



**Amaka Development Limited v Kenya Electricity Transmission Company Limited (KENTRACO) & another (Environment & Land Case 84 of 2021) [2022] KEELC 2363 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2363 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 84 OF 2021**

**LL NAIKUNI, J**

**JULY 5, 2022**

**BETWEEN**

**AMAKA DEVELOPMENT LIMITED ..... PLAINTIFF**

**AND**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED  
(KENTRACO) ..... 1<sup>ST</sup> DEFENDANT**

**KENYA POWER & LIGHTING CO. LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Preliminaries**

1. What is before this Honorable Court for its determination is the Notice of Preliminary Objection dated 30<sup>th</sup> October, 2021 filed by the 2<sup>nd</sup> Defendant herein. It seeks to strike out the entire suit instituted by the Plaintiff for allegedly lack of jurisdiction of the court to hear and determine this dispute hereof.

**II. The 2<sup>nd</sup> defendant's Case**

2. The Objection by the 2<sup>nd</sup> Defendant/Applicant is on the grounds that the Honorable court lacks jurisdiction to hear and determine this dispute and suit as against the 2<sup>nd</sup> Defendant herein. Likewise, it should strike out all consequential orders with costs as the same offends the provisions of Section 3(1), 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42 and 224(2)(e) of the Energy Act, 2019 together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations, 2012 as read together with Article 159 (2) (c) and 169 (1)(d) and (2) of the Constitution of Kenya, 2010 and Section 9 (2) and (3) of the Fair Administration Act, 2015.



### III. Submissions

3. On 14<sup>th</sup> December, 2021 while all parties were present in Court, the Honorable Court directed that the Notice of Preliminary Objection be canvassed by way of written submissions. Pursuant to that, they all complied and on 16<sup>th</sup> May, 2022 a ruling date was reserved to be delivered on notice.

### IV. The 2<sup>nd</sup> Defendant's Written Submissions

4. On 31<sup>st</sup> January 2022, Learned Counsel for the Defendant the Law firm of Messrs. Ochieng J. Advocates filed their written submissions in support of the filed Notice of Preliminary Objection. Mr. Ododa Advocate submitted that the Plaintiff/Applicant instituted a suit through a Plaint dated 5<sup>th</sup> May, 2021 and simultaneously filed a under the Certificate of urgency and a Notice of Motion application dated 5<sup>th</sup> May, 2021. The Notice of Motion application was brought under the provision of Articles 10 (2), 9 (D), 20, 23, 40 (3), 48, 159 and 258 of *the Constitution* of Kenya, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, cap. 21 and the Order 40 Rule 2 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. In the Plaint, the Plaintiff/Applicant had sought among others the following orders:-
  - a. An order directing the Defendants to compensate the Plaintiff for loss of property as valued in the valuation report in the hands of the parties and Defendants within a reasonable time and in default, a mandatory order do issue compelling the Defendants to demolish the High Voltage power lines at their cost.
  - b. A permanent injunction restraining the Defendants whether by their officials, servants, workmen, agents or otherwise howsoever from further erection/installation of high voltage power lines, wasting, occupying, taking possession or in any manner dealing with the Plaintiff's portion of the suit property.
5. The Learned Counsel further submitted the Plaintiff/Applicant that in their notice of motion application sought the following orders:-
  - a. That the further installation of electrical lines by the Defendants over Land Reference No. Mainland North/sectionII/10445 (C.R. No. 42879) be stopped forthwith until payment of the land already installed by High Voltage Lines is paid pending the hearing and determination inter parties of this application.
  - b. THAT the further installation of electrical lines by the defendants over LAnd Reference No. Mainland North/section11/10445 (C.R. No. 42879) be stopped forthwith until payment of the land already installed by High Voltage Lines is paid pending the hearing and determination inter parties of this suit.
6. The Learned Counsel submitted that the 2<sup>nd</sup> Defendant/Respondent herein filed the Notice of Preliminary objection urging the Honorable Court to dismiss the Notice of Motion dated 5<sup>th</sup> May, 2021 and the suit with costs.
7. The Learned Counsel submitted that the foundational basis of their Preliminary Objection was on the question of jurisdiction. He relied on the cases of *Adero Adero and Another – Versus - Ulinzi Sacco Society Limited* [2002] eKLR; *Albert Chaurembo Mumbo & 7 Others – Versus - Maurice Munyao & 148 others*; SC Petition No. 3 of 2016, [2019] eKLR and *United Millers Limited – Versus - Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 Others* [2021] eKLR.



