



**Thaathini Development Company Limited v Kenya Electricity
Transmission Company Limited (Environment & Land Case
E084 of 2022) [2023] KEELC 19834 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E084 OF 2022
SM KIBUNJA, J
SEPTEMBER 20, 2023**

BETWEEN

THAATHINI DEVELOPMENT COMPANY LIMITED PLAINTIFF

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED . DEFENDANT

RULING

1. The plaintiff commenced this suit against the defendant vide the plaint dated the 29th July 2022 seeking for permanent injunction restraining the defendant from continuing with the erection of high voltage electricity grid on the listed plaintiff's parcels of land, order directing the defendant to pull down the entire offensive high voltage electricity grid from the plaintiff's land, damages for trespass, compensation for forceful detainer and costs of the suit. Filed contemporaneously with the said plaint is the notice of motion of even date seeking for permanent injunction pending the hearing and determination of the suit and mandatory orders.
2. The defendant opposed the application through the replying affidavit of David Iraya, Engineer of Construction Works, Rabai - New Bamburi – Kilifi Transmission Line, sworn on the 16th September 2022. The defendant also filed the notice of preliminary objection to the application and suit dated the 16th September 2022 raising five (5) grounds inter alia that;
 - a. The court lacks original jurisdiction to hear and determine this suit which is a preserve of the Energy and Petroleum Tribunal.
 - b. The plaintiff is without locus standi to sue the defendant.
 - c. The plaintiff's notice of motion is res judicata.
 - d. That the plaintiff's notice of motion is a non-starter and defective.



- e. The notice of motion and plaint are a nullity and fatally defective ab initio.
3. The learned counsel for the defendant and plaintiff filed their written submissions on the notice of preliminary objection dated the 24th April 2023 and 10th July 2023 respectively which the court has considered.
 4. From the five (5) grounds on the notice of preliminary objection, the following are the issues for the court's determinations;
 - a. Whether the court is with the original jurisdiction to hear and determine the issues on the plaint and notice of motion.
 - b. Whether the plaintiff has locus standi to institute this suit over the parcels of land not proved to be registered in their name.
 - c. Whether the plaintiff's notice of motion is non-starter in view of defect in the annexures to the supporting affidavit failing to comply with Rule 9 of the Oaths and Statutory Declarations Rules.
 5. The court has carefully considered the grounds on the preliminary objection, pleadings filed, submissions by the learned counsel, superior court's decisions cited thereon and come to the following findings;
 - a. In the case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696, the Court of Appeal held that preliminary objection consists of points of law pleaded or implied from the pleadings, which, if argued as a preliminary point, may dispose of the suit. Examples include objections to jurisdiction, pleas of limitation, or submissions regarding contractual obligations to refer disputes to arbitration. Sir Charles Newbold, P, further explained that a preliminary objection raises a pure point of law that assumes the correctness of all facts pleaded by the opposing side. It cannot be raised if any fact needs to be ascertained or if judicial discretion is required.
 - b. The first issue raised in the preliminary objection pertains to whether the Court has original jurisdiction over the suit. The second issue is of the plaintiff's locus or capacity to sue over some of the properties in the suit whose ownership is in contention. To resolve that issue, evidence would need to be called for, either through affidavits to which documents of title would be annexed or oral testimonies. This would also apply to the third issue of whether or not the plaintiff's notice of motion is a non-starter for reasons of defects in the annexures to the supporting affidavit. It is therefore apparent that issues (b) and (c) above are not pure points of law and cannot be raised and determined through a preliminary objection. Such issues would best be dealt with through an application supported by an affidavit so as to give the other party an opportunity to present their evidence through their replying affidavit(s).
 - c. Going back to the first issue, the plaintiff has not contested that the issue of jurisdiction is a pure point of law. The court therefore finds that the issue of jurisdiction falls within the definition of a preliminary objection as described in the aforementioned case. It is well-established that jurisdiction is a fundamental requirement for a Court to have when dealing with any matter before it. This was emphasized in the leading case of Owners of the Motor Vessel "Lillian S" versus Caltex (Kenya) Limited [1989] eKLR, where it was held that jurisdiction is everything for a Court. That without jurisdiction, a Court lacks the power to proceed. The preliminary objection on jurisdiction should therefore be determined first before moving on to any other matter. This was the position taken in the cases of Owners of the Motor Vessel "Lillian S" versus



