



**Kiringo (168) v Kenya Electricity Transmission Company Limited
(KETRACO) & 3 others (Environment and Land Case Civil Suit
28 of 2021) [2022] KEELC 13765 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 28 OF 2021
MAO ODENY, J
OCTOBER 28, 2022**

BETWEEN

**ASHA MUTHONI KIRINGO PLAINTIFF
168**

AND

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED
(KETRACO) 1ST DEFENDANT
KENYA POWER & LIGHTING COMPANY LTD 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT
OFFICE OF THE ATTORNEY GENERAL & DEPARTMENT OF
JUSTICE 4TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Preliminary objection dated April 29, 2021 and June 3, 2021 by the 1st and 2nd defendants respectively on the grounds that:
 - a) The suit filed by the 3rd 40th, 58th, 67th, 68th, 81st, 87th, 129th, 131st, 132nd, 136th, 154th, 158th, 159th, 167th, 168th and 169th be struck out on grounds that they have not executed a verifying Affidavits in accordance with Order 4 Rule 1(2) of the [Civil Procedure Rules 2010](#).
 - b) The court lacks jurisdiction to hear and determine the suit on grounds that 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 Section 9 (2) and(3) of the Fair Administration Act, 2015.

2. Counsel agreed to canvas the application by way of written submissions which were duly filed.

1ST Defendant's Submissions

3. Counsel gave a brief background to the suit and stated that this suit was filed by 169 Plaintiffs and as per paragraph 7 of the Plaint, the Plaintiffs allege to be legal owners and residents in quiet possession of all that land in Mguruleni Kasimbiji and Ganda located in Malindi sub-county. That at the time of filing the suit on April 14, 2021, all 169 Plaintiffs allegedly authorized one Asha Muthoni Kiringo to appear, plead and act on their behalf.
4. Counsel submitted that the 1st Defendant has established that, this being a representative suit, Asha Muthoni Kiringo does not have the requisite authority to act on behalf of some of the Plaintiffs as alleged hence the suit against the 1st Defendant by the non-compliant Plaintiffs to be struck out with costs.
5. Counsel identified two issues for determination as follows: -
 - a. Whether Asha Muthoni Kiringo has authority to appear, plead and act in the suit on behalf of the 3rd, 40th, 58th, 67th, 68th, 81st, 87th, 129th, 131st, 132nd, 136th, 154th, 158th, 159th, 167th, 168th and 169th Plaintiffs in accordance with Order 1 Rule 13 of the Civil Procedure Rules 2010.
 - b. Whether the Plaintiffs complied with the mandatory provisions of Order 4 Rule 1(2) of the Civil Procedure Rules 2010.
6. On the first issue counsel submitted that this being a representative suit, the Plaintiffs are required to comply with Order 1 Rule 13 of the Civil Procedure Rules 2010. And from the authority attached to the pleadings or the Plaintiffs List and Bundle of Documents dated 6th April 2021, the 3rd, 40th, 58th, 67th, 68th, 81st, 87th, 129th, 131st, 132nd, 136th, 154th, 158th, 159th, 167th, 168th and 169th have not signed the authority in accordance with the mandatory provisions of Order 1 Rule 13(2) as read with Order 4 Rule 1(3) of the Civil Procedure Rules 2010.
7. It was counsel's further submission that in the absence of the authority, the aforesaid Plaintiffs ought to have filed Verifying Affidavits together with the Plaint in accordance with Order 4 Rule 1(2) of the Civil Procedure Rules 2010.
8. Counsel relied on the case of Shadrack Mwamuu Nzioka & 2 others (suing on their behalf as officials of Crescent Self Help Group) v Tropical Blooms Limited [2020] eKLR where the court held that the other members of the Group that never gave the 1st Plaintiff written authority to swear and plead on their behalf cannot be said to be parties to this suit as Plaintiffs.
9. Counsel also cited the case of Research International East Africa Ltd V Julius Arisi & 213 Others [2007] eKLR where the Court of Appeal in dismissing the case of 213 Plaintiffs who had not authorized a co-plaintiff in writing held that; -

' The true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying



affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule.'

