



**Kenya Power & Lighting Company Ltd v Aminga (Environment and Land Appeal E017 of 2021) [2022] KEELC 3461 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3461 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E017 OF 2021**

**JM ONYANGO, J**

**JULY 21, 2022**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY LTD ..... APPELLANT**

**AND**

**JEREMIA SIRO AMINGA ..... RESPONDENT**

*(Being an Appeal from the Ruling of Hon. E. Obina (SPM) delivered on 30th August, 2021 in Kisii CM ELC case No. 85 of 2020)*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated 9<sup>th</sup> September 2021, the Appellant filed an appeal against the judgment of Hon. E. Obina (SPM) delivered on 30<sup>th</sup> August, 2021 in KISII CM ELC Case No. 85 of 2020 (hereinafter referred to as the Appeal).
2. As per Memorandum of Appeal dated 23<sup>rd</sup> May 2019, the Appeal is premised on the following grounds:
  - a. The learned trial Magistrate erred in law and fact by finding that the Magistrate's Court has jurisdiction on disputes arising from the Energy Act contrary to section 25 and 36 of the Energy Act, 2019.
  - b. The learned trial Magistrate erred in law and fact by misinterpreting the Preliminary Objection dated 10<sup>th</sup> December, 2020 and arriving at a wrong conclusion.
  - c. The learned trial Magistrate erred in law and fact in failing to take into consideration and appreciating the grounds of the Preliminary Objection dated 10<sup>th</sup> December, 2020.



- d. The learned trial Magistrate erred in law and fact in failing to consider the Appellants submissions and consequently reached a decision that was erroneous.
  - e. The learned trial Magistrate failed to determine the Appellant's Objection as against the Respondent.
3. Premised on the above grounds the Appellant prayed that:
- a. Appeal be allowed.
  - b. The ruling of the learned trial Magistrate dated 30<sup>th</sup> August, 2021 be set aside.
  - c. The Plaintiff/Respondent's case against the Appellant be dismissed with costs to the Defendants.
  - d. Costs of the Appeal be borne by the Respondents together with interests thereon at the court's rate.

### **Background of the Suit**

4. The Respondent filed suit through a plaint dated 18/8/2020 seeking a declaration that the power line installed by the Respondent and passing through the parcel of land known as L.R No. West Kitutu Mwamonari /2025 (hereinafter referred to as the suit property) is illegal.
5. He also sought for general damages as well as costs of the suit together with interest. In support of his claim, the Respondent alleged that he was the registered owner of the suit property whereupon the Appellant's agent on or about August, 2018 had entered and erected electric poles without the Plaintiff's consent.
6. He complained that the Appellant's actions had made him suffer loss since he was unable to use the crops and plantations on the suit property as the electric poles had been placed in the middle of the suit property thus posing immense danger to him and his family members. He alleged that he had on several occasions approached the Appellant and requested it to re-route the poles, but the Appellant had refused or ignored to do so forcing him to file the suit in the lower court.
7. Upon being served with the Plaint and Summons the enter appearance, the Appellant filed a Preliminary Objection dated 10<sup>th</sup> December, 2020. In the said Preliminary Objection he argued that the trial court lacked jurisdiction to hear and determine the suit as it offended the provisions of Sections 3(1), 10, 11 (e) (f) (i) (k)&(l), 23, 24, 36, 40, 42, 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 Administrative Actions Act*.
8. The trial Magistrate directed that the Preliminary Objection by the Appellant he heard first and further directed that the same be canvassed by way of written submissions. Both parties filed their submissions and the trial Magistrate eventually delivered his ruling on 31<sup>st</sup> August, 2021 dismissing the Appellant's Preliminary Objection with costs to the Respondent. In his ruling the trial Magistrate held that;

I have considered the objection raised. I have considered the written submissions filed and guided by the decisions in ELC Case No. 5/2020 *Malindi Fleetwood Ltd vs Kenya Power and Lightning*, Civil Appeal No. 80 of 2016 *Kenya Power and Lighting Company Ltd vs Malindi Fleetwood Ltd* and also the reasoning of E.L.R.C NO. 11 of 2016



at Mombasa Scholastica Okwaro vs Taita Taveta County Government, I dismiss the Preliminary Objection with costs to the Plaintiff.

