



**Ndolo (Suing on behalf of Elizabeth Kamene Ndolo) v Nol Turesh Loitokktok
Water and Sanitation Company & 9 others (Environment & Land Case
E005 of 2020) [2023] KEELC 20770 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20770 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E005 OF 2020
TW MURIGI, J
OCTOBER 4, 2023**

BETWEEN

**STEPHEN NDOLO (SUING ON BEHALF OF ELIZABETH KAMENE
NDOLO) PLAINTIFF**

AND

**NOL TURESH LOITOKK TOK WATER AND SANITATION
COMPANY 1ST DEFENDANT
MUEMA KITULU 2ND DEFENDANT
EMILY MWELU GATUGUTA 3RD DEFENDANT
HON. MR JUSTICE DANIEL MUSINGA 4TH DEFENDANT
DAVID MUSEMBI KATIE 5TH DEFENDANT
ALPHONCE MWENDWA (SUING ON BEHALF OF THE ESTATE OF JACKSON
KAKUNZU) 6TH DEFENDANT
SAMUEL KYALO MUNYAE 7TH DEFENDANT
PETER KANYASYA 8TH DEFENDANT
MATHEW KYEVA MUTETI 9TH DEFENDANT
MARIA MUTISO 10TH DEFENDANT**

RULING

1. This ruling is with respect to the Preliminary Objection raised by the 2nd – 10th Defendants vide the Notice of Preliminary Objection dated 10th November, 2022 on the following grounds:-



1. That this Honourable Court lacks jurisdiction to hear and determine this suit by virtue of the fact that Section 121 of the Water Act 2016 empowers the Water Tribunal to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.
2. That accordingly the said suit is fatally defective and incompetent, frivolous, vexatious and ill-conceived brought in utter bad faith and is otherwise an abuse of the court process and the same ought to be categorically dismissed with costs to the Defendants forthwith.
2. The Plaintiff opposed the preliminary objection vide a replying affidavit filed on 1st February, 2022. He averred that the cause of action in the present suit is founded on the tort of trespass against the 1st Defendant with respect to the suit property.
3. He further averred that the Preliminary Objection is fatally defective because it does not meet the threshold set out in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distribution Ltd*. He asserted that the 1st Defendant entered the suit property without his consent and connected water meters to unknown persons.
4. The Plaintiff contended that the Preliminary Objection is aimed at protecting the 1st Defendant's acts of trespass on the suit property. According to him, the 1st Defendant has continued to earn profit from his acts of trespass committed on his property.
5. The parties were directed to canvass the Preliminary Objection by way written submissions.

The 2nd – 10th Defendants Written Submissions

6. The 2nd -10th Defendants written submissions were filed on 2nd May, 2023. On their behalf, Counsel outlined the following issues for the court's determination:-
 - i. Whether this Honourable Court has jurisdiction to hear and determine this suit?
 - ii. Whether the suit is an abuse of the Court process?
 - iii. Who should bear the costs?
7. On the first issue, Counsel submitted that the court lacks jurisdiction to hear and determine this suit. To buttress this point Counsel relied on the case of *Owners of the Motor Vessel "Lillian S" v Caltext Oil (Kenya) Ltd* (1989) KLR1 and on the provisions of Sections 119(1) and 121 of the Water Act of 2016. Counsel contended that the Water Tribunal is the appropriate forum to hear and determine this suit, since the dispute herein relates to the supply and use of water on the suit property. Counsel further submitted that the instant suit offends the doctrine of exhaustion because the Plaintiff did not exhaust the available dispute resolution mechanism provided by the law before filing the instant suit.
8. On the second issue, Counsel submitted that the suit is an abuse of the court process for the reason that the Plaintiff had failed to exhaust the alternative dispute resolution mechanism provided by the law.
9. On costs, Counsel submitted that the preliminary objection is merited and should be upheld with costs to the 2nd-10th Defendants.
10. To buttress his submissions, Counsel relied on the list of authorities dated 15th May 2023.



The Plaintiff's Submissions

11. The Plaintiff's submissions were filed on 3rd February, 2023.
12. Counsel outlined the following issues for the court's determination:-
 - i. Whether the Preliminary objection meets the threshold as laid down in law.
 - ii. Whether the present suit relates to the provisions of water services or trespass?
 - iii. Whether the Preliminary objection has been overtaken by events seeing that the 2nd to 10th Defendants have subjected themselves to the Lordshipable court's jurisdiction by virtue of their own Motion dated 30th November, 2020.
13. On the first issue, Counsel submitted that a preliminary objection can only be raised on a pure point of law. That for a preliminary objection to succeed, the facts should not be disputed. To buttress this point, Counsel relied on the following authorities:-
 1. *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696.
 2. *Oraro v Mbajja*(2005) eKLR.
 3. *Alfred Obuya Obengo & another v the National Chairman Nurses Association of Kenya & others* (2014) eKLR.
14. On the second issue, Counsel submitted that the jurisdiction of the *Water Act* cannot apply in the present matter because the dispute herein is founded on the tort of trespass and not on the provision of water services.
15. Counsel submitted that the contract between the Plaintiff and the 1st Defendant was for the supply of water within a designated area in the Plaintiff's premises. That by installing water meters in other areas on the Plaintiff's land without his authority clearly amounts to trespass onto the Plaintiff's land.
16. Counsel contended that the issues raised in the preliminary objection do not meet the threshold of a preliminary objection set out in the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (*supra*) because they are issues of fact and not issues of law.