10. Mr Rambo submitted that at paragraphs 2 and 3 of the Complaint states that the 167th Plaintiff (Maziwani Primary School) is a public school recognized under the Education Act, Cap 211 (now repealed). Additionally, counsel submitted that it is also averred, that the 168th Plaintiff (Masjid Anwar Mosque Sheikh Omar Maulid) and 169th Plaintiff (Mosque Ganda) are religious institutions registered under the *Societies Act*, Cap 108.
11. It was counsel's submission that the *Basic Education Act* No 14 of 2013 which repealed the Education Act 2011, under Section 55 (1) (b) as read with the 4th Schedule Part 1, Section 1 provides for Incorporation of a Board of Management which is a body corporate with the capacity to sue and be sued.
12. Counsel therefore submitted that Asha Muthoni Kiringo has not demonstrated that she has any authority to plead or act on behalf of the school from the Board of Management of Maziwani Primary School and that the school cannot sue in its own name but through the Board of Management.
13. Mr Rambo relied on the case of *Beatrice Tilitei & another v William Kibet Chiboi [2017] eKLR* where this court held that the body which can sue or be sued on matters affecting a public school is the Board of Management as per Section 10(2) (2) of the Education Act cap 211.
14. Further Mr Rambo submitted that with respect to the two religious' institutions, Asha Muthoni has not demonstrated that she has authority from the registered trustees or officials of the Mosque as provided under Section 3 of the *Societies Act*. Similarly, the Mosque cannot sue in its own name but through its officials or trustees and relied on the case of *Mavoko Land Development Company Limited v Mlolongo Catholic Church & 2 others [2022] eKLR* where the court held that it is trite that a society registered under the *Societies Act*, including a religious organisation, can only sue or be sued through its officials. Counsel urged the court to strike out the case against the 1st Defendant in respect of the non-compliant Plaintiffs.

2ND Defendant's Submissions

15. Counsel cited the Supreme Court case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR* where the court held that even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.
16. Similarly, counsel relied on the Supreme Court case of *United Millers Ltd v Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 Others [2021] eKLR* where the court echoed Albert Chaurembo case (supra).
17. Mr Rambo submitted that the jurisdiction in this present matter is with the Energy and Petroleum Regulatory Authority and Energy and Petroleum Tribunal, who have been expressly set out in the *Energy Act*, 2019 and urged the court to find that it lacks jurisdiction and proceed to strike out this matter with costs to the 2nd Defendant.
18. Counsel identified the issue as to whether the court has jurisdiction to hear and determine this matter and relied on the cases of *Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR*, *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR*, *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service [2019] eKLR*, *Kenya Ports Authority v Modern*



Holdings [EA] Limited [2017] eKLR and *Owners of the Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd [1989] KLR 1.*

19. Mr Rambo also cited the case of *John Musakali vs Speaker County of Bungoma & 4 others [2015] eKLR* where the court held that whereas the *Constitution* protects rights the same Constitution is alive to the fact that it has created institutions which must be allowed to function and carry out their mandate.
20. Counsel therefore submitted that the Energy & Petroleum Regulatory Authority (the Authority) and the Energy & Petroleum Tribunal (the Tribunal) are such creatures of Parliament through the *Energy Act, 2019* (the Act) and by the powers donated by Article 169(1)(d) is the proper forum for resolution of this dispute and relied on the cases *Thomas Schering vs Nereah Michael Said & 3 Others [2019] eKLR*, *Alice Mweru Ngai vs Kenya Power & Lighting Co Ltd [2015] eKLR*, *James Kibugi Githinji vs Kenya Power & Lighting Company Limited [2016] eKLR*, and *James Mwaura Ndung'u v Kenya Power and Lighting Co Ltd [2016] eKLR*,

Plaintiffs' submissions

21. Counsel for the Plaintiff equally gave a brief background to the case and identified the following issues for determination: -
 - a. Whether the Plaintiff has a reasonable cause of action against 4th Defendants?
 - b. Whether the Plaintiff is liable to compensate the Defendants in respect of the space taken by the electricity power lines on the suit property?
 - c. Whether this court has jurisdiction to hear and determine the suit?
 - d. Whether the instant suit is competent?
22. Counsel cited the case of *Mukisa Biscuit Manufacturing Co Ltd –vs- West End Distributors Ltd (1969) EA 696*, on the principles of preliminary objection and further relied on the cases of *Jonathan Munene v Attorney General & 2 others; Kenya Judges Welfare Association (Interested Party) [2021] eKLR* where the court adopted cause of action definition by Justice Havelock, (as he then was), in *Carton Manufacturers Limited v Prudential Printers Limited [2013] eKLR* quoting *Drummond Jackson v British medical Association (1970) e WLR 688*.
23. Mr Ole Kina submitted that courts should sparingly strike out pleadings and that the Plaintiffs should be given an opportunity to prove the mischief and unconstitutionality of the 4th Defendant's actions and failure to protect the rights of citizens.
24. Counsel relied on Sections 171 and 173 of the *Energy Act* Ca1 of 2019 on the procedural regulations in the construction of transmission lines on private land and submitted that the 1st Defendant filed its statement of defence and admitted that it did not compulsorily acquire land for the project and what it did was the acquisition of the way leave.
25. Mr Ole Kina further submitted that the law required the 1st Defendant to seek consent of the Plaintiffs as the owners of the suit property before using the affected portions of land as way leaves and that after receipt of the consent, an agreement for compensation amount must be made, but the 1st Defendant failed seek consent as well as to pay compensation.
26. Counsel relied on the case of *Republic vs Returning Officer of Kamkunji Constituency & the Electoral Commission of Kenya HCMCA No 13 of 2008 [2008] eKLR* where the court held that statutory provisions should not be construed to oust or restrict the jurisdiction of the court in the absence of clear and unambiguous language to that effect. That where there was a lacuna with respect to enforcement



of remedies provided under the Constitution or Act of Parliament, an aggrieved party was left with no alternative but to invoke the jurisdiction of the court.