8. The Learned counsel submitted that the jurisdiction in the present matter is with the Energy and Petroleum Regulatory Authority and Energy and Petroleum Tribunal, who have been expressly set out in the [Energy Act](#), 2019 and they therefore urge the Honorable Court to find that it lacks jurisdiction and proceed to strike out this with costs to the 2<sup>nd</sup> Defendant.
9. The learned counsel for the further submitted that the key framework giving rise to the Preliminary Objection herein is the [Energy Act](#), 2019. The Act at Section 3 (1) deals with the issue of conflicts of law and the said section stated that:
  - 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; 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. (2) Save where this Act expressly provides otherwise, any license granted or anything done under this Act shall not affect the right, privilege, obligation or liability acquired by any licensee or other person in any contract or under any written law prior to the commencement of this Act.”
10. The Learned Counsel guided the court on Section 9 of the Act which establishes the Energy & Petroleum Regulatory Authority (Authority) and the Section 11 sets out the powers of the Authority. The Counsel stated that under the provision of Section 11 the Act sets out the power of the authority which is to investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions. The Authority also has powers to make and enforce directions to ensure compliance, issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, issue orders or directions to ensure compliance and impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days. Counsel submitted that these powers of the Authority are buttressed by Section 167 of the Act which grants the Cabinet Secretary power to make regulations for several purposes. One of the purposes is the procedures for hearing, settlement of disputes and any proceedings before the Authority.
11. The Learned Counsel submitted that Sections 3, 9, 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42 and 224 (e) of the [Energy Act](#), 2019 as read with Regulations 2, 4, 7, 9, of the Energy (Complaints and Disputes Resolution) Regulations 2012 gives the Authority jurisdiction to handle disputes similar to the one that the Plaintiff had filed herein.
12. While relying on the case of “*The Speaker of National Assembly – Versus - Njenga Karume* (1992) 1KLR 425, the Learned Counsel submitted that under the Sections of the [Energy Act](#), 2019 and the provisions of the Energy (Complaints and Disputes Resolution) Regulations, 2012 the Authority has powers to investigate and determine complaints or disputes between parties and grant equitable reliefs mentioned. The Counsel further submitted that pursuant to the forgoing provisions, this Honorable Court has no jurisdiction to hear and determine the suit or even grant the reliefs sought by the plaintiff as against the 2<sup>nd</sup> Defendant. The appropriate forum with Jurisdiction is the Energy and Petroleum Regulatory Authority.
13. On the jurisdiction of the Energy & Petroleum Tribunal, counsel submitted that Section 36 (3) of the [Energy Act](#) grants the Tribunal original civil jurisdiction on any dispute between parties. Counsel submitted that it was common knowledge that the defendant was a licensee according to the Act. It was



submitted that under Sub - section (5) the Tribunal had powers to grant equitable reliefs. According to section 37 of the Act, appeals from the Tribunal lay with the High Court.

