



Mangale & another v Kenya Electricity Transmission Company (Environment and Land Appeal E002 of 2023) [2023] KEELC 20395 (KLR) (3 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20395 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND APPEAL E002 OF 2023**

AE DENA, J

OCTOBER 3, 2023

BETWEEN

PAUL MANGALE 1ST APPELLANT

EMMANUEL NYANZA 2ND APPELLANT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY RESPONDENT

RULING

1. This Ruling is subject of the appellants Notice of Motion application dated 15th February 2023 and the respondent's preliminary objection dated 6th March 2023. The application seeks the following verbatim orders that; -
 1. Leave be granted to the Appellants to file an appeal out of time and the Memorandum dated and filed on 25th January 2023 be deemed as duly filed.
 2. The Advocate for the Appellants herein be deemed to be properly on record.
 3. Costs be borne by the Respondent.
2. The application is based on the grounds on its face and is supported by the affidavit of Paul Mangale sworn on the 15th February 2023. The Application is opposed by the respondent's preliminary objection to have both the Memorandum of Appeal dated 25/01/23 and the application herein struck out. The following grounds are raised; -
 - a. The appellants appeal dated 25th January 2023 is filed contrary to section 79G of the [Civil Procedure Act](#) read together with order 42, rule 13(4) of the [Civil Procedure Rules](#), 2010.
 - b. The court lacks jurisdiction to hear and determine the suit as the same offends the provision of section 12 of the [Civil Procedure Act](#).



- c. The appellants appeal dated 25th January 2023 is filed contrary to section 16A (1) of the [Environment and Land Court Act](#) No. 19 of 2011.
 - d. The court lacks jurisdiction to determine the suit as the same offends the provisions of sections 3(1),10, 11(e), (f), ((i), (k) & (1,23,24,36,40,42 and 224(2)(e) of the [Energy \(Complaints and Disputes Resolution\) Regulation](#) 2012 as read together with Article 159(2) (2) and 169(1)(d) and 2 of the [Constitution](#) of Kenya 2010 and Section 9(2) and (3) of the [Fair Administration Act](#),2015.
 - e. The court lacks jurisdiction to hear and determine the suit as held by the Court of Appeal on 3/2/23 in Kisumu Civil Appeal No.42 of 2021, [Abidha Nicholus v Vs. Attorney General & 7 others; National Environmental Complaints Committee \(NECC\), NEMA, Siaya County, KPLC & Others](#) (2023) eKLR.
3. Both the application and the preliminary objection were canvassed by way of written submissions. The applicant's submissions were drawn by Mwawasaa & Company Advocates are dated 15th May 2023 and filed in court on even date. The respondent's written submissions drawn by Davis O. Obare Advocate on behalf of the respondent are dated 22nd July 2022 and filed in court on the 16th April 2023. The court has considered both sets of the submissions.
 4. It is important to state that on 14/3/2023 the court made directions that the preliminary objection be dispensed with first. I however note that the parties in their submissions herein have canvassed both the PO and the application dated 15/2/23. My consideration of the substantive application will be dependent upon the court's findings on the preliminary objection.

Analysis and Determination

5. I will first deal with the preliminary objection questioning the jurisdiction of this court as espoused by respondent in this matter. I'm guided in this regard by the dictum of Justice Nyarangi of the Court of Appeal in the celebrated case on the subject [Owners of the Motor Vessel Lillian S v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1 where it was held as follows; -

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
6. The grounds upon which the preliminary objection is anchored have already been set out. I will focus on the objection relating to territorial jurisdiction for the reason that the rest of the objections raised will be dependent on whether or not the court is clothed with territorial jurisdiction. If non-then I will have to down my tools at that point.
7. The respondents case is that the appeal herein ought to have been instituted within the local limits of whose jurisdiction the property is situate as per the requirement of Section 12 of the [Civil Procedure Act](#). According to Counsel the Mariakani Court where the ruling was delivered falls within the larger Mombasa County and not Kwale County. That it would be proper to institute the instant appeal before the Mombasa High Court and not Kwale High Court.



8. The applicant submits that territorial jurisdiction is not a pure point of law since it requires evidence. That the suit property being in South Samburu Ranch falls within the County of Kwale thus the jurisdiction of the ELC Kwale.

9. Section 12 of the Act provides as follows; -

Suit to be instituted where subject matter situate

Subject to the pecuniary or other limitations prescribed by any law, suits—

- (a) for the recovery of immovable property, with or without rent or profits;
- (b) for the partition of immovable property;
- (c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
- (d) for the determination of any other right to or interest in immovable property;
- (e) for compensation for wrong to immovable property;
- (f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

10. Let me first state that the jurisdiction of this court is derived from Section 13 of the Environment and Court Act as read together with Article 162 (2) (b) of the *Constitution*. The initial suit the subject of the intended appeal herein was filed in Mariakani and which must have been under the consideration of the provisions of section 12 above. However, for appeals my understanding is that where the suit generating the appeal is filed is what determines where the appeal shall be filed and heard. At the point of filing an appeal the location of the subject matter is not a matter for consideration in my view but where it should be heard. The reason that the suit property is in Kwale does not therefore arise at the point of filing an appeal. In any case this is an administrative process.

11. The judiciary published the Judiciary Environment And Land Court New Divisions: User Operations Guidelines 2023. As part of the appendices (A) is on Environment and Land Court Jurisdiction. It is shown that Malindi ELC has jurisdiction over Mariakani Magistrates Court. Clearly it therefore follows that the suit having been filed in Mariakani there is no option available for an appeal arising therefrom to be filed and heard in Kwale but Malindi Environment and Land Court. This appeal having not been heard it is my view that the guidelines apply.

12. Noting that the Malindi ELC is a court of concurrent jurisdiction and applying the above read mutatis mutandis with the provisions of order 47 Rule 6 and 8, I would re-designate the intended appeal and the application herein to the ELC judge sitting at Malindi.

13. Having made the above finding I find no need to consider the rest of the grounds of the preliminary objection which in my view should be canvassed by the judge sitting at Malindi together with the Notice of Motion application dated 15th February 2023. The following orders shall issue; -

1. The file of these proceedings shall by dint of the re-designation be transmitted to the ELC Malindi for consideration of the remaining grounds in the preliminary objection and the application dated 6th March 2023.
2. The file Kwale Appeal E002 of 2023 shall be closed.



3. Costs shall be in the course.

It is so ordered

DELIVERED AND DATED AT KWALE THIS 3RD DAY OF OCTOBER, 2023.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform.

In the presence of:

Mr. Mwawasaa for Appellant /Applicant

Mr Obare for the Respondent

Mr. Daniel Disii- Court Assistant.