Caltex Oil (Kenya) Ltd [1989] KLR 1, [1989] eKLR], County Government of Migori versus I N B Management IT Consulting Ltd [2019] eKLR, Phoenix of E.A Assurance Company Ltd versus S. M. Thiga t/a Newspaper Service [2019] eKLR, and Samuel Kamau Macharia & Another versus Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, among others, and informed the court's directions of 23rd February 2023 that submissions on the preliminary objection be filed and exchanged.

- d. The defendant has submitted that the plaintiff's main complaint that the defendant has trespassed onto its parcels of land and erected high voltage electricity grid lines, is a dispute relating to the defendant's mandate to acquire wayleaves, easements, or rights of way in relation to generation, transmission, distribution, supply and use of electrical energy and such a complaint ought to have been raised first with the Energy and Petroleum Regulatory Authority [EPRA], which is the successor of the Energy Regulatory Commission [ERC], pursuant to Regulation 4(a) of the Energy [Complaints and Dispute Resolution] Regulations 2012. That any party not satisfied would file an appeal to the Energy and Petroleum Tribunal established under section 25 of the Energy Act 2019. The Tribunal has powers to hear and determine all disputes and appeals from EPRA in matters relating to energy and petroleum and can grant equitable reliefs including injunctions, penalties, damages, specific performance under section 36(1) and (5) of the Energy Act 2019. That the decisions of the Tribunal are appealable to this court in accordance with section 37(3) of the said Act. The plaintiff's position is that considering it is the owner of the suit lands and the prayers sought, the court is with the original jurisdiction to hear and determine the suit in view of its powers under section 13 of the *Environment and Land Court Act* No. 19 of 2011 and Article 162 (2)(b) of *the Constitution*. Paragraphs 4 and 5 of the plaint dated the 29th July 2022 contains the plaintiff complaints against the defendant to be inter alia that the defendant has without colour of right trespassed on the plaintiff's land and erected high voltage electricity transmission lines thereby causing damages to the properties.
- e. Section 3 of the Energy Act 2019 provides that if there is a conflict between the Act and any other Act, this Act shall prevail on matters related to
- “(a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy,
 - (b)
 - (c) all works and apparatus for any or all of these purposes.”
- The said Act defines “works” to mean
- “(a) electric supply lines, machinery, lands, buildings, structures, earth works and water works, and includes any apparatus or things of whatever description, required for the importation, exportation, generation, transmission, distribution, supply and use of electrical energy, or
 - (b) machinery, land, building, structures, earth works and water works, and includes any apparatus required for the production, importation, exportation, storage, transportation, distribution and supply of any other form of energy.”

Section 36(3) to (5) of the Act under the heading Jurisdiction of the Tribunal provides that;

- “(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 the 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.”

That section 37 of the Act sets out the Power of Review and Appeals from Tribunal and subsection (3) provides that “Any person aggrieved by a decision of the Tribunal may within thirty days from the date of the decision or order appeal to the High Court.” The foregoing clearly shows that the plaintiff’s complaints against the defendant falls within matters that on first instance should be heard and determined within the dispute resolution framework provided under the Energy Act No. 1 of 2019.

- f. The superior courts have time and again emphasized on the need for litigants to exhaust the dispute resolution mechanism under the statutes before invoking the jurisdiction of the formal courts, under the doctrine of exhaustion, as is exemplified succinctly by the Court of Appeal in the case of Geoffrey Muthiga Kabiru & 2 Others Vs Samuel Munga Henry & 1756 others (2015) eKLR where the Court stated thus:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked”.

The Court of Appeal upheld the doctrine as a sound one and expressed the view that Courts ought to be fora of last resort and not the first ports of call any time that a dispute arises. In the case of C O D & another v Nairobi City Water & Sewerage Co. Ltd [2015] eKLR the court discussed what constitutes a constitutional issue before concluding that:

“The parties in this dispute are in agreement that the spectrum of the dispute before me revolves around a contract for supply of water to the Petitioners. In that regard, the Petitioners contend that they are entitled to supply of water since they have paid all their outstanding bills and that the alleged account with arrears does not belong to them in any way. In that context, where is the constitutional issue that the Court is called upon to determine?