14. The court was informed that on 26<sup>th</sup> September 2008, the then chairman of the Energy Tribunal gazetted the Energy Tribunal Rules, 2008 (the Rules) under paragraph 12(4) of the [Energy Act, 2006](#) (repealed) as the Gazette Notice No. 9163 vide Kenya Gazette Vol CX-No. 78 dated 26<sup>th</sup> August 2008. The Rules clearly set out the procedures before the Energy and Petroleum Tribunal. The Learned Counsel relied on the case of “Cyrus Komo Njoroge – Versus - Kiringa Njoroge Gachoka & 2 Others [2015]eKLR.
15. The Learned Counsel submitted that going by the provisions of Section 36 of the [Energy Act, 2019](#) the Honorable Court has no jurisdiction to hear and determine the suit or even grant the reliefs sought by the Plaintiff as against the 2<sup>nd</sup> Defendant. It was the counsel’s submission that the alternative judicial forum with the jurisdiction is the Energy and Petroleum Tribunal.
16. The Learned Counsel further averred that the issue of jurisdiction of the courts has further been extensively addressed by the Fair Administration Act, 2015. Section 9(2) and (3) of the Fair Administration Act, 2015 further illustrates the appropriate forum for resolution of disputes. It is the Plaintiff’s case and the 2<sup>nd</sup> Defendant in exercising its powers and undertaking its duties provided for under the [Energy Act, 2019](#) had purportedly trespassed onto the Plaintiff’s land. Reliance was made on the case of “*Night Rose Cosmetics (1972) Limited – Versus - Nairobi County Government & 2 Others* [2018] eKLR.
17. The Learned Counsel submitted that the Plaintiff in filing this matter in this Honorable Court, knowingly and deliberately by passed the Energy and Petroleum Regulatory Authority and also the Energy & Petroleum Tribunal in total disregard to the clearly laid down statutory provisions. The Counsel relied on the case of “*Republic – Versus - Energy Regulatory Commission & 2 Others* [2018] eKLR and *Abidha Nicholas – Versus - Attorney General & 7 Others: National Environmental Complaints Committee (NECC) & 5 Others (Interested Parties)* [2021].
18. The Learned Counsel further submitted that there are plausible reasons as to why the Authority of the Tribunal are vested with jurisdiction in energy matters and the above captioned powers and the same should strictly be adhered to. The Learned Counsel cited the cases of “*Republic – Versus - Public Procurement Administrative Review Board & Energy Sectors Contractors Association, Zoec – Zhopedc - Nginu Ex Parte Kenya Power & Lighting Company Limited* [2020] eKLR and [Geoffrey Muthinja & Another – Versus - Samuel Muguna Henry & 1756 Others](#) [2015] eKLR.
19. The Learned Counsel concluded by urging Court to have the suit herein be dismissed with costs to the 2<sup>nd</sup> Defendant.

## V. The Plaintiff’s Written Submissions

20. On 18<sup>th</sup> March, 2022 the Learned Counsel for the Plaintiff filed her written submissions in opposition of the Preliminary Objection. The Learned Counsel submitted that the Preliminary Objection failed the test laid down in the now famous case of:- “*Mukisa Buscuit Manufacturing Co. Limited – Versus - West End Distribution* [1969] E.A. 696 where it was held .....a preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded on the other side are correct. It cannot be raised if any fact has be ascertained or if what is to be sought is the existence of judicial direction.
21. The Learned Counsel submitted that the Preliminary Objection is based on disputed facts; the Counsel stated that they were not talking about statutory jurisdiction but facts which may or may not confer



jurisdiction. The Plaintiff/Applicant is claiming that the Defendant/Respondents are trespassers who have encroached the Plaintiff's land without the Plaintiffs consent whereas the position of the Defendants/Respondents relies on the facts of licenses and licenses conditions which however they have not shown to be existent by way of affidavit or otherwise. It was the Learned Counsel's submission that in the event of a license it is incumbent to the Defendants to prove existence of a license in the absence of an express admission of by the Plaintiff in its pleadings.

