



**Nduni v Kirui & 4 others (Environment & Land Case E092 of 2022)
[2022] KEELC 14432 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E092 OF 2022**

**MD MWANGI, J
NOVEMBER 1, 2022**

BETWEEN

LAWRENCE WARARI NDUNI PLAINTIFF

AND

TERESIA KARAGI KIRUI 1ST DEFENDANT

CATHERINE WANJIRU KURIA 2ND DEFENDANT

PETER KIRUI 3RD DEFENDANT

ALOISE NJOROGE HIUHU 4TH DEFENDANT

KENYA POWER AND LIGHTING COMPANY 5TH DEFENDANT

(In respect of the 5th Defendant's Preliminary Objection challenging the jurisdiction of this court to hear and determine the Plaintiff's case against the 5th Defendant in view of the existence of the Energy and Petroleum Regulatory Authority & the Energy and Petroleum Tribunal created under the provisions of the Energy Act, 2019)

RULING

1. The 5th Defendant in this matter, Kenya Power and Lighting Company Ltd by a Preliminary Objection dated March 26, 2022 contests this court's jurisdiction to hear and determine the Plaintiff's case in view of the existence of the Energy and Petroleum Authority & the Energy and Petroleum Tribunal created under the provisions of the [Energy Act, 2019](#). The 5th Defendant's objection is that the Plaintiff's case against it offends the provisions of sections 3(i); 10; 11(e), (f), (i), (k), (l); 23; 24; 36; 40; 42 & 224(2)(e) of the [Energy Act, 2019](#) as read together with regulations 2, 4, 7 and 9 of the [Energy \(Complaints and Disputes Resolution\) Regulations, 2012](#) and article 159(2)(c) and 169(1)(d) and (2) of the [Constitution of Kenya, 2010](#) and sections 9(2) and (3) of the [Fair Administrative Action Act, 2015](#).



2. The Plaintiff's case as against the 5th Defendant as stated in the plaint is that the 5th Defendant has encroached and trespassed into the Plaintiff's parcel of land No Dagoretti/Riruta/1655 (hereinafter called 'the suit property') by installing electricity posts in the land without adhering to procedural requirements.
3. The 5th Defendant is yet to file a statement of defence against the Plaintiff's claim.

Court's Directions

4. The court's directions were that the Preliminary Objection be canvassed by way of written submissions. Parties complied and the court has had the opportunity to peruse the submissions thus filed.

Issues for determination

5. The sole issue for determination in the court's opinion is whether the 5th Defendant's Preliminary Objection is merited. In other words; does this court have the jurisdiction to hear and determine the Plaintiff's suit as against the 5th Defendant?

Analysis and Determination

6. I will start with a quotation from the well-known case of *Mukbisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA where Law, JA defined a Preliminary Objection in the following terms:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arise by clear implication out of the 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 a submission that parties are bound by the contract giving rise to the suit to refer the suit to arbitration.”

7. Sir Charles Newbold P in the same case made the observation 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.”

8. From the above definition, a party who raises a Preliminary Objection should in the clearest of terms bring out the pure point of law in the Preliminary Objection. The Preliminary Objection should be drafted with precision to enable the party(s) against whom it is raised to sufficiently understand it, prepare and respond to it.
9. In the case of *Bashir Haji Abdulabi v Adan Mohammed Nooru & 3 others* (2004) eKLR, the court held that: -

“We are of the considered view that if a party wishes to raise a preliminary objection and files in court a Notice to that effect, and is subsequently served on the other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the Preliminary points of law to be raised. To state that the application is 'bad in law' without saying more does not assist the other parties to the suit nor the court to sufficiently prepare to meet the challenge. If it is only at the hearing that the preliminary objection is amplified and elaborated, it gets the



other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged.”

10. The preliminary objection, by the 5th defendant in this case as framed is not only wanting in material particulars but is also too generalized. The 5th Respondent has cited a total of 9 sections of the [Energy Act, 2019](#) and 4 regulations of the [Energy \(Complaints & Disputes Resolution\) Regulations, 2012](#). The 5th Defendant has gone further to cite Articles 159(2)(c) and 169(1)(d) & 2 of [the Constitution of Kenya, 2010](#) and sections 9(2) & (3) of the [Fair Administrative Action Act, 2015](#) without any elaborations; without pointing out how the Plaintiff’s case offends the said provisions of the law. I entirely agree with the pronouncement of the court in the Bashir Haji Abdulahi Case (supra) that such practice ought to be discouraged.
11. Nevertheless, as I stated in my ruling of October 11, 2022 in this matter, there is a trend in all matters where the 5th Defendant, Kenya Power & Lighting Company Ltd has been sued to raise Preliminary Objections challenging the jurisdiction of the Environment and Land Court (ELC) viz a viz that of the Energy & Petroleum Tribunal and the other entities established under the [Energy Act, 2019](#). I promised to look at the issues in details and render a ruling separately from the one on the objection by the 1st to the 4th Defendants.
12. In the case of [Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 others](#) (2020) eKLR, the Supreme Court of Kenya while citing its earlier decision in [R v Karisa Chengo](#) (2017) eKLR emphasized that: -

“By ‘jurisdiction’ is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics..... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

13. The Supreme Court had in the case of [Samwel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others](#) (2012) eKLR also held 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.”