9. I have seen the Petitioners’ Petition which is premised under the provisions of Articles 26, 27, 28, 35, 43, 46, 47, 48 and 50 of [the Constitution](#). As much as the Petitioners have alleged a violation of those rights it must be remembered that the crux of their case is based on a contract for supply of water which has allegedly been terminated. It has not been alleged in any way that the Respondent has refused to grant access to the Petitioners to clean and safe water. It is indeed admitted that the Petitioners had been connected and had not only access but supply of water before a dispute arose between the parties. The question then would be whether the Parties had performed their respective obligations under the contract to supply water. In my judgment, the court can do so but not through a constitutional petition.



10. The High Court in International Centre for Policy and Conflict and 5 Others –vs- The Hon. Attorney-General & 4 Others [2013] eKLR observed as follows;

“[109] An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of *the Constitution* in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”

The foregoing legal truism was restated by the Court in the case of Issa Ahmed & 15 others v Mohamed Al-Sawae [2021] eKLR as follows:

“It is common ground that the issue at hand in this matter was about physical planning and execution of an existing development plan. The issues were purely matters of planning and development that are covered under the Physical Planning and Land Use Act. For the aforesaid reasons, I am persuaded that the Plaintiff ought to have followed and exhausted the alternative mechanism provided by Parliament under the Physical Planning and Land Use Act before engaging the Environment and Land court.”

And in the case of Kibos Distillers Ltd & 4 others vs Benson Ambuti Adege & 3 others [2020] eKLR, the Court of Appeal observed in part:

“As aptly stated by the Supreme Court in Samuel Kamau Macharia and Another- vs- Kenya Commercial Bank Ltd and 2 Others (Supra), jurisdiction cannot be conferred by way of judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of counsel or a litigant drawing pleading to confer or oust the jurisdiction conferred on a Tribunal or another institution by *the Constitution* or statute”.

The court went further to state:

“..... further, I observe that the jurisdiction of the ELC is appellate under Section 130 EMCA. The ELC also has appellate jurisdiction under Section 15, 19 and 38 of the Physical Planning Act. An original jurisdiction is not an appellate jurisdiction. A court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other competent organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.....”

The Supreme Court of Kenya added its voice on this issue in their decision in the appeal from the Court of Appeal in the case of Benson Ambuti Adege & 2 Others versus Kibos Distillers Limited & 5 Others [2020] eKLR in which it inter alia held that the superior court should have reserved the issues that the tribunal did not have jurisdiction over, and await the outcome of the tribunal’s decision over the matters it could handle, thereby affording any aggrieved party the opportunity to appeal to the court. The court would then determine any reserved issues,



alongside any of the appeal filed, thereby ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected.

- g. Further, in the case of Speaker of National Assembly versus James Njenga Karume [1992] KLR 21 the court held that;

“Where there is a clear procedure for redress of any particular ground 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 procedure.”

That in view of the the above superior courts decisions the court finds that in this matter it is without the original jurisdiction to hear and determine the suit, and the preliminary objection on jurisdiction is upheld. That as dictated upon this court by the decision in the case of Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd [1989] KLR 1, [1989] eKLR], this court now downs its tools and there is no need to pronounce itself on the other issues of locus standi and whether or not the notice of motion is a non-starter and or defective.

- h. That the defendant having succeeded in the preliminary objection is in terms of section 27 of the *Civil Procedure Act* Chapter 21 of Laws of Kenya entitled to costs.

6. Having come to the foregoing findings, the court directs as follows;

- a. That the defendant’s preliminary objection on the ground of the court lacking the original jurisdiction to hear and determine the the suit commenced through the plaint dated the 29th July 2022, and the notice of motion of even date predicated on the said suit is hereby upheld.
- b. That the plaintiff’s suit and application are hereby struck out with costs to the defendant.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 20th DAY OF SEPTEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: No appearance

Defendant: M/s Chelugui for Akobi Advocate.