22. The Learned Counsel quoted Section 9 of the [Energy Act](#) which establishes the Energy and Petroleum Regulatory Authority and section 11 sets out the powers of the Authority. Under Section 11 (i) the Authority has a power to investigate and determine complaints or disputes between parties over any matter relating to licenses and licenses conditions under this Act. It was the Learned Counsel's submission that there has never been an existing, mutual and legal contract between the Plaintiff/Applicant herein and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents; the Defendant/Respondents have failed to prove the existence of a legal relationship with the Plaintiff/Applicant either through a legal binding contract or deposition of an affidavit. Under the Law of Contract section 3(a) there is a provision that for the disposition of an interest in land, the contract has to be written, signed and attested between the parties. In the case there is no such contract creating a license or any obligation enforceable by the Energy and Petroleum Tribunal. The counsel further submitted that the tribunal would have had jurisdiction only if the parties have a legal relationship recognizing the legal obligations of the parties.
23. The Learned Counsel submitted that as per the Mukisa Buscuit case, it is trite holding that the facts must not be disputed. The Plaintiff/Applicant's position of a trespasser differs from that of the Defendants/Respondents who claim licenses and licenses condition which unfortunately they have not shown this Honorable Court of their existence. The cause of action arising from the tort of trespass is different from a cause of action arising from a contract. The Defendants reliance on Sections 36 and 37 of the [Energy Act](#) are not of any assistance to the defendants as the disputes to the entertained are between licenses and Third party. No such relationship of a licensee or third party is pleaded or admitted by the Plaintiff. The Defendants did not also provide any proof of such relationship.
24. The Learned Counsel stated that the Defendants also sought to rely on regulations 2 of the Energy (complainants and dispute resolution regulations) which also do not assist them because the underlying word is license which they submit is not the case here. It was the counsel submission that in as much as the Defendants may try to widen the scope of the regulations, it is trite law that Regulations cannot be ultra vires the main or parent Act which limits the jurisdiction of the Energy and Petroleum Tribunal to investigate and determine complainants or disputes between parties over any matter relating to licenses and license conditions under the Act. It was the Counsel's submission that the Regulations only related to a scenario where there is already a licenses and license. It is common ground there is no written agreement between the parties and in this case here has never been any official communications or acknowledgement on the placement of the Defendants materials in the Plaintiff's land hence making the Defendants ordinarily trespassers and encroachers.
25. The Learned Counsel informed the court that the Applicant herein is the registered owner of all parcel of land reference Number Mainland North/sectionII/10445 (C.R. NO. 42879) measuring approximately two naught one decimal five (201.5) Acres or thereabout, located at Mwakirunge Area Mombasa County having absolute interest thereof. It is an undisputed fact that the Defendant/Respondent herein encroached the Plaintiff/Applicant's parcel of land without the consent of the Plaintiff. The 2<sup>nd</sup> Defendant/Respondent through its agent the 1<sup>st</sup> Defendant/Respondent through its agent the 1<sup>st</sup> Defendant/Respondent unlawfully encroached the Plaintiff/Applicant's parcel of land without consent and installed High Voltage Power lines covered 45.98 acres of the Plaintiff/Applicant's



