



M'tuamwari v Kenya Power and Lighting Company (Environment & Land Case E23 of 2021) [2022] KEELC 13777 (KLR) (26 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E23 OF 2021
CK NZILI, J
OCTOBER 26, 2022**

BETWEEN

PETER KAIMATHIRI M'TUAMWARI PLAINTIFF

AND

KENYA POWER AND LIGHTING COMPANY DEFENDANT

RULING

1. The defendant has taken out a preliminary objection dated 5.8.2021 that the court lacks jurisdiction to entertain this suit by dint of sections 3(1), 10, 11(e) - (l), 23, 24, 36, 40, 42, 224 (2)(e) of the [Energy Act, 2019](#) as read together with regulations 2, 4, 7 & 9 of the [Energy \(Complaint and Dispute Resolution\) Regulation, 2012](#), article 159 (2) & 169 (1) 4 (b) & 2 of the [Constitution](#) and sections 9 (b) & (3) of the [Fair Administrative Action Act, 2015](#).
2. The preliminary objection is also captured under paragraphs 21 & 22 of the statement of defence dated 17.8.2021, that the suit offends section 4 (2) and the [Limitations of Actions Act](#) and sections 3 (4) of the [Public Authorities Limitations Act](#). That the dispute should have gone to the Energy and Petroleum Regulatory Authority or the Small Claims Court under Sections 12 of the [Small Claims Court Act, 2016](#).
3. With leave of court parties agreed to canvass the preliminary objection by way of written submissions dated 23.5.2022 and 10.6.2022 respectively.
4. The defendant submitted that Section 36 of the [Energy Act, 2019](#) establishes the Energy & Petroleum Tribunal with original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
5. Therefore, the defendant urged the court to down its tools. Reliance was placed on [Owners of Motor Vessel Lilian "S" v Caltex Oil \(19\) Ltd](#) (1989) eKLR, [Elijah Mulahi & 10 others v KPLC](#) (2020) eKLR, [Joseph Njuguna Mwaura & 20 others v Republic](#) (2013) eKLR, [Mukisa Biscuits Manufacturing Co Ltd](#)



v West End Distributors Ltd (1969) EA 696 *Vitalis Ouma Osan v KPLC* (2021) eKLR *Equity Bank Ltd v Bruce Mutie Mutuku t/a Dicius Tour & Travel* (2016) eKLR, *Phoenix of EA Assurance Co Ltd v SM Thiga t/a Newspaper Service* (2019) eKLR, *AG & another v Andrew Maina Githinji & another* (2016) eKLR, *Samuel Kamau Macharia & another v KCB & 2 others* (2012) eKLR, *Amy Kagendo Mate v Prime Bank Credit Reference Bureau Africa Ltd* (2013) eKLR, *Kakuta Maina, Hamisi v Peris Pesi Tobiko & 2 others* (2013) eKLR *John Musakali v Speaker County of Bungoma & 4 others* (2015) eKLR, *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & another* (2018) eKLR, *Republic v Energy Regulatory Commission & 2 others* (2008) eKLR, *Mutanga Tea & Coffee Ltd v Shikara Ltd & another* (2015) eKLR, *Bernard Murage v Fine Serve Africa Ltd & 2 others* (2015) eKLR.

6. Further, the defendant urged the court to strike out the suit with costs guided by the case law of *Kenya Sugar Board v Ndugu Gathini* (2013) eKLR, *Joseph Nzyoki Mwanthi v KPLC* (2017) eKLR & *Cecilia Karuru Ngaya v BBK & another* (2016) eKLR and *Republic v Rosemary Wairimu Munene exparte applicant v Ihururu Dairy Farmers Cooperative Society Ltd*.
7. On his part, the plaintiff submitted that this court is seized with jurisdiction under article 162 (2) (b) of the *Constitution* as read together with sections 3, 4 & 13 of the *Environment and Land Court Act*. Reliance was placed on *Kenya Hotels Properties Ltd v AG & 5 others* (2018) eKLR, *IEBC v Jane Cheprenger & 2 others* (2015) eKLR.
8. It is trite law that parties are bound by pleadings and issues flow from pleadings.
9. By a plaint dated June 9, 2021, the plaintiff as the registered owner of LR No Nyambene/Uringu/1/1023 situated in Tigania West Sub-County sued the defendant for trespass into his land. It was alleged the defendant moved in, dug holes and erected electricity posts in an area measuring 627.59 meters without the plaintiff's authority or consent or permission.
10. The plaintiff averred the entry was forceful, unjustifiable and as a consequence of which the defendant indiscriminately cut down 77 manmade trees alleged to be on a wayleave, yet they were not on the powerline hence causing special damages of Kshs 875,200/=. He sought for a permanent injunction restraining the defendant from entering into or in any way whatsoever interfering with his land, special damages of Kshs 875,200/= removal and or uprooting of the electricity posts erected on his land and general damages for trespass, conversion annexure or loss of user. The plaintiff relied on his list of documents dated 9.6.2021.
11. By a defence dated 17.8.2021, the defendant denied that the plaintiff was the registered owner of LR No Nyambene/Uringu/1/1023 as alleged or at all or that it illegally, irregularly and or unprocedurally entered the aforesaid land and erected electricity posts depriving the plaintiff its use and utilization and or committing acts of destruction, damage or occasioning loss to the plaintiff.
12. In the alternative, the defendant averred if any electricity posts were installed on the land as alleged, the same was lawfully done pursuant to a grant of easement in line with Section 28(1) of the *Land Registration Act, 2012* and that it was the plaintiff who had illegally encroached on and trespassed into the defendant's lawful wayleaves corridor and with impunity continues to do so.
13. Further, the defendant averred the plaintiff had come to court with unclean hands after committing an offence under Section 169(1) (a) of the *Energy Act*, to the prejudice of the defendant.
14. Additionally, the defendant pleaded that the plaintiff's claim was fraudulent and out to facilitate unjust enrichment by: - seeking compensation through false pretenses, forging documents, initiating and undertaking a scheme to defraud the defendant; encroaching on a wayleave and deposing a false verifying affidavit. The defendant also pleaded lack of jurisdiction and the failure to exhaust other lawful Alternative Dispute Mechanisms before coming to court.



