



**Ochoki (Suing as the administrator of the Estate of Ochoki Mogeni - Deceased) v Kenya Power and Lighting Company Limited (Environment & Land Case 20 of 2022) [2025] KEELC 1076 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1076 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 20 OF 2022**

**M SILA, J  
MARCH 4, 2025**

**BETWEEN**

**RUTH MORAA OCHOKI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF OCHOKI MOGENI - DECEASED) ..... PLAINTIFF**

**AND**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... DEFENDANT**

**RULING**

(Plaintiff filing suit against the defendant claiming that the defendant has trespassed into her land and erected high voltage electricity poles; plaintiff seeking orders to have the defendant remove the same; objection raised that the court has no jurisdiction and that the suit is ought to be heard by the institutions established under the *Energy Act*; plaintiff asserting that the dispute is of trespass to which this court would have jurisdiction; court persuaded that there is an alternative mechanism under the *Energy Act* that the plaintiff can pursue; court would however have jurisdiction only that pursuant to the doctrine of exhaustion the plaintiff first needs to exhaust the alternative forum before coming to court; application allowed but no orders as to costs)

1. The application before me is that dated 25 October 2024 filed by the defendant. The defendant seeks orders to have this court declare that it has no jurisdiction and proceed to strike out the suit with costs to the applicant/defendant. The application is founded upon the following grounds :
  - a. That by an amended plaint dated 25 July 2024, the plaintiff brings this suit claiming that the defendant erected electrical posts with high voltage cables on his property without their consent;
  - b. That by an amended statement of defence dated 18 September 2024, the defendant made among other averments that the issues raised in the plaintiff's case are a preserve for the



Jurisdiction of the Energy Petroleum Tribunal or the Energy and Petroleum Regulatory Authority;

- c. That the plaintiff's suit is a dispute between a licensee under the [Energy Act](#) and a third party the original jurisdiction of which is vested on the Energy and Petroleum Tribunal;
  - d. That the power granted to the defendant to erect power lines on public and private properties and the requirement to obtain wayleave consents is a matter regulated under the [Energy Act](#) the jurisdiction of which is vested upon the judicial and quasi-judicial tribunals/authorities under established under the [Energy Act](#);
  - e. That the plaintiff has not exhausted all the local dispute resolution avenues provided in the law in light of Articles 159(2)(c) and 169(1)(d) of [the Constitution](#) of Kenya and sections 7 and 9 of the [Fair Administrative Action Act](#), No. 47 of 2012;
  - f. That the application herein raises a preliminary point of law on jurisdiction that ought to be determined in the first instance before the Honourable Court delves into the substance of the suit;
  - g. That the applicant has previously raised the issue of jurisdiction through their notice of preliminary objection dated 29 September 2022, statement of defence dated 29 September 2022, Replying affidavit of Joseph Muchai dated 26 April 2024, submissions dated 6 June 2024 and amended statement of defence dated 18 September 2024;
  - h. That it is in the interest of justice and fairness that the defendant/applicant's application be allowed.
2. The supporting affidavit is sworn by Joseph Muchai, a Legal Officer of the applicant. He has more or less deposed that the matters in this suit lay within the jurisdiction of the Energy and Petroleum Tribunal or the Energy and Petroleum Regulatory Authority. He has deposed that the dispute is between a licensee under the [Energy Act](#) and a third party and that original jurisdiction is vested upon the Energy and Petroleum Tribunal. He deposes that the power granted to the applicant to erect power lines on public and private property and the requirement to obtain wayleaves is a matter regulated by the [Energy Act](#) and jurisdiction is vested upon the judicial and quasi-judicial authorities established under the said Act. He contends that the plaintiff ought to exhaust these avenues.
  3. In response the plaintiff filed grounds of opposition as well as a replying affidavit dated 5 November 2024 wherein she contended that the defendant illegally and without consent erected electrical posts with high voltage cables on her property parcel number Kisii Central Kitutu/monyero/20 (the suit land) without any permission, authority and/or notice in writing from the registered owner contrary to sections 47 and 52 of the [Energy Act](#). She contended that the Energy and Petroleum tribunal or the Energy and Petroleum Regulatory Authority has no jurisdiction to deal with actions of trespass, or encroachment into private property in ignorance of Section 47 of the [Energy Act](#). She deposed that the defendant is guilty of trespass into private property and thus it should be estopped from raising a preliminary objection after omissions of failing to secure permission from the land owner before laying electric supply lines. She insisted that the plaintiff's suit is between a registered owner and a trespasser and not between a licensee and a third party as alleged. It was her contention that the Energy and Petroleum Tribunal is not constitutionally mandated to deal with title to land as well as trespass. She asserted that it is the Environment and Land Court established under Article 162(2) of [the Constitution](#) that has jurisdiction to hear and determine disputes relating to environment and title to land. She contended too that Section 46 of the Electrical Power [Act No. 11 of 1997](#) is very clear on how the defendant should have approached the plaintiff. She posits that the defendant should have given a