14. The Supreme Court went further to point out that a 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.”



15. The [Energy Act, 2019](#) (hereinafter referred to as ‘the Act’) came into force on March 28, 2019. The Act, inter alia provides for the establishment, powers and functions of the energy sector entities. Of interest in this matter is the Energy & Petroleum Regulatory Authority - formerly Energy Regulatory Commission (hereinafter referred to as ‘the Authority’) established under Section 9 of the [Act](#) and the Energy and Petroleum Tribunal (hereinafter referred to as ‘the Tribunal’ established under section 25 of the Act.
16. The jurisdiction of the Tribunal is provided for under Section 36 of the Act. The Tribunal has original civil jurisdiction on any dispute between a licensee and a third party or between licensees. The Tribunal too has appellate jurisdiction over the decisions of the Energy & Petroleum Regulatory Authority and any (other) licensing Authority.
17. In respect of ‘electrical energy’, section 10(a)(i) of the Act provides that the Authority shall ‘regulate’;

“(i) generation, importation, exportation, transmission, distribution, supply and use of electrical energy with the exception of licensing of nuclear facilities.”
18. Section 11 of the Act gives the Authority the necessary powers to enable it perform its functions provided for under section 10 of the Act.
19. A person aggrieved by the decision of the Authority has the right of appeal to the Tribunal within 30 days of receipt of the decision of the Authority.
20. The Minister is yet to make regulations under the [Energy Act, 2019](#). Section 224(2)(b) of the Act (Repeals and Savings) however, makes provision to the effect that until such regulations are made, the statutory instruments issued under the repealed Act (the [Energy Act, 2006](#)), shall be deemed to be statutory instruments/subsidiary legislation granted by the Authority under the provisions of this Act and shall remain in force until specifically revoked under this Act.
21. By virtue of the provisions of section 224 of the Act, the 5th Defendant was therefore justified to make reference to the 2012 Regulations. They are the applicable [Regulations](#) until new ones are made under the Act, 2019.
22. Regulation 4 of the [Energy \(Complaints & Disputes Resolution\) Regulations 2012](#) is instructive of the nature of disputes that the Authority may handle, notably: -

“Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensees practices and procedures, metering, new connections and extensions, re-connections, quality of services, quality of supply, tariffs, way leaves, easements or rights of way in relation to the generation transmission, distribution, supply and use of electrical energy.”
23. The Plaintiff’s complaint as against the 5th Defendant is that the 5th Defendant has ‘installed electricity posts in the Plaintiff’s parcel of land LR No Dagoretti/Riruta/1655 without procedural requirements’ thereby ‘encroaching and trespassing’ onto the said land. The question that the court must then answer is whether this a kind of dispute that may be handled under the provisions of the [Energy Act, 2019](#) and the [Energy \(Complaints & Disputes Resolution\) Regulations, 2012](#).
24. Regulation 4 of the [2012 Regulations](#) comes in handy in answering this question. As per the Regulation 4, any dispute in relation to ‘way leaves, easements or rights of way in relation to the transmission, distribution, supply and use of electrical energy’ is one of the disputes contemplated under that regulation. The Plaintiff’s complaint against the 5th Defendant properly put into context is that the