- suit property without compensation and are in breach of the Plaintiff/Applicant's constitutional rights to own property and right to be compensated in the event of a compulsory acquisition.
26. The Learned Counsel stated that the said parcel of land affected was valued at a sum Kenya Shillings Three Sixty Five Million (Kshs 365,000,000.00) as valued by the firm of Messers. Njihia Muoka Rashid Company Limited. The Plaintiff/Applicant was informed verbally that it was an urgent government project and the Plaintiff/Applicant would be expeditiously compensated but this was not communicated officially and the Plaintiff follow up ended in frustration. The Counsel submitted that the Plaintiff had been unable to utilize its land on account of such installation and had yet to be compensated as stipulated by law. From the facts aforesaid, the Defendants have never acknowledged the rights of the Plaintiff and have never endeavored to create any contractual relationship. The Defendants/Respondents have failed to prove the existence of a relationship with the Plaintiff/Applicant either through a legally binding contract or deposition of an affidavit.
  27. The Learned Counsel submitted that the Energy and Petroleum Tribunal handles matters between parties who have an agreement and a problem arises from that agreement. The Defendants/Respondents has not shown any valid contract between the two parties to enable the tribunal to have jurisdiction on the matter. It was the counsel's submission that the Defendants should not seek to avoid the determination of this suit by this Honorable Court by invoking jurisdiction of a tribunal which only assumes jurisdiction when there is a contractual relationship of licensee and licensor between the parties.
  28. The Learned Counsel submitted that the authorities that the Defendants had referenced to were irrelevant and could be distinguished from the Plaintiff's case. The Counsel stated that all those authorities related to scenarios where there was an existing written and agreed contract between the independent parties visa vis the Defendants. Some of the authorities relate to issues clear license like dispute over electricity meters by users which is not the case. In the Plaintiffs case there was no agreement and the cause of action is not based on a license but on the tort of trespass.
  29. The Learned Counsel submitted that this court has the requisite jurisdiction to entertain this dispute. They made reference to Article 162(2)(b) of *the Constitution* of Kenya. The Learned Counsel guided the court to Section 13(1) of the *Environment and Land Court Act* provides that this Honorable Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution*. The dispute between the parties was that of trespass and therefore fell within the ambit of Article 162(b) *the Constitution* of Kenya, 2010. There was no express provision of law or circumstances of facts in this particular case before this court which can oust the jurisdiction of this Honorable Court.
  30. The Learned Counsel submitted that in the case of Compulsory Acquisition, Article 107 of *the Constitution* of Kenya, 2010 provided that the National Land Commission having been satisfied that the conditions of Compulsory Acquisition were met (this is public purpose or interest), it must publish a notice in the Kenya Gazette, Land Registry and to everybody who appears to be interested in the land. The Counsel further submitted that an individual could be deprived of his right to private land on condition that he was promptly compensated in full and the acquisition is for public interest. It was the submission of the Counsel that no compulsory acquisition occurred as there was absence of gazettelement and compensation. Therefore, the Defendant/Respondents did not act in good faith or meet the qualification of good faith such as gazettelement which would be a notice to acquire land for the public. It was stated by the Counsel that since Compulsory Acquisition did not occur this is a matter of trespass as the Defendant/Respondents herein unlawfully encroached the Plaintiff/Applicant's suit parcel of land.



31. The Learned Counsel submitted that it was imperative for the Defendants/Respondents to show how their licenses and relationship were created. The Defendants/Respondent have to discharge the burden of proof showing how the relationship between the Plaintiff/Applicant and Defendants/Respondents falls within the ambit of the Energy and Petroleum Tribunal.
32. The Learned Counsel concluded to submit that the Preliminary Objection on a point of law failed the test laid down in the case of “Mukisa Biscuit Manufacturing Co. Limited (Supra). That it was trite holding that the facts ought not be disputed. The Plaintiff/Applicant’s position of a trespasser differed from that of the Defendants/Respondents. The court had not been told by the Defendant how they came to be on the Plaintiffs land and the court could not be left to speculate. The Counsel submitted that the Preliminary Objection was unmerited and was an experimental shot by the Defendants hoping it would hit the target. The Counsel further submitted that even in circumstances where courts felt that they should deal with the matter the practice had been to transfer the same to relevant division or court. The Plaintiff had so far incurred a loss of about a sum of Kenya Shillings Three Sixty Five Million (Kshs. 365, 000, 000.00) and had been prejudiced with the Defendants antics which had frustrated an early determination of this matter and prayed that the Preliminary Objection be dismissed with costs and the matter be given a hearing date on priority basis.