27. Counsel further cited the case of Benjamin Jomo Washiali, Majority Chief Whip, National Assembly & 2 Others [2018] eKLR. According to counsel the dispute relates to occupation and use of land and one which consequently falls within the broad jurisdiction donated to this Court by virtue of Section 13 (1) and (2) of the Environment and Land Court Act that this court has jurisdiction to adjudicate all disputes relating to land therefore it would be improper to say that this court lacks jurisdiction to hear a dispute relating to entry onto and use of land for the purpose of supplying electric power.
28. On the issue whether this suit is competent, counsel relied on Order 4 rule 1(3) which provides that; -

' Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.'
29. Counsel also cited the case of Joseph Muindi Mutua & 5 others v Boniface M Muunda & another [2022] eKLR where the court held that: -

' That failure to file an authority to plead to accompany the Originating Summons has not prejudiced the 1st respondent in any way. No prejudice has been alluded to. The applicants can still regularize this anomaly without the court necessarily striking out the originating summons which would cause delay, increase the costs and prejudice to the applicants.'
30. Mr Ole Kina urged the court to exercise its discretion to allow the non-compliant Plaintiffs to comply with Order 1 rule 13 of the Civil Procedure Rules and relied on the case of Hezekia Kipkorir Maritim & 10 others v Philip Kipkoeb Tenai & 2 others [2016] eKLR where the court had to determine whether the 1st Plaintiff lacked authority to swear on behalf of the 10 Plaintiffs.
31. Counsel therefore urged the court to dismiss the Preliminary Objection with costs.

Analysis And Determination

32. This is a Preliminary Objection on the jurisdiction of the court and non-compliant with Order 1 rule 13 of the Civil Procedure Rules by some of the Plaintiffs on filing of authority to plead on their behalf by Asha Muthoni.
33. Order 1 rule 13 of the Civil Procedure Rules and Order 4 rule 1(3),
 1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 2. The authority shall be in writing signed by the party giving it and shall be filed in the case.
34. Order 4 rule 1(3) provides that; -

' Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others.'
35. The order provides that where there are more Plaintiffs one or more of them may be authorized by any of them to appear plead or act for such other in the proceedings and such authority must be in writing.



36. This order is in mandatory terms to require such authority to be sought and obtained. The mischief that the order sought to address is where any party can wake up one morning and file a suit on behalf of a party who has not given such authority or even not aware of a case being filed on his or her behalf. That is why there are such rules to be adhered to. If this rule was not in place, then there would be abuse with pecuniary consequences for the affected parties.
37. Article 159 of the Constitution should also not be abused by litigants who have not followed due process to escape the consequences for non-compliance. The court also has discretion to allow regularization of minor anomalies that do not go to the root of the case and those that cannot prejudice the opposing parties. However, this discretion must be exercised judiciously.
38. On the first limb of the Preliminary Objection of the non-compliant Plaintiffs for lack of filing an authority, the 3rd 40th, 58th 67th 68th 81st, 87th 129th 131st 132nd 136th 154th, 158th and 159th may get a reprieve and exercise of the court's discretion to allow them to regularize their position but Plaintiff's No 167, 168 and 169 fall in different categories which need more than authority to plead.
39. Paragraphs 2 and 3 of the plaint states that the 167th Plaintiff (Maziwani Primary School) is a public school recognized under the Education Act, Cap 211 (now repealed). Further the 168th plaintiff (Masjid Answar Mosque Sheikh Omar Maulid) and 169th Plaintiff (Mosque Ganda) are religious institutions registered under the Societies Act, Cap 108.
40. The Basic Education Act No 14 of 2013 which repealed the Education Act 2011, under Section 55 (1) (b) as read with the 4th Schedule Part 1, Section 1 provides for Incorporation of a Board of Management which is a body corporate with the capacity to sue and be sued. There is no evidence that such Board is in place and that they are the ones suing in this case, therefore Asha Muthoni Kiringo has no authority to plead on behalf of such institutions as was held in the case of Beatrice Tilitei & another v William Kibet Chiboi [2017] eKLR where this court held that the body which can sue or be sued on matters affecting a public school is the Board of Management as per Section 10(2) (2) of the Education Act cap 211.
41. Similarly in the case of Kisumu ELC Case No 225 of 2014, Evans Otiende Omollo vs School Committee Union Primary School and Another (2015) eKLR Kibunja J stated that; -
- ' The parties described as Defendants herein do not exist as they are not legal entities under the Basic Education Act capable of being sued or to defend this suit. He further stated at paragraph 5 that 'having found that the four named defendants are nonexistent as entities capable of being sued, the court finds that to allow the suit as filed to continue to further hearing would be an abuse of the courts' process'
42. Further in the case of Headmistress Menengai Primary School & another v Jamila Anyona [2006] eKLR Kimaru J stated that; -
- ' It is the school committee of the primary school which can sue or be sued. The headmistress of a primary school cannot therefore be sued in respect of any action that she undertakes in school on behalf of the school. Secondly, The Parents Teachers Association cannot be sued because it is not a body which is recognized in law. The education Act does not recognize the existence of a Parents' Teachers' Association. In the circumstances of this case therefore, it is clear the respondents sued the appellants wrongfully. The appellants lacked capacity to be sued on behalf of Menengai primary school. I therefore find merit on the ground of appeal by the appellants that they had been sued when they lacked capacity to be sued.'



