



Kiragu v Kenya Power & Lighting Company (Environment and Land Case Civil Suit E047 of 2022) [2022] KEELC 13533 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E047 OF 2022
MD MWANGI, J
SEPTEMBER 27, 2022**

BETWEEN

JACINTA WAIRIMU KIRAGU PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY DEFENDANT

RULING

Background

1. The plaintiff in her plaint dated February 8, 2022 prays for;
 - a. A declaration that the defendant has trespassed on the suit property without the plaintiff's consent and caused permanent and irreparable damages thereto.
 - b. A permanent injunction to restrain the defendant by itself, its servants, agents or otherwise howsoever from remaining on or continuing to have its electric power supply line traversing the parcel of land known as Land Reference No Dagoretti/Riruta/3131.
 - c. A permanent injunction restraining the defendant by itself, its directors, officers, shareholders and its servants or agents or any of them or otherwise howsoever from entering, re-entering or remaining upon the suit Land Reference No Dagoretti/Riruta/3131.
 - d. General damages for continuous trespass.
 - e. Compensatory damages for Trespass of Kshs 175,000,000/=.
 - f. Disturbance allowance of Kshs 1,200,000/=.
 - g. Loss of user to a tune of Kshs 91,000,000/=.
 - h. Specific damages of Kshs 15,000,000/=.



- i. Costs of the suit as well as interest on (c), (d) and (e) above.
2. The plaintiff's case is that the defendant herein illegally and unlawfully set up a way leave through the suit property without her consent. She alleges that the defendant laid a high voltage electric power supply line that has remained thereon since the year 2012 occasioning irreparable damage on the suit property. The plaintiff avers that this is a violation of her rights, title and interest in the suit property and has caused a reduction of its salability.
3. The plaintiff pleads that in the year 2019, she had put up a semi-permanent church hall on the suit property and a complete permanent office block. However, the defendant's electric poles and sagging power cables made it impossible for the plaintiff to proceed with the construction of more permanent structures as she had planned. The sagging power lines posed a safety threat to the church users resulting to the premature termination of lease agreement leaving the premises vacant. This has occasioned the plaintiff loss of rental income. Eventually, the church hall had to be demolished. The plaintiff therefore prays for damages as particularized in the plaint.
4. The defendant filed its statement of defence dated the March 14, 2022 in which it entirely denied the plaintiff's claim. The defendant further contested this court's jurisdiction to hear and determine the instant suit. The defendant's notice of preliminary objection dated March 14, 2022 reads as follows;

‘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; 40; 42 and 224(2)(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.’
5. When the matter came up for directions, the parties agreed to dispense with the preliminary objection first and by way of written submissions.

Court's directions

6. The court directed parties to file written submissions. Both parties have complied. The defendant filed its submissions dated June 1, 2022 whereas the plaintiff's submissions are dated June 21, 2022.

Defendant's submission

7. The defendant submits that the jurisdiction in this present matter is with the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal, as established in the Energy Act, 2019. It urges the court to find that it lacks jurisdiction and proceed to strike out this matter with costs to the defendant.
8. It submits that the court derives its jurisdiction from the Constitution or statute and as such it must be slow to arrogate itself jurisdiction. That section 5 of the Civil Procedure Act, 2010 which provides that; ‘Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.’
9. It was submitted that article 159 (2) (c) of the Constitution expressly recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Article 169 (1) (d) on the other hand makes provisions for establishment of tribunals



- by an act of parliament. Counsel argued that the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal are such creatures of Parliament created by the [Energy Act](#), 2019.
10. According to the defendant's counsel sections 3, 9, 10, 11(e), (f) (i) (k) and (l); 23, 24, 36, 40, 42, 159 (3), 160 (3) 167; 168 and 224 (2) (e) of the [Energy Act](#), 2019 together with regulations 2, 4, 7, and 9 of the Energy (Complaints and Disputes Resolution) Regulations 2012 vest jurisdiction on the authority to handle the dispute arising in this case.
 11. On the jurisdiction of the Energy & Petroleum Tribunal, counsel submitted that section 36 (3) of the [Energy Act](#) grants the tribunal original civil jurisdiction on any dispute between the licensee and a third party. Counsel submitted that it was common knowledge that the defendant was a licensee according to the act. It was submitted that under subsection (5) the tribunal has powers to grant equitable reliefs. That only an appeal from the decision of the tribunal would lie in this court.
 12. Counsel further submitted that under section 9(2) and (3) of the [Fair Administration Act](#), the court could not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any written law were first exhausted. The defendant submitted that section 9 of the [Fair Administration Act](#) deprived this court of jurisdiction to entertain the suit in the first instance. The court was thus urged to dismiss the suit with costs to the defendant. Counsel cited numerous authorities in support of her assertions.