#### **IV. Analysis and Determination**

33. I have read and considered the application herein, the affidavit in support and the responses thereto, the written submission of both parties, the authorities cited and the provisions of *the Constitution* of Kenya and relevant provisions of the Law in relation to the filed Preliminary Objections dated 30<sup>th</sup> October, 2021. In order to arrive at an informed, just and reasonable decision, I have formulated the following three (3) issues. These are:-
  - a. Whether the Preliminary Objection filed by the Defendant herein meets the threshold of an objection as founded by law and precedents.
  - b. Whether the Defendant is entitled to the relief sought from the filed Preliminary Objection.
  - c. Who should meet the costs of the Preliminary Objections.

#### **Issue No. a). Whether the Preliminary Objection filed by the Defendant herein meets the threshold of an objection as founded by law and precedents.**

34. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd – Versus- West End Distributors Limited*. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“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 demurer 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 in 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”

35. In addition, this Honorable Court wishes to cite the case of *Attorney General & Another –Versus- Andrew Mwaura Gitthinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
  - iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Defendant are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Defendant was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to *Mukisa Biscuits Manufacturing Co. Limited (Supra)*. Applying the above test, the matters raised by the Respondent in their preliminary question are clearly pure points of law that I shall proceed to consider them and determine them accordingly.

**Issue No. b). Whether the Defendant is entitled to the relief sought from the filed Preliminary Objection.**

36. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. In the *Matter of Interim Independent Electoral Commission* [2011] eKLR the Supreme Court stated as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in “*Owners of Motor Vessel ‘Lillian S’ – Versus - Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“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.”

[30] The *Lillian ‘S’* case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear



and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*”.

37. The Learned Counsel for the Defendants submitted that this court lacks the jurisdiction to hear and determine this case on account of breach of Sections 6(1), 61(3), 107, 108 and 110 (1) of the *Energy Act* together with Rule 2 of the Energy (Complaints and Disputes Resolution) Regulations, 2012. Counsel contended that the first port of call by the Plaintiff should have been the Energy Regulatory Commission, a body established by Section 4 of the *Energy Act* and whose mandate is to be found at Section 6 of the same Act. He submitted that the Plaintiff's complaint should have been filed there in the first instance and if it was not handled to his satisfaction, his recourse would be to appeal to a Tribunal set up under the same Act and not to this court. Counsel cited pronouncements in decided cases emphasizing that where the law provides for or has established a dispute resolution forum, it is not open to a party to directly file his matter in court without first ventilating his claim before the established forum. One such pronouncement was found in the Supreme Court's decision in “*Alice Mweru Ngai – Versus - Kenya Power and Lighting Co. Limited* [2015] eKLR where the court quoted with approval its decision in Constitutional Application No. 2 of 2011 as follows:-

“To allow the application now before us would constitute an interference with due process and with the rights of parties to be heard before a court duly vested with jurisdiction; allowing such an application would constitute an impediment to the prospects of any appeal from the High Court up to the Supreme Court. This is a situation in which the court must protect the jurisdiction entrusted to the High Court”

38. On his part, learned counsel for the Plaintiffs submitted that the aforementioned sections of the law did not apply to the facts and issues raised in the Plaintiff's case. Counsel contended the cause of action in the Plaintiff's case was one of trespass by the Defendants whereby the Defendants had forcefully entered his land on diverse dates and installed their high voltage electricity lines and poles thereon. Counsel contended that such a cause of action could only be determined by this court and not the Energy Regulatory Commission. He argued that the Plaintiff could only be subjected to the Commission or any Tribunal created by the said provisions if he had consented to the 1<sup>st</sup> Defendant installing the electric poles on his land and thereafter a dispute arose between them. Counsel submitted that the cause of action had no relation to the matters enlisted under the *Energy Act* as matters which the Commission has jurisdiction to deal with.