notice of intention to lay the power lines in the plaintiff's property and thereafter await for the response from the plaintiff in writing, but instead, the defendant in a foolhardy manner and in a show of might and of the highest impunity, entered onto the plaintiff's property, erected huge poles and on them pulled high voltage cables diagonally, rendering the entire four (4) acres useless. She underscored too that the defendant ignored its own regulatory statute i.e Section 46 of the Electric Power Act, [Act No. 11 of 1997](#).

4. I gave liberty for counsel to file submissions in respect of the application. I have seen the submissions of Mr. Maanzo for the applicant, and Mr. Ochoki for the respondent. They more or less reiterated their positions as set out in the application and in the reply thereto. I have given the submissions due consideration.
5. What I need to determine is whether this court has jurisdiction to hear and determine this dispute. In a nutshell, the applicant contends that the suit falls under the purview of the [Energy Act](#) and should be heard by the institutions created therein, whereas the position of the respondent is that this is a suit for trespass and illegal occupation of land and it is this court with jurisdiction.
6. For a court to assess whether or not it has jurisdiction, the starting point has to be the pleadings and a distillation of what the cause of action is. In the amended plaint, the respondent avers to be the administrator of the estate of the late Ochoki Mogeni who before his demise was registered as proprietor of the land parcel Central Kitutu/Monyerero/20 in the year 1974. She has pleaded that this land was utilized as a tea farm and some trees are also grown there. She pleaded that after her husband died, she was not able to tend the farm and in the year 2006 she proceeded to the USA where she stayed for five (5) years. When she came back she found that the applicant had erected electrical posts right across the land rendering it useless. She wonders why the applicant erected poles on her land yet there is a murrum road just 5 metres away. She avers that she visited the applicant's offices and even caused letters to be written, but to no avail, hence the filing of this suit. In her amended plaint she has asked for the applicant to be ordered to remove its poles from the suit land; a permanent injunction to restrain her from future trespass; loss of earnings of Kshs. 20,000,000/=; mesne profits and costs.
7. The applicant filed a defence which is more or less a denial of the claim. In the alternative she pleaded Section 28 (i) of the [Land Registration Act](#), 2012. She also raised the issue now in this application, i.e that the dispute should be a preserve of either the Energy or Petroleum Tribunal (the tribunal) or the Energy and Petroleum Regulatory Authority (EPRRA).
8. In his submissions, counsel for the applicant urged that the issue in the respondent's suit is that the applicant is using her land without obtaining wayleaves. He referred to Section 3 of the [Energy Act](#) which he submitted supercedes all other statutes including the [Land Act](#) and the [Environment and Land Court Act](#). He referred to Section 2 of the [Energy Act](#) on the definition of 'works'; Section 9 on the establishment of EPRRA and its powers as outlined in Section 11. He specifically referred to Section 11 (i) which gives EPRRA power to 'investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act.' He submitted that the applicant, as a licensee, obtains wayleaves under the Act and hence the power to ensure compliance with regard to obtaining of wayleaves is with EPRRA. He also referred to the Energy Complaints and Disputes Resolution Regulations 2012 and quoted Regulation 2 which provides that 'these regulations shall apply to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct, practice or operation of any party or any matter regulated under the Act.' He similarly referred to Regulation 4 thereof on the nature of disputes that ought to be heard by EPRRA and underscored disputes relating to 'wayleaves, easements, or rights of way in relation to the generation, transmission, distribution, supply and use of electrical energy.' He referred to Section 24 which provides that a person may appeal the decision of EPRRA to the Energy Tribunal and thereafter there is a further right of



appeal to the High Court. He submitted that because of these provisions this court has no jurisdiction. He further submitted that under Section 36 (3) of the Energy Act, it is the Tribunal which has original civil jurisdiction on any dispute between a licensee and a third party and the Tribunal can give reliefs including injunctions and damages. He relied on several authorities including the case of Kenya Power & Lighting Company PLC vs Gichure (2024) KEELC 3333 (KLR); and Sombo K. Sombo & 2 Others vs KETRACO & 3 Others (2023) UR Kwale ELC No. E021 of 2022.