9. It is against the said holding by the trial court that the Appellant has lodged this Appeal based on the grounds highlighted above.
10. The Court directed that the Appeal be disposed of by way of written submissions and both parties complied with the court's directions.

### **Issues for Determination**

11. Having considered the entire Record of Appeal and the rival submissions the only issue for determination is whether the learned trial Magistrate erred in law and fact by finding that the Magistrate's court had jurisdiction to hear and determine disputes arising from the [Energy Act](#).

### **Analysis and Determination**

12. Section 25 of the [Energy Act](#), No. 1 of 2019 provides as follows:

“25. There is established the Energy and Petroleum Tribunal, hereinafter referred to as the Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law.”

13. Sections 36 of the [Energy Act](#), No. 1 of 2019 provides that:

“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.”

14. It is not in dispute that the dispute between the Appellant and the Respondent revolves around the development of energy infrastructure namely electricity poles on the Respondent's land which is private land. The Respondent is aggrieved by the acts of the Appellant. Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector arising under the Act upon the Tribunal. The dispute herein therefore falls within the jurisdiction of the Energy and Petroleum Tribunal.
15. Had the trial court taken its time to consider these important provisions of the law that were highlighted in the Preliminary Objection, it would have found that the Respondent had no option



but to refer the dispute to the Tribunal as the appropriate forum with jurisdiction to grant the orders sought by the Respondent.

16. Article 159 (2) c of *the Constitution* of Kenya 2010 provides that in exercising judicial authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration.
17. Further Section 9 of the Fair Administrative Actions Act provides that :

“9.

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

18. I therefore agree submissions of counsel for the Appellant that had the trial Magistrate looked at his submissions and the Preliminary Objection especially on the above provisions of the law, he would have discovered that Appellant’s act of constructing the power lines in the Respondent’s land was a decision that affected the rights of the Plaintiff and therefore is an administrative action.

19. Section 2 of the Fair Administrative Actions Act defines administrative action as follows:

“2. In this Act, unless the context otherwise requires- "administrative action" includes-(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates; means a person who takes an or who makes an administrative ..... "decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be; "empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken; "failure", in relation to the taking of a decision, includes a refusal to take the decision;" state organ" has the meaning assigned



to it under Article 260 of the Constitution; and "tribunal" means a tribunal established under any written law.

20. In light of the above provisions of the law it is clear that this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Energy Act. The trial Magistrate therefore fell into error by finding that the court had jurisdiction to hear disputes arising from the Energy Act contrary to sections 25 and 36 of the Energy Act, 2019.
21. In arriving at this finding I am guided by decision in case of Elijah Mutahi & 10 others vs Kenya Power and Lighting Company Ltd 2020 eKLR where the High Court held that: -

“Since the Energy Act of 2019 under Section 25 as read together with Section 36 creates an exclusive jurisdiction on the disputes relating to energy and gives the Tribunal original civil jurisdiction on any dispute between a licensee and a third party or between licensees and has power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance, I hereby refer this dispute to the Energy and Petroleum Tribunal established under Section 25 of the Energy Act, Act No. 1 of 2019, to hear and determine the dispute within the framework of section 36 of the Energy Act, No. 1 of 2019”.
22. In Civil Appeal No. 80 of 2016 Kenya Power and Lighting Company Ltd vs Malindi Fleetwood Ltd upon which the trial magistrate based his decision, the issue of the jurisdiction of the court was never raised by the Appellant. Furthermore, the said case was based on the Energy Act No. 12 of 2012 which was however repealed and replaced with the Energy Act No. 1 of 2019 which was the subject of the Preliminary Objection before him.
23. Having arrived at the finding that the court had no jurisdiction, I am of the view that the appeal has merit. Accordingly, I allow the appeal by setting aside the ruling of the learned trial Magistrate dated 31<sup>st</sup> August, 2021 and substituting it with an order upholding the Preliminary Objection and dismissing the Respondents claim in the lower court with costs to the Appellant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 21<sup>ST</sup> DAY OF JULY, 2022.**

**J.M ONYANGO**

**JUDGE**