39. In order to determine this Preliminary Objection, it will be important to examine the role of the Energy Regulatory Commission in relation to dispute resolution. The *Energy Act* 2006, creates the Energy Regulatory Commission; which is empowered, under Section 6 of the Act, to hear and determine matters related to the energy disputes. The said section provides in part as follows: -

Section 6. “The Commission shall have all powers necessary or expedient for the performance of its functions under this Act and in particular the Commission shall have power to:

- h) Investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act;
- o) Impose sanctions and penalties on persons who are in breach of any of the provisions of this Act or any regulations made there under”



40. In the locus classicus case of Mukisa Biscuits Manufacturing Company Limited -Versus - West End Distributors (1969) EA 696 on Preliminary Objection, the court stated:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

41. I endorse the decision in *John Musakali – Versus - Speaker County of Bungoma & 4 others* (2015) eKLR which elaborated the foregone legal position whereby Mwita J. stated that: -

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

42. Similarly, in the case of “County Government of Migori -Versus - I N B Management IT Consulting Limited [2019] eKLR, Mrima J cited with approval the decision in Oraro -Versus - Mbaja (2005) KLR 141, where Ojwang J. as he then was, quoted the Mukisa Biscuit Case (Supra) and expressed himself thus;

“A ‘Preliminary Objection’ correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

43. On the source of jurisdiction, it was held in the case of “Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank Limited & others (2012) eKLR that -

“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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... 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. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or



tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

44. The Plaintiff’s claim against the Defendants was based on trespass. The Plaintiff claimed that the Defendants entered the suit property without its permission and installed electric cables and transmission lines in addition to committing other acts of waste of the property. The 1<sup>st</sup> Defendant has contended that the alleged acts of trespass complained of by the plaintiff involved the laying of electric cables and installation of electric transmission lines on the suit property which activities were being carried out by the 1<sup>st</sup> Defendant in exercise of its mandate under the Act. 1<sup>st</sup> Defendant has contended that distribution of electricity and the installation of electricity transmission lines and cables are matters which are regulated under the Act. The 1<sup>st</sup> Defendant has argued that the Energy Regulatory Commission established under section 4 of the Act has power to investigate all complaints by parties with grievances over any matter required to be regulated under the Act and that any party who is aggrieved with the decision of the commission has a right to appeal against the same to the Energy Tribunal established under Section 108 of the Act. The 1<sup>st</sup> Defendant opined that the Plaintiff should have exhausted this dispute resolution mechanism provided under the Act before coming to court.
45. I have considered the 1<sup>st</sup> Defendant’s preliminary objection together with the authorities and provisions of the law cited in support thereof. I am not in agreement with the 1<sup>st</sup> Defendant that this court has no jurisdiction to determine the dispute before it. As rightly submitted by the Plaintiff, under Section 13 of the *Environment and Land Court Act*, 2011, this court has original and appellate jurisdiction to hear and determine all disputes relating to the environment and use, occupation and title to land in accordance with Article 162(2)(b) of *the Constitution* of Kenya.
46. I understand this to be a grievance relating to alleged illegal entry onto and illegal use of land for the purpose of supplying electric power to the alleged trespassers. In my view, this is a dispute relating to occupation and use of land and one which consequently falls within the broad jurisdiction donated to this Court under Article 62 (2) (b) of *the Constitution*. Article 162 of *the Constitution* provides thus:-

162. System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
  - a) employment and labour relations; and
  - b) the environment and the use and occupation of, and title to, land.
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

47. Similarly, Section 13 (1) and (2) of the *Environment and Land Court Act* confers upon this court jurisdiction to adjudicate all disputes relating to land. It provides thus:-

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 land administration and management;
  - 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; and
  - e) any other dispute relating to environment and land.

