



Itabari v Kenya Electricity Transmission Company Limited (Environment & Land Case E077 of 2022) [2024] KEELC 3644 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3644 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E077 OF 2022**

CA OCHIENG, J

MAY 7, 2024

BETWEEN

IBRAHIM KARUTI ITABARI PLAINTIFF

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED . DEFENDANT

RULING

1. What is before this court for determination is the Defendant's Notice of Preliminary Objection dated the 5th October 2023, which is based on the following grounds:
 - a. The Court lacks jurisdiction to hear and determine this suit as the same offends the provisions of sections 3(1) and 224(2) (e) of the *Energy Act* 2019 as read together with Regulations 4(a) and 7 of the *Energy (Complaints and Disputes Resolution) Regulations* 2012.
 - b. The court lacks jurisdiction to hear and determine this suit as held by the Court of Appeal on 3rd February 2023 in Kisumu Civil Appeal No. 42 of 2021, *Abidha Nicholus v Attorney General & 7 Others; National Environmental Complaints Committee (NECC), NEMA, Siaya County, KPLC & Others* [2023] eKLR.
2. The Notice of Preliminary Objection was filed in opposition to the Plaintiff's suit. Vide a Plaint dated the 26th October 2022, the Plaintiff had alleged that the Defendant had trespassed onto his property, being Konza North/Konza North Block 2 (Malili)/3 (formerly Plot No. 1923 at Malili Ranch Ltd) and he sought for declaratory and injunctive orders against it.
3. In response to the suit, the Defendant had filed a Notice of Preliminary Objection dated the 25th November 2022 contending that the Plaintiff lacked locus standi to institute the suit. The Court vide its Ruling delivered on 20th September, 2023, disallowed the said Preliminary



Objection as there was no Defence filed to rebut the Plaintiff's averments. Further, the Defendant was directed to file and serve its Statement of Defence within twenty-one (21) days from the said date. The Defendant instead of filing its Statement of Defence as directed, proceeded to file the instant Notice of Preliminary Objection opposing the suit.

4. The instant Notice of Preliminary Objection was canvassed by way of written submissions.

Submissions by the Defendant

5. The Defendant in its submissions relied on sections 3(1) and 37(3) of the *Energy Act*, Regulations 4(a) and 7 of the *Energy (Complaints and Disputes Resolution)*. It argued that the High Court only had jurisdiction at the Appellate level and that any dispute herein ought to first be determined by the Energy and Petroleum Regulatory Authority. In support of its arguments, it relied on the following decisions: *The Owners of Motor Vessel "Lilian S" vs Caltex Oil Kenya Ltd* [1989] KLR; *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others Application* No. 2 of 2011 and *Abidha Nicholus v Kenya Power & Lighting & 13 Others*.
6. The Plaintiff in his submissions insisted that the Defendant had not filed any Defence and hence the Preliminary Objection was premature. He argued that, for the court to determine this Preliminary Objection, it would first have to establish whether a wayleave existed or not, but the same could not be determined in the absence of any such explanation from the Defendant's pleadings. He reiterated that his claim was based on trespass as he seeks damages for the said trespass, which falls under the jurisdiction of this court. He explained that his claim does not constitute a complaint as defined by the Regulations, and that the Defendant's conduct is purely unlawful and amounts to trespass, as it had not sought his consent, hence the need of this court to determine the issue of ownership as well as restrain it, from continued use of the suit land. To buttress his averments, he relied on the following decisions: *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Company Limited* (1969) EA 696; *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others*, Civil Application No. 36 of 2014; *Kisaka v Muyia & 3 Others (Environment & Land Case E009 of 2022)* KEELC 18345 (KLR); *George Waweru Njuguna v Pauline Chesang Gitau Kamuyu* (2017) eKLR and *Abidha Nicholus v Attorney General & 7 Others*; and *National Environment Complaints Committee (NECC), Nema, Siaya County; kplc & Others* (2023) eKLR.

