



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 181 OF 2017

NYABOCHWA OBIERO.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....1ST DEFENDANT

KENYA RURAL ELECTRIFICATION AUTHORITY.....2ND DEFENDANT

RULING

INTRODUCTION

1. This Ruling is in respect of a Preliminary Objection raised by the Defendant through its Notice of Preliminary Objection dated 23rd October 2017. The said objection is based on the grounds that the Plaintiff's suit is misconceived, frivolous and devoid of merit for the reasons, *inter alia*, that the Plaintiff has not complied with the statutory provisions of the law, specifically Sections 6(1), 61(3), 107, 108, and 110(1) of the Energy Act, 2006 together with Rule 2 and 4 of the Energy (Complaints Disputes Resolution) Regulations, 2012.
2. The Plaintiff filed suit against the Defendant vide a Plaint dated 21st September, 2017. He complained that the Defendant had trespassed into his land parcel known as NORTH MUGIRANGO/IKONGE/890 through its agents and/or employees who installed power transmission lines and poles thereon in order to connect electricity for one Nelson Ongere Nyabware. The Plaintiff sought various reliefs including damages and costs.
3. The Court directed that the Preliminary Objection be canvassed by way of written submissions. The Plaintiff filed his submissions on 17th June, 2021 while the 1st Defendant filed their submissions on 23rd October, 2017. The 2nd Defendant did not file any response to the suit or to the Preliminary Objection.

ISSUES FOR DETERMINATION

4. Having considered the Preliminary Objection and the submissions filed by counsel for the 1st Defendant and the Plaintiff, the main issue for determination is whether this court lacks jurisdiction to hear and determine the suit herein on the grounds that it contravenes 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.

ANALYSIS AND DETERMINATION

5. 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’ v. 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”.*

6. 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 is to be found in the Supreme Court’s decision in **Alice Mweru Ngai vs Kenya Power and Lighting Co. Ltd [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”

7. 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 in 2017 and installed their 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 1st 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. He distinguished the facts of this case from those in the case of **Alice Mweru Ngai vs KPLC ELC 287 OF 2014**.

8. He argued that unlike this case, the Plaintiff in the Alice Mweru case had signed a wayleave agreement with the Defendant and she was even offered some payment by the Defendant which payment was never made and that is why she proceeded to court. He submitted that the Plaintiff herein had not entered into any agreement with the Defendants nor did he enter into any dealings with them which would have placed his cause of action within the jurisdiction of the Energy Regulatory Commission.

9. 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.

10. 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”

11. **Section 61(3) of the Energy Act** provides that: -

“61(3); If any dispute arises as to-

a) Any charges;

b) The application of any deposit;

c) Any illegal or improper use of electrical energy;

d) Any alleged defects in any apparatus or protective devices; or

e) Any unsuitable apparatus or protective devices;

It shall be referred to the Commission.”

12. Under **Rule 4 of the Energy (Complaints and Disputes Resolution) Regulation 2012** the complaints and disputes to which the regulation applies are:-

"a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.

b) Damages, adulteration under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

c) Any other activity and/or matter regulated under the Act."

13. Section 107 of the Act provides that:-

"where under this Act the provision is made for appeals from the decisions of the Commission, all such appeals shall be made to the Energy Tribunal, in accordance with the provisions of this Part."

Sections 108 and 110 of the Act further gives effect to section 107.

14. It is common ground that in the instant case, the cause of action is based on trespass. My analysis of the above provisions of the Energy Act reveals that that the Energy Act does not deal with claims for trespass. It is clear that the Defendant did not install the power supply lines on the Plaintiff's land for the benefit of the Plaintiff nor did he serve any notice to the Plaintiff before the said power lines were installed. It is also clear that the Plaintiff did not sign any wayleave agreement to allow the Defendant to install cables on his land for the benefit of one Nelson Ongere Nyabware. It is therefore misleading for the Defendant to claim that the Energy Regulatory Commission would be the appropriate forum to determine the Plaintiff's proprietary interest in the suit property. As correctly submitted by counsel for the Plaintiff, this court has jurisdiction to deal with claims of trespass to land and its jurisdiction cannot be ousted by the provisions of the Energy Act highlighted above.

15. In a bid to circumvent this suit, the 1st Defendant removed the power cables it had installed on the Plaintiff's land sometime in 2018 during the pendency of this suit. By so doing the 1st Defendant acknowledged that it had trespassed on the Plaintiff's property. In the circumstances it would not have made sense to refer this matter to the Commission assuming that it had jurisdiction to determine the dispute since the Commission would have nothing to determine.

16. I note that when the matter came up for mention on the 27th April 2021, counsel for the 1st Defendant indicated that the suit had been settled save for the issue of costs. It would therefore appear that the only reason that the 1st Defendant is raising the Preliminary Objection is to avoid paying costs.

17. In the final result, it is my finding that the Preliminary Objection is not well founded and the same is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF NOVEMBER, 2021.

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J.M ONYANGO

JUDGE