2. When this suit came up for directions on 11th June 2022, the parties through their advocates on record agreed that the said Notice of Preliminary Objection be canvassed by written submissions.

Defendant’s Written Submissions

3. The defendant through the firm of Justus Ododo Advocate submitted that this case is about an alleged trespass into the plaintiff’s land and cutting down 36 trees belonging to her which dispute is purely about wayleaves as set out in the *Energy Act*, 2019. He therefore submitted that this Honourable Court is divested of jurisdiction to determine such a dispute and that the suit should be struck out



with costs. He referred to the following cases in support;- Benard Nyakundi Osugo v Kenya Power Limited (2021) e KLR, Joseph Njuguna Mwaura & 2 Others v Republic (2013) e KLR, Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel (2016) KLR, Phoenix of E.A Assurance Company Limited v SM Thiga t/a Newspaper Service (2019) KLR, Kenya Ports Authority v Modern Holdings (E.A) Limited (2017) e KLR, Mukisa Biscuits v West End Distributors Limited (1969) E. ALR 696, Owners of the Motor Vessel ‘Lillian S’ c Caltex Oil (Kenya) Limited (1989) KLR 1, John Musakali v Speaker County of Bungoma & 4 Others (2015) e KLR, Amy Kagendo Mate v Prime Bank Credit Reference Bureau Africa Limited (2013) e KLR, Abidha Nicholas v Attorney General & 7 Others; National Environmental Complaints Committee (NECC) & 5 Others (Interested Parties) (2021) e KLR, Speaker of National Assembly v Njenga Karume (1992) 1KLR 425, Cyrus Komo Njoroge v Kiringa Njoroge Gachoka & 2 Others (2015) e KLR, Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 Others (2018) e KLR, Republic v Energy Regulatory Commission & 2 Others (2018) e KLR, Mutanga Tea & Company Ltd v Shikara Ltd & Another (2015) e KLR, Republic v Public Procurement Administrative Review Board & Energy Sectors Contractors Association, Zoec-Zhepedc-Nginu Ex-parte Kenya Power & Lighting Company Limited (2020) e KLR, Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others (2015) KLR, Thomas Schering v Nereah Michael Said & 3 Others (2019) e KLR, Alice Mweru Ngai v Kenya Power & Lighting Company Limited (2015) e KLR, James Mwaura Ndung’u v Kenya Power and Lighting Company Limited (2016) KLR, Kenya Power & Lighting Company Limited v Samuel Mandere Ogeto (2018) e KLR, and Joseph Nzyoki Mwanthi v Kenya Power & Lighting Co. Ltd (2017) e KLR.

Plaintiff’s Submissions

3. The plaintiff through the firm of N. Kaleli & Associates Advocates on the other hand stated that the gravamen of the plaintiff’s claim is that the defendant through its agents/employees trespassed into her private land and illegally destroyed her trees/property and that her claim against the defendant is within this Honourable Court’s jurisdictional Authority as donated under Article 162 of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*, 2011.
4. The plaintiff further submitted that the provisions of the *Energy Act*, 2019 and the Energy (Complaints and Disputes Regulation) Regulation 2012) confirm that the Original and Appellate Powers of the Energy & Petroleum Tribunal as well as the Energy & Petroleum Authority are limited to specific complaints and Disputes in relation to generation, transmissions, supply, distribution and use of electrical energy and petroleum products and that the plaintiff’s claim against the defendant does not fall within the scope of disputes adjudicated on by the Energy & Petroleum Tribunal or Energy & Petroleum Authority.
5. She also submitted that the claim against the defendant relates to the Environment, use and occupation of title to land and that no part of her claim relate to electrical energy or petroleum products. The plaintiff referred to the following cases in opposition to the objection; Cape Suppliers Limited vs Kenya Power & Lighting Company Plc (2022) e KLR, Rosewa Agencies Limited vs Kenya Power & Lighting Company Limited (2022) e KLR.

Analysis and Decision

6. I have considered the Notice of Preliminary Objection dated 18/2/2022, the rival submissions by the parties and the applicable law. I have also considered the pleadings in this case. From the averments and the prayers in the plaint dated 21/01/2022, it is clear that the plaintiff’s claim is based on failure by the defendant to issue the requisite notice pursuant to the provisions of the *Energy Act*, 2019. That can be clearly shown in paragraph 12 of the plaint where the plaintiff averred as follows’;



12. The plaintiff avers that the defendant's actions and or inactions are in blatant breach of the mandatory terms of Section 55 of the [Energy Act](#), 2019. In this regard, the plaintiff avers that;

12.