Analysis And Determination

17. Having considered the pleadings, the Preliminary Objection and the rival submissions the only issue that arises for determination is whether this Court has jurisdiction to hear and determine this suit.
18. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
19. The principles as to what constitutes a Preliminary Objection were laid down by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, where Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or



a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

20. Further on Sir Charles Newbold JA stated:-

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 had 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 issue. The improper practice should stop.”

21. In Oraro v Mbaja [2005] eKLR Ojwang J (as he then was) described it as follows:-

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

22. The Defendants Preliminary Objection is based on the grounds that this Court lacks jurisdiction to hear and determine this suit. The basis of this argument is that the dispute herein falls within the jurisdiction of the Water Tribunal. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. The Notice of Preliminary Objection raised by the 2nd-10th Defendants fits the description of a Preliminary Objection set out in the *Mukisa Biscuits Case (supra)*.

23. It is trite law that jurisdiction is everything and where a court holds that it has no jurisdiction, it should down its tools. This was the holding in the case of Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited (1989) eKLR where the Court held as follows:-

“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...”

24. Similarly, the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR pronounced itself thus;

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

25. The record shows that the Plaintiff instituted this suit against the 1st Defendant vide a Plaint dated 30th October, 2020 seeking the following orders:-



- a. An order be and is hereby made that the Defendant immediately stops any water connection in the land title number I.R 70883 on North-West of Sultan Hamud.
 - b. An order be and is hereby made that the Defendant removes all the water lines, meters, other installations and machinery from the land title number I.R. 70883 on North-West of Sultan Hamud.
 - c. An order be and is hereby issued for a permanent injunction restraining the Defendant from trespassing upon the land title number I.R 70883 on North-West of Sultan Hamud.
 - d. An order be and is hereby issued against the Defendants and their servants/agents restraining them from interfering with the land title number I.R 70883 on North- West of Sultan Hamud.
 - e. General damages for trespass.
 - f. Exemplary damages for trespass.
 - g. Aggravated damages.
 - h. Interest at court rates on (e), (f) and (g) above from the date of filing suit to judgment until payment in full.
 - i. Costs of the suit.
 - j. Any other/further relief that this court may deem fit to grant.
26. Vide a ruling delivered on 24th June 2021, the 2nd - 10th Defendants were enjoined as Defendants in the suit herein. In the instant suit, the objection is that the dispute relates to water resources or services where there is a contract and hence it falls within the jurisdiction of the Water Tribunal. Counsel for the 2nd - 10th Defendants argued that the dispute should be heard and determined by the Water Tribunal in accordance with Section 121 of the [Water Act](#) 2016.
27. The said Section provides for the jurisdiction of the Water Tribunal as follows:-
1. The tribunal shall exercise the powers and functions Set out in this Act and in particular shall hear and determine appeals at the instance of any person or institutions directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or any other person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.
 2. In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.
28. It is clear from the above provisions that the jurisdiction of the Water Tribunal is twofold. Firstly, it is to hear and determine appeals from decisions or order of the Cabinet Secretary, the Authority and Regulatory Board or any other person acting under the authority of the Cabinet Secretary or the Authority and Regulatory Board. In the present case the Plaintiff is not challenging the decision of the Cabinet Secretary or the Authority and Regulatory Board.
29. Secondly, the Tribunal has jurisdiction to hear and determine disputes relating to water resources or water services where there is a contract. In the present case, the dispute revolves around trespass and connection of water services on the suit property.



30. Under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, 2011, this Court has jurisdiction to determine all disputes relating to the environment and the use and occupation of, and title to land. Section 13(1) and (2) of the Environment and Land Court Act provides as follows:

“ 13. Jurisdiction of the Court

- (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.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”

31. Having carefully studied the pleadings, it is abundantly clear to this court that the main point of contention is trespass and water connection on the suit property.

32. The prayers as sought by the Plaintiffs in their Plaint dated 5th May 2022, are prayers that can be heard and determined by the Environment & Land Court as they relate to the use of land.

33. From the foregoing, it is crystal clear that this Court has jurisdiction to determine the dispute herein as it relates to the use, occupation and title to land.

34. The upshot of the foregoing is that the Preliminary Objection dated 10th November, 2022 is devoid of merit and the same is dismissed with Costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4TH DAY OF OCTOBER, 2023.

HON. T. MURIGI

JUDGE