Analysis and Determination

7. I have considered the instant Notice of Preliminary Objection including the rivaling submissions and the only issue for determination is whether this suit should be dismissed with costs. The parameters for consideration of a Preliminary Objection are well settled in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696, where the Court held that 'A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'
8. While in the case of *Autar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No. 53 of 2004, the Court held that: "a preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained." Emphasis Mine
9. Further in the case of *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others* Civil Application No. 36 of 2014, the Supreme Court reiterated the principles set out in the



aforementioned case and held as follows: ‘A Preliminary Objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion.’ Emphasis Mine

10. The jurisdiction of this court stems from Article 162(2) of *the Constitution* as well as section 13 of the *Environment and Land Court Act*. *The Constitution* at Article 162(2) (b) states that:

‘(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to —

(b) the environment and the use and occupation of, and title to, land.’

While section 13 of the *Environment and Land Court Act* provides that:

‘(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

11. Section 13(2) (c) & (d) further stipulates that ‘in exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes –

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land’

12. In the instant suit, the Plaintiff alleges trespass on the part of the Defendant; which the Defendant has not denied. From a reading of the legal provisions I have cited, I opine that this suit clearly, falls under the ambit of Article 162(2) (b) of *the Constitution* as read together with the above cited provisions in the *Environment and Land Court Act*, since trespass touches on ownership and occupation of land. Further, the Defendant has sought to rely on sections 3(1) and 224(2) (e) of the *Energy Act* 2019 as read together with Regulations 4(a) and 7 of the *Energy (Complaints and Disputes Resolution) Regulations* 2012 to challenge this suit.

Section 3(1) of the *Energy Act* provides as follows;

20. ‘(1) If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters—

a. the importation, exportation, generation, transmission, distribution, supply or use of electrical energy;

b. the exploration, production, transportation, distribution, and supply of any other form of energy; and

c. all works and apparatus for any or all of these purposes’

While Section 224(2) (e) of the *Energy Act* 2019 stipulates thus:

“Notwithstanding the provisions of subsection (1) any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act”.



13. Further, Regulations 4(a) and 7 of the [Energy \(Complaints and Disputes Resolution\) Regulations 2012](#) states inter alia:
- ‘4(a) These regulations shall apply to complaints and disputes in the following areas— a) billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
- 7(1) In the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the Commission for recourse.’
14. In Juxtaposing these provisions against the Plaintiff, this court does not see a clear connection between the alleged trespass and the disputes that could arise out of operations envisaged under the [Energy Act](#). Further, the Plaintiff has in the Plaintiff stated that the Defendant entered into the property without his consent. I opine that such kind of entry cannot fall under the ambit of a dispute under the [Energy Act](#), as Regulation 4(a) outlines a wide array of disputable areas and trespass is not one of them.
15. The above notwithstanding, the court notes that, this is the second Preliminary Objection raised by the Defendant. In reiterating this court’s position in its ruling dated the 20th September 2023 on a previous objection by the same Defendant, is trite law that unless the Defendant files a defence expressly rebutting the averments by the Plaintiff and denying jurisdiction, the suit remains unopposed. To my mind, I find that, the Defendant has chosen to fail to comply with an order of the court and engage in delaying tactics, which will only serve to delay justice, which goes against the constitutional principle of expeditious disposition of a matter before court. Guided by the overriding objective principle clothed under Article 159 of [the Constitution](#), this court is keen to have this matter determined expeditiously and on its merit, without further undue regard to procedural technicalities.
16. I note the Defendant has heavily relied on the case of Kisumu Civil Appeal No. 42 of 2021, [Abidha Nicholas v Attorney General & 7 Others; National Complaints Committee \(NECC\), NEMA, Siaya County, KPLC & Others](#) [2023] eKLR. On perusal of the said case, there is a clear distinction with the instant suit, which relates to trespass on private property while in the cited decision, it deals with operations on a neighbouring land which touched on environmental impact. Whereas the provisions of the [Energy Act](#) could be applicable in view of the parties involved, the prayers sought and the subject activities are different.
17. In the circumstances, while associating myself with the decisions cited, I find the Notice of Preliminary Objection dated the 5th October, 2023 premature and will strike it out with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 7TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Isack Opar for Defendant

Mutinda for Plaintiff

Court assistant – Simon/Ashley