1 Prior to cutting down her trees, the defendant did issue the requisite seven (7) days' notice requiring the plaintiff to lop or cut her trees so as to prevent the obstruction or interference of any electric supply lines.

12.

2 While cutting down the trees, the defendant failed and or neglected to ensure that the trees were lopped and cut in a way that little damage as possible was done to them. Instead, the defendant cut down the trees in a destructive manner leaving the trunks to dry.

7. The main issue for determination as raised in the Notice of Preliminary Objection dated 18/02/2022 is whether this Court is seized with the requisite jurisdiction to hear and determine this matter.

8. The issue of jurisdiction was dealt in the locus classicus case of the Owners of the Motor Vessel Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR where it was held;

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

9. The damages occasioned to the plaintiff is provided for under Part Vii of the [Energy Act](#), 2019, which deals with Rights of way, wayleaves and use of land for Energy Resources and Infrastructure.

Section 177 of the said Act provides as follows;

Liability of licensee to make compensation for damage

The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act or by the loss or damage or breaking of any energy infrastructure or by reason of any defect in such infrastructure."

Section 180 of the same Act which directly relates to the plaintiff's claim provides as follows;

Power to lop trees and hedges

1. Where any tree or hedge obstructs or interferes with the construction by a licensee of any energy infrastructure, or interferes or likely to interfere with the maintenance or working of any such infrastructure, owned by any licensee, such licensee shall give a seven days' notice to the owner or occupier of the land on which the tree or hedge is growing, requiring the person to lop or cut it so as to prevent the obstruction or interference of the infrastructure,



subject to the payment by such licensee of the expenses reasonably incurred by the owner or occupier of the land in complying with the Notice;

Provided that in any case where such a Notice is served upon an occupier who is not the owner of the land on which the tree or hedge is growing, a copy of the notice shall also be served upon the owner thereof, if his address is known.

2. If within fourteen days from the date of giving such notice the owner or occupier of the land on which the tree or hedge is growing gives a counter-notice to the licensee objecting to the requirements of the notice, the matter shall, unless the counter-notice is withdrawn following consultations between the licensee and owner or occupier, be referred to the Authority for determination and the Authority, after giving the parties an opportunity to be heard, make such orders as it thinks just, and any such order may empower the licensee, after giving a seven day prior notice to any such person by whom the counter-notice was given of the commencement of the work as the order may direct, to cause the tree or hedge to be lopped or cut, and may determine any question as to compensation, if any, and expenses are to be paid;

Provided that any party aggrieved by any decision of the Authority with regard to compensation may within thirty days after being notified of such decision appeal to the Tribunal.”

10. The Tribunal has the appellate jurisdiction to hear and determine appeals to all disputes arising from the decision of the Authority or licensing authority relating to energy matters and any matter referred to the Authority or any licensing Authority. The Energy (Complaints and Disputes Resolution) Regulations 2012 provides for conflict resolution in the energy Sector.
11. The Regulations define a conflict to include dissatisfaction with the service rendered by or a practice of any person carrying out any undertaking pursuant to a licence, permit or registration issued or granted by the commission, under the Act.
13. A complainant refers to any person affected by a licensee’s undertaking activity or practice regulated under the Act.

Regulation 4 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 procedure, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, wayleaves, 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.



14. It provides that where a complaint or a dispute is not resolved to the satisfaction of a party, the dispute is referred to the Commission.
15. From the totality of my analysis and the applicable law, I find that the claim against the defendant in this case is in respect of wayleaves in relation to the distribution and supply of Electrical energy. The plaintiff in the plaint averred that on 26/11/2021, the defendant trespassed into her property and without any notice and or consent, cut down thirty-six (36) trees which were maintained below the defendant's power cables erected on the plaintiff's property. If the plaintiff was dissatisfied with the defendant's actions, she should have referred the complaint to the Energy Authority.
16. In view of the matters aforesaid, I find that this Honourable Court lacks jurisdiction to handle disputes in respect of wayleaves in relation to the distribution and supply of electrical energy and places the jurisdiction to the Energy Authority.
17. The upshot of my finding is that the Notice of Preliminary Objection dated 18/02/2022 succeeds and the same is hereby upheld. Consequently, this suit commenced by way of a plaint dated 21/01/2022 is struck out with costs to the defendant. It is so ordered.

THE RULING IS DELIVERED/ENDORSED VIRTUALLY AT KERUGOYA THIS 22ND JULY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