Plaintiff's submissions

13. The plaintiff submitted that the only issue for determination was whether this honourable court has jurisdiction to hear and determine this suit. It is her submission that this court has both original and appellate jurisdiction to hear and determine all disputes relating to the environment and land. That the jurisdiction emanates from the provisions article 162(2) (b) of the [Constitution](#) of Kenya, 2010 and at section 13 of the [Environment and Land Court Act](#).
14. It is the plaintiff's submission that the dispute before this honourable court is one of trespass and breach of way leave. That the defendant illegally entered on to her property and erected and electric supply lines without her consent. It is the plaintiff's contention that the subject matter of the dispute herein purely touches on the issue of trespass which squarely falls under the jurisdiction of this honourable court as provided for in section 13(2)(e) of the [Environment and Land Court Act](#). She relies on the decisions made in the case of [Cape Suppliers -vs- Kenya Power and Lighting company Plc \[2022\] eKLR](#) and that of [Swaminarayan Flats Limited -vs- Kenya Power and Lighting Company Ltd & 3 others \[2019\] eKLR](#),
15. The plaintiff further aver that she was not served with any notice by the defendant under section 46 of the [Energy Act](#). That she did not ascent to the consent if any was issued as required under section 47 of the [Energy Act](#). To this end she cites the case of [Rachael Wanyonyi V Kenya Power Co Ltd \[2018\] eKLR](#) where the court held that it could not decline jurisdiction in the dispute yet the defendant had not complied with section 46 and 47 of the [Energy Act](#) for a dispute to be referred to the commission established under section 4 of the Energy Act. The plaintiff therefore prays that the preliminary objection raised herein be dismissed with costs.

Issues for determination

16. I have considered the gist of the preliminary objection as well as the rival submissions thereon. I have also considered the relevant constitutional and statutory frameworks together with the prevailing jurisprudence on the key question falling for determination in the preliminary objection. The single issue for determination is whether the Plaint herein offends the doctrine of exhaustion of remedies.



Analysis and determination

17. An objection to the court's jurisdiction may be raised as a preliminary objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from the Constitution or statute. 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. This position was stated by the Supreme Court in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others*(2012)eKLR
18. The defendant's contention is that the matter before this court falls within the jurisdiction of both the Energy and Petroleum Tribunal and the Energy and Petroleum Regulatory Authority. The plaintiff's position on the other hand is that the dispute in this case is that of trespass therefore this court has jurisdiction as provided under section 13 of the Environment Act.
19. The doctrine of exhaustion of remedies provides that, where a dispute resolution mechanism has been established by a statute outside the mainstream courts, that mechanism should be exhausted before the jurisdiction of the mainstream courts is invoked. Put differently, where there exists a legitimate statutory primary dispute resolution mechanism, such as a tribunal, the mainstream courts should be the fora of last resort and not the first port of call.
20. The Supreme Court of Kenya explained the importance of the doctrine of exhaustion of remedies in the case of *Benard Murage -vs- Fine Serve Africa Limited & 3 others* [2015] eKLR in the following words:

' Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.'
21. The Court of Appeal in the case of *Geoffrey Muthinja & Another Vs Samuel Muguna Henry & 1756 others* (2015) eKLR was also elaborate 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.'
22. See also the case of *Speaker of the National Assembly vs James Njenga Karume* (1992) eKLR where the Court of Appeal emphasized that where there is a clear procedure prescribed by the Constitution or by a statute for the redress of a particular grievance, that procedure should be strictly followed and exhausted before invoking the jurisdiction of the court.
23. The dispute in this suit was triggered by the defendant's illegal set up of a way leave over the suit property without the plaintiff's consent. She alleges that the defendant laid a high voltage electric power supply line through her land and has since then continuously trespassed thereon since 2012 occasioning irreparable damage on the suit property. That this is a violation of her rights, title and interest in the suit property and reduction of its salability.
24. Continuing trespass is defined by *Clerk On Law of Torts*, 16th



Edition para 23-01 as;

' Every continuance of a trespass is a fresh trespass of which a new cause of action arise from day to day as long as the trespass continues.'

25. Granted the above definition and as long as a trespasser continues to occupy another's land unlawfully, such occupation constitutes a continuing trespass which is actionable from day to day so long as the trespasser remains on the land. The plaintiff alleges that the electric power lines are still on her land.
26. The plaintiff's cause of action arose in 2012 before the enactment of the [Energy Act](#), 2019 in any event.
27. The Supreme Court of Kenya in the case of [Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & 2 others \(2012\) eKLR](#) while addressing the issue of retrospective application of the law held that,

' As for non-criminal legislation, the general rule is that all the statutes other than those that are merely declaratory or which relate to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless by express words or necessary implication it appears that this was the intention of the legislature.'

28. Therefore, this court's finding is that the provisions of the [Energy Act](#), No 1 of 2019 are not applicable to the plaintiff's cause of action as suggested by the defendant.
29. Indeed, 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.
30. From the pleadings herein, the plaintiff's case is that the defendant trespassed onto the plaintiff's land without her consent. The consequences of the actions of the defendant are that the plaintiff is unable to use her property as she desired. In fact, she alleges that she lost tenants who had occupied the church hall and offices due to the safety risks caused by the electric cables.
31. This is not a dispute between the defendant and a licensee.
32. It is a dispute on the use and occupation of the land; trespass to land to be more precise. 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.
33. Having considered the plaint on one hand and the functions of the Energy Regulatory Commission and the jurisdiction of the Energy Tribunal under the repealed [Energy Act](#), it is obvious that the issues raised in the plaint do not fall under the mandate of either of the two institutions. The plaintiff's cause of action is purely that of trespass.
34. Ultimately therefore, the defendant's preliminary objection is devoid of merit. It is hereby accordingly dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2022

M.D. MWANGI

JUDGE

In the virtual presence of:



Ms Ali for the plaintiff.

Ms Walala for the defendant.

Court Assistant Hilda.

MD MWANGI

JUDGE