43. I therefore find that the Preliminary Objection succeeds in so far as the 167th, 168th and 169th is concerned and the suit is struck out against the Defendants. The other Plaintiffs are granted 14 days to regularize if the Preliminary Objection by the 2nd Defendant is not upheld.

44. On the Preliminary Objection by the 2nd Defendant that the court does not have jurisdiction to hear and determine the suit that the same falls within the jurisdiction of both the Energy and Petroleum Tribunal and the Energy and Petroleum Regulatory Authority, in the case of United Millers Limited v Kenya Bureau of Standards & 5 others [2021] eKLR (supra) the Court of Appeal held; -

' In Council v Trans Mara County Council & Another [2000] eKLR and in the case of Godfrey Muthinja Kabiru, (Supra) this Court stated thus:

We may further add that in the case of Albert Chaurembo Mumba &7 others v Maurice Munyao & 148 others (2019) eKLR the Court in addressing similar circumstances was emphatic that:

'In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute'.

45. The Plaintiffs case as captured in paragraph 7 of the plaint is the Plaintiffs are legal owners of all land in Mguruleni Kasimbiji and Ganda in Malindi sub county within the Republic of Kenya that is currently in development as Mguruleni Way leave trace. Further at paragraph 8 that in 2017 the Defendants approached the Plaintiffs to vacate their parcels of land and that their land would be compulsorily acquired for the purpose of establishing way leave trace for installation of an electrical transmission line.

46. Section 36 of the *Energy Act* provides for the jurisdiction of the Tribunal and states at Sub Section 3 that the Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees. Sub Section 5 provides that the Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

47. The composition of the Tribunal is provided for under Section 26 as follows;

(1) The Tribunal shall consist of not more than seven members as follows

(a) A chairperson who shall be appointed by the President from among persons qualified to be judges of the High Court and who has at least five years' experience in energy and petroleum matters; and

(b) Six other persons possessing knowledge and experience in law, petroleum and energy and who are not in the employment of the Government, Agency or the Authority

48. Section 46 of the *Energy Act* states: -

46

(1) 'No person shall enter upon any land, other than his own-

(a) To lay or connect an electric supply line; or



(b) To carry out a survey of the land for the purposes of paragraph (a) except with the prior permission of the owner of such land.

(2) The permission sought in sub-section (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry'.

49. In the case of *Alice Mweru Ngai v Kenya Power & Lighting Co Ltd* [2015] eKLR the court struck out a similar case for lack of jurisdiction and for having failed to approach the relevant forum for dispute resolution set out by an Act of Parliament.

50. Similarly, in the case of *Vitalis Ouma Osano vs Kenya Power and Lighting Company PLC* [2021] eKLR the court held that: -

' I do find that this disputes revolves on development of Energy infrastructure namely Electricity Supply lines on the alleged Plaintiff's land which is private land. The Plaintiff is aggrieved with the act of the defendant.

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 to the Tribunal. The plaintiff has no option but to refer the dispute to the Tribunal. The Tribunal has the Jurisdiction to grant the orders being sought by the plaintiff.

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.

In view of the above, this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act. The Preliminary Objection is upheld and the suit is struck out. Costs to the defendant.'

51. I have considered the Preliminary Objection, the submissions by counsel and the authorities cited and find that the 2nd Defendant's Preliminary Objection has merit and therefore the suit is struck out with costs to the 2nd Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