48. It is clear from the foregoing that the 1<sup>st</sup> Defendant had no right to enter the suit property without the permission of the Plaintiff to lay or connect electric supply lines or cables. The 1<sup>st</sup> Defendant had to seek the Plaintiff's permission to enter the suit property by serving the Plaintiff with a notice of its intention to enter the suit property accompanied by a statement of what it intended to do therein. The Plaintiff had a right to grant the 1<sup>st</sup> Defendant permission to enter the suit property for the purposes of the said activities or to refuse to give its consent. In the event that the Plaintiff had objected to the 1<sup>st</sup> Defendant's entry onto the suit property, it was for the 1<sup>st</sup> Defendant to apply to the Energy Regulatory Commission (ERC) under Section 48(1) of the Act to determine the dispute. The Plaintiff argues that the Defendants entered the suit property without its permission or consent. There was no evidence before me that prior to the 1<sup>st</sup> Defendant entering the suit property, it served upon the Plaintiff a notice as required under the provision of Section 46 of the Act requesting for permission of the Plaintiff to be allowed to make such entry. Additionally, there was also no evidence that the Plaintiff consented to or rejected such an application. There was no evidence therefore that the dispute resolution mechanism provided for under the Act was invoked by the 1<sup>st</sup> Defendant. I am of the considered opinion that where the 1<sup>st</sup> Defendant enters into a parcel of land without the permission of the owner, it becomes a trespasser and where after such entry it fails to invoke the dispute resolution mechanism provided for under the Act, the land owner has a right to approach the court for a remedy against the 1<sup>st</sup> Defendant being a trespasser. Section 52 of the Act provides as follows:-

“52. Liability of licensee to make compensation for damage

The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, for damage or loss caused by the exercise or use of any power or authority conferred by this Act or by any irregularity, trespass or other wrongful proceeding in the execution of this Act, or by the loss or damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.”

49. The Plaintiff's complaint was that the Defendants entered the suit property illegally. There was no evidence so far placed before the court showing that the 1<sup>st</sup> Defendant followed the procedure provided



for under the Act when entering the suit property. There was no evidence before the court that the Defendants did not trespass on the suit property. I am of the view that the Plaintiff had a right under the provision of Section 52 of the Act to bring this suit against the Defendants in the circumstances as the procedure provided for in the Act for dispute resolution was not available to it.

### **Issue No. c). Who bears the Costs of the Objection**

50. It is trite law that the issue of costs is the discretion of courts. Costs means what is the outcome from any action or proceedings after a litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow events. Whereby events here refers to result of any action or litigation.

In this case the result are that the Preliminary objection dated 30<sup>th</sup> October, 2021 raised by the Defendant herein is dismissed for lack of merit and therefore the Plaintiff is entitled to costs thereof.

### **VI. Conclusion & Disposition**

51. In conclusion, this Honorable Court approves the position that a Preliminary Objection must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence; see Oraro – Versus - Mbaja (supra). In the end, it is the finding of this court that the preliminary objection by the Respondent is bereft of any merit and therefore it must fail.

52. Wherefore, this Court makes the following Orders:-

- a. That this Honorable Court has jurisdiction to hear and determine the suit before it.
- b. That the Preliminary Objection dated 30<sup>th</sup> October 2021 and filed on even date be and is hereby dismissed with costs to the Plaintiff.
- c. That for expediency sake this matter should be fixed for hearing and final determination within the next one hundred and eighty (180) days from this date. There should be a mention date on 28<sup>th</sup> September, 2022 for purposes of holding a Pre – Trial Conference and fixing a hearing date thereof.
- d. That the Defendant to bear the Costs of the Preliminary Objection.

It Is Ordered Accordingly.

**RULING DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5<sup>TH</sup> DAY OF JULY 2022.**

**HON. JUSTICE MR. L. L. NAIKUNI (JUDGE)**

**ENVIROMNENT AND LAND COURT**

**MOMBASA**

**In the presence of: -**

M/s. Yumnah Hassan, Court Assistant.

No appearance for the Plaintiff/Respondent

M/s. Layoo Advocate holding brief for the 1<sup>st</sup> Defendant/Respondent.

Mr. Ododa Advocate for the 1<sup>st</sup> Defendant/Applicant.