9. On the other hand, Mr. Ochoki asserted that the claim is of trespass for which this court would have jurisdiction. He further submitted that the applicant ignored its own statute by failing to first seek permission of the respondent before laying its electricity lines. He submitted that Article 40 of the Constitution provides the right to property and that Parliament is obliged not to enact a law that permits the deprivation of property without compensation. He submitted that Section 3 of the Energy Act may take precedence over other statutes but is inferior to the Constitution. He insisted that this case is not one of a licensee and third party but is one of trespass.
10. I have considered the matter. Indeed what is in dispute is the act of the defendant laying lines across the land of the plaintiff. Is this a matter that ought to be heard before EPRA or the Tribunal ?
11. It appears that this issue has been determined in previous cases and Mr. Maanzo actually provided a plethora of them. For example in Kenya Power & Lighting Company PLC vs Jane Njoki Gichure (supra), the respondent filed suit inter alia for trespass as the appellant had erected poles on her land. A preliminary objection was raised before the trial Magistrates' Court that the court had no jurisdiction but the objection was dismissed. On appeal, Angima J, held that the claim related to a matter regulated under the Energy Act, 2019, as it concerned a dispute between licensee (the appellant) and a third party ( the respondent) on the alleged action of constructing electricity lines on her land. He noted that Part VII of the Act deals with wayleaves and therefore the activity of the appellant was one which the Energy Tribunal had jurisdiction. A similar decision was also reached by Dena J, in the case of Sombo K Sombo & 2 Others vs Ketraco & Others (supra), the issue again being on laying of electricity lines on the plaintiffs' parcel of land.
12. I am not persuaded to depart from these decisions of my learned brothers and sisters. I have indeed looked up at the various Sections of the law outlined by Mr. Maanzo particularly Section 36 of the Energy Act, which provides as follows :

#### 36. Jurisdiction of the Tribunal

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.



13. The Tribunal referred to above is the Energy Tribunal and it will be seen that it is vested with original civil jurisdiction to hear disputes between a licensee and a third party or between licencees. The applicant is a licensee having been licenced to distribute power and the respondent is a third party. The dispute is whether or not the applicant has a wayleave to use the respondent's land to lay electricity lines.
14. Mr. Ochoki is however right that this court would have jurisdiction given the provisions of Article 162 (2) (b) of *the Constitution* which gives this court the power to hear disputes relating to the environment and land. The dispute here is over land and this court would have jurisdiction. We have to be careful when we say a court has no jurisdiction. It means that there is no law whatsoever that vests it with power to hear such dispute. This court certainly has power to hear a dispute such as that which has been presented here. It does not however mean that a court with jurisdiction must take up that jurisdiction. It can avoid jurisdiction and have the matter decided by other lesser institution following the doctrine of exhaustion.
15. This doctrine was discussed in depth by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR. The Court stated as follows:

“ 52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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 mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R v Independent Electoral and Boundaries Commission (I E B C) ex parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR, where the Court opined thus:

42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

43. While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.”

16. Equally the court of Appeal in the case of this is Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, stated that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...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 mechanisms in place for resolution outside the Courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

17. Further the Court of Appeal in the case of Speaker of the National Assembly Vs. Karume [1992] KECA 42 (KLR) underscored the relevance of exhausting alternative dispute resolution mechanism created in law by stating;

“ 15. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

18. Thus where there is an alternative dispute resolution mechanism that has been established, it is now settled that parties need to first exhaust that path before coming to court. If those mechanisms were not available then this court could proceed to hear the dispute. It has not been shown that those alternative mechanisms do not exist or are ineffective so that the respondent can assert to have this court determine the case. In such instance this court would avoid exercising jurisdiction over the matter and have the dispute first be determined by those alternative mechanisms.

19. For the above reasons, I find merit in this application. The result is that I proceed to strike out the case of the plaintiff. The plaintiff is advised to first exhaust the dispute resolution mechanisms set out in the *Energy Act*.

20. What about costs ? In my discretion I will not make any orders as to costs. I am persuaded to hold as much since I have seen many letters written to the applicant by the respondent seeking audience over the matter but I saw no effort even to make the courtesy of a reply. The applicant knew that this dispute was looming; she could have proposed to have it settled by negotiation, and if not settled then refer the dispute to the tribunal. The applicant has to do better in its manner of settling disputes especially given that it is more or less a monopoly. Ignoring persons with issues and declining to have a discussion with them cannot be encouraged for an institution such as the applicant. It is for that reason I am not persuaded to grant it costs. Each party will bear his/her owns costs of this case.

Orders accordingly.

**DATED AND DELIVERED THIS 4<sup>TH</sup> DAY OF MARCH 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Saussi for the plaintiff/respondent

Mr. Maanzo for the defendant/applicant

Court Assistant – Michael Oyuko