15. Section 3 (1) of the [Trespass Act](#) states that any person who without reasonable excuse enters, is or remains upon or erects any structure on or cultivates in a private land without the consent of the occupier thereof shall be guilty of an offence. In [John Kiragu Kimani v Rural Electrification Authority](#) (2018) eKLR, the court cited [Clark & Lindsell on Torts](#) 18th ED Pg 923, where trespass is defined as unjustifiable intrusion by one person upon the land in possession of another.
16. In [AG v Halal Meat Products Ltd](#) (2016) eKLR the court held where a person is deprived of his property he is entitled to mesne profits for the damage suffered out of the wrongful period of occupation by another.
17. In [Ajit Bhogal v KPLC](#) (2020) eKLR the court held that permission is needed before entering into a land and laying electric supply. A statement of particulars has to be served upon the owner to assent or dispute the compensation.
18. Section 46 of the [Energy Act](#) (cap 314), provides that no person should enter into any land and lay or connect an electricity supply line without prior permission of the owner.
19. In [Duncan Nderitu Ndegwa v KPLC Ltd & another](#) (2013) eKLR, Nyamweya, J as she then was, held that once trespass to land is established, it is actionable per se with no proof of damage being necessary for the court to award damages. In [Mulwa v Muthaga Mweke](#) (2016) eKLR & in [Nguruman Ltd v Shompole Group & 3 others](#) (2007) eKLR, the Court of Appeal held that every continuance of a trespass is a fresh trespass.
20. The court stated sections 143-149 of the [Land Act](#) is the law over wayleaves and other rights of way and that evidence must also be available of any compensation to be made. See also [Samuel Motari Nyambati v KPLC](#) (2018) eKLR, [Richard Buddy Okemwa & another v KPLC](#) (2013) eKLR.
21. In [KPLC v Ringera & 2 others](#) Civil Appeal E24 and 248 of 2020 (Consolidated) (2022) KECA 104 KLR (February 4, 2022) Judgment cited with approval [Fleetwood Enterprises Ltd vs KPLC \(2015\) eKLR](#), [KPLC v Fleetwood Enterprises Ltd](#) (2017) eKLR, [Duncan Ndegwa v KPLC Ltd](#) (2013) eKLR, [Capital Fish \(K\) Ltd v KPLC](#) (2016) eKLR, while considering section 46 (1) & 50 of the [Energy Act](#), the court held nothing bars a party aggrieved by the appellant's trespass or conduct in seeking redress from court before resorting or exhausting the inbuilt out of court dispute resolution or compensatory mechanisms in the said provisions. The court dismissed preliminary objections based on the provisions of the [Energy Act, 2006](#) together with the [Energy \(Complaint & Dispute Resolution\) Regulations, 2012](#).
22. The court said a party was at liberty to invoke and seek compensation for trespass on the laying of electricity supply posts and cables without consent, authority or knowledge.
23. Applying the foregoing binding decisions, the plaintiff's case is based on trespass under Section 46 of the [Energy Act](#). He has attached a copy of the title deed. The defendant has not pleaded if the permission under Section 46 [Energy Act](#) and section 143 of the [Land Act](#) was sought and obtained.
24. It has not pleaded it gave notice and statement of particulars to the plaintiff's trespass as per the caselaw above is a continuing one.
25. The case of [Elijah Mutahi](#) (*supra*) & Abdalla Nicholas Kenya Hotels (*supra*) are distinguishable and irrelevant to the facts herein
26. I therefore find no merits in the preliminary objection. The same is dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26TH DAY OF OCTOBER, 2022



In presence of:

C/A: Kananu

Gitonga for plaintiff

Ododa for defendant

HON. C.K. NZILI

ELC JUDGE