- 5th Defendant installed ‘electric supply lines’ over the suit property without following the laid down procedures under the Act.
25. ‘Electric supply line’ as defined under the Act means ‘a wire conductor or other means used for the purpose of conveying, transmitting, transforming or distributing electricity, together with a casing, coating, covering, tube, pipe, pillar, pole or tower, post, frame, bracket or insulator enclosing, surrounding or supporting it or part of it, or an apparatus connected therewith for the purpose of conveying, transmitting, transforming or distributing electricity.’
26. The Plaintiff’s complaint against the 5th Defendant is therefore the kind of dispute that may be handled under the provisions of the [Energy Act, 2019](#) and the [Energy \(Complaints & Disputes Resolution\) Regulations, 2012](#). The court takes judicial notice as invited by the 5th Defendant that the 5th Defendant, Kenya Power and Lighting Company, is a public utility company engaged in bulk purchase, transmission, distribution and retail supply of electricity in Kenya and therefore qualifies to be a ‘licensee’ within the definition in section 2 of the Act.
27. Part VII of the [Act](#) makes provision for the rights of way, way leaves and use of land for energy resources and infrastructure. Section 171 specifically provides that any person who wishes to enter upon any land not his own to undertake any of the activities listed therein including but not limited to laying or connecting electric supply lines, shall seek the prior consent of the owner of such land.
28. The Act does not exempt a licensee from the liability to compensate the owner of the land or occupier 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 either wrongful proceeding in execution of this Act or by the loss or damage or breaking of any energy infrastructure or by reason of any defect in such infrastructure.
29. As against the 5th Defendant, the Plaintiff prays for an order of permanent injunction, an order directing the 5th Defendant to remove the electricity posts placed on parcel number L.R. No. Dagoretti/Riruta/1655, general and exemplary damages for trespass.
30. I note that the Plaintiff’s submissions in respect of the Preliminary Objection by the 5th Defendant. The Plaintiff submits that the [Energy Act, 2019](#) does not take away the jurisdiction of this court in land matters especially on trespass, as is the case in this matter. He insists that trespass to land is within the jurisdiction of this court.
31. This is however, where the exhaustion doctrine applies. The doctrine is now well established in Kenya. The Court of Appeal of Kenya pronounced it in the famous case of [Speaker of National Assembly v Karume](#) (1992) KLR in the following words: -
- “Where there is a clear procedure for redress of any particular grievance 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 procedures.”
32. The Karume case was decided prior to the 2010 Constitution. However, the reasoning in the case has been adopted and affirmed post the 2010 Constitution.
33. In the case of [Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others](#) (2015) eKLR, the Court of Appeal once again upheld the exhaustion doctrine in the following words: -
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the court is invoked. Courts ought to be fora of last



resort and not the first port of call the moment a storm brews. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts.”

34. The Court of Appeal was emphatic that the exhaustion doctrine aligns with article 159 of the [Constitution](#) which enjoins courts to encourage alternative means of dispute resolution.
35. The Supreme Court too in the case of [Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 others](#) (2020) eKLR, affirmed the exhaustion doctrine.
36. Discussing the doctrine, also referred to as the ‘doctrine of judicial abstention’, the Supreme Court stated that the doctrine is not founded in constitutional or Statutory Provisions. It has been established through common law practice. It provides that, ‘a court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be otherwise legislatively mandated institutions and mechanisms.’
37. In this case, the court’s finding is that the Plaintiff has at his disposal a statutory mandated dispute resolution mechanism under the [Energy Act, 2019](#) which he should exhaust before invoking the jurisdiction of this court.
38. I must point out that the jurisdiction of the Energy and Petroleum Tribunal as provided for under Section 36 of the [Act](#) gives the Tribunal original civil jurisdiction on any dispute(s) between a licensee and a Third Party or between licensees. Subsection 5 provides that the Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages and specific performance. The authority on the other hand is empowered under section 11 of the Act to *inter alia*: -

‘.....make and enforce directions to ensure compliance with the Act, issue orders or directions in writing to ensure compliance with the Act, issue orders in writing requiring acts/things to be done or prohibiting acts/things from being done and to impose sanctions and fines not exceed Kshs 100,000/- per violation per day subject to a maximum of 30 days.’
39. The Plaintiff will not therefore be prejudiced in any way by having his complaint determined under the provisions of the [Energy Act](#) as the reliefs sought may be granted as well under the Act.
40. The upshot is that the court upholds the Preliminary Objection by the 5th Defendant. The 5th Defendant prayed for the striking out of the Plaintiff’s case as against it with costs. In the Kibos distillers case (supra), the Supreme Court expressed the view that the Court of Appeal, upon finding that the ELC did not have the jurisdiction to hear and determine the petition, should have issued appropriate remedies, which could have included, but not limited to, ‘remitting back the matter to the appropriate institutions for deliberations and determination’. That is what I should essentially do in this matter.
41. However, the Plaintiff has not only sued the 5th Defendant but also four (4) other Defendants. The claim against the four (4) other Defendants is not one that falls within the mandate of the entities created under the [Energy Act, 2019](#). It would therefore not be appropriate to ‘remit’ the Plaintiff’s case as it is to the appropriate institutions under the [Energy Act, 2019](#) for determination. What I will do therefore is to uphold the 5th Defendant’s Preliminary Objection and strike out the Plaintiff’s suit as against the 5th Defendant but with no orders as to costs.
42. The plaintiff is at liberty to lodge his complaint against the 5th defendant with the appropriate entity under the provisions of the [Energy Act, 2019](#) as he deems fit.



It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER 2022

MD MWANGI

JUDGE

In the virtual presence of:

Mr Ododa for the 5th defendant.

Ms Chepkorir holding brief for Ms Muhoro for the Plaintiff.

Court Assistant: Hilda.

MD MWANGI

JUDGE

