



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 32 OF 2020

VITALIS OUMA OSAN.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

Vitalis Ouma Osero (**hereinafter referred to as the plaintiff**) has come to court against Kenya Power Ltd (**hereinafter referred to as the defendant**) claiming to be the registered proprietor of L. R. No. Kisumu/Kanyakwar B/133 measuring 4.0Ha which is his ancestral land. He claims that the Defendant has constructed on the land 33KV lines from Kisumu to Kabuya through his parcel of land. He claims that this is trespass and that he has not been compensated.

The plaintiff contends that the Defendant has destroyed his trees and plants causing him loss and damage. The destroyed trees were valued at Kshs. 1,310,828. The land occupied by the values is valued at Kshs. 20,311,885.

The Plaintiff prays for a **declaration that the Defendants have illegally and unlawfully trespassed into the suit parcel KISUMU/KANYAKWAR “B” /135 in March 2018 and August 2019 and illegally cut down his trees and built overhead power lines thereon.**

He prays for Special damages for trees cut down at Kshs. 310,828/= and the Value of portion of land illegally excised off Kshs. 20,511,885/= plus interest thereon at court rates from date of filing until date of payment in full. Lastly, he prays for General damages for trespass and Costs and interest of this suit.

On his part, the Defendant denies allegations by the Plaintiff and avers that the power lines were constructed in 1964 when the Plaintiff was a minor and with the approvals of the relevant authorities. The defendant has not received any complaint by the plaintiff. The defendant alleges that it is the plaintiff who has encroached on public land.

The defendant raises a Preliminary Objection whose import is that **this court has no jurisdiction to preside over the same at first instance pursuant to the provisions of Section 36 as read together with Section 197 of the Energy Act 2019. That the suit herein is contrary to the provisions of the Energy Act, Energy (Complaints and Disputes Resolution) Regulations, 2012. That the suit herein offends the provisions of section 9 (2), (3) & (4) Fair Administration Act, 2015. Lastly, that the suit filed herein offends the provisions of Article 159 (2) (c) of the Constitution of Kenya.**

The Defendant submits that the dispute herein involves the transmission of Electricity power by the defendant provided for under Section 170 of the Act. The dispute falls within the Jurisdiction of the Energy and Petroleum Trust.

The Defendant relies on the case of Elijah Mutahi & 10 others vs Kenya Power and Lighting Company Ltd 2020 eKLR where the High Court held that: -

“Since the Energy Act of 2019 under Section 25 as read together with Section 36 creates an Exclusive Jurisdiction on the disputes relating to energy and gives the Tribunal original civil jurisdiction on any dispute between a licensee and a third party or between licensees and has power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance, I hereby refer this dispute to the Energy and Petroleum Tribunal established under Section 25 of the Energy Act, Act No. 1 of 2019, to hear and determine the dispute within the framework of section 36 of the Energy Act, No. 1 of 2019”.

The Defendant relies on Section 36 (5) of the Energy Act 2019 that provides:

“(5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.”

The Defendant concludes that the court lacks jurisdiction to entertain the suit.

The Plaintiff on his part argues that the plaintiff’s claim in this suit is of blatant trespass on Kisumu/Kanyakwar B/135 by the defendant despite his streams complaint and objection thereto. The court has Jurisdictions to hear and determine disputes relating to the environment and the use and occupation of and title to land.

According to the Plaintiff, the claim does not arise from nor does it call for determination of matters referred to the Tribunal from the Energy Sector nor does it relates to the Energy and Petroleum Sector arising under the said Act.

The Plaintiff argues that the Preliminary Objection as raised would require looking at the facts of the case and documents filed to try get the truth of whether the plaintiff attempted to negotiate with the defendant before filing the suit.

The plaintiff relies on the case of Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696 Newbold J.A. stated that:

“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 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop.”

The plaintiff further submits that provision of Section 9 (3) and (4) of the Fair Administration Action Act, 2015 does not apply. It talks of a person being aggrieved by an administrative decision may file a judicial review application to the High Court to review the same. This Honourable Court should note that the Defendant Company is a private limited liability company supplying electricity for profit. Its offices are not public offices nor can their decision be reviewed by way of judicial review.

Secondly the Plaintiff claim is for damage for trespass which is a tort remedied by payment of damages.

The final ground of preliminary objection relates to Article 159 (2) (c) of the Constitution of Kenya 2010; which provides that in exercising its authority, the court will seek a promotion alternative form of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism. It is our humble submission that this Article cannot be a ground of raising a preliminary objection as there is no contract which provide that the parties must attempt medication or arbitration before moving to court, nor does this ground confirm to the clear provision of what is a preliminary objection as set out in the “Mukisa Biscuits Case”.

In totality the preliminary objection must fail it should be dismissed with costs and the suit set down for hearing and determination on merit.

I have considered the Preliminary Objection and do find that the interpretation section of the Energy Act Cap 314 Laws of Kenya describes a person as any public or Local authority, company, person or body of persons and therefore the defendant is one of the persons described by the section. Section 170 of the Energy Act 2019 provides:

“170. A person may develop energy infrastructure, including but not limited to electric supply lines, petroleum or gas pipelines, geothermal or coal infrastructure, on, through, over or under any public, community or private land subject to the provisions of this Act and relevant written law.”

Section 25 of the Energy Act 2019 provides:

“25. There is established the Energy and Petroleum Tribunal, hereinafter referred to as the Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law.”

Sections 36 of the Act provides:

“36. (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act. (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence. (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees. (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration. (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance. (6) The Tribunal shall hear and determine matters referred to it expeditiously.”

I do find that this disputes revolves on development of Energy infrastructure namely Electricity Supply lines on the alleged Plaintiff’s land which is private land. The Plaintiff is aggrieved with the act of the defendant.

Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector

arising under the Act to the Tribunal. The plaintiff has no option but to refer the dispute to the Tribunal. The Tribunal has the Jurisdiction to grant the orders being sought by the plaintiff.

Indeed Article 159 (2) c of the Constitution of Kenya 2010 provides that in exercising Judicial Authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration.

Section 9 of the fair Administration Act provides:

“9. (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection(2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

I do agree with the defendant that the defendant act of constructing the power lines in the plaintiff’s land is a decision that affects the rights of the plaintiff and therefore is an administrative action.

Section 2 of the fair Administrative Act on its part defines administrative action to include:

“2. In this Act, unless the context otherwise requires- "administrative action" includes-(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates; means a person who takes an or who makes an administrative ‘decision" means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be; “empowering provision" means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken; “failure”, in relation to the taking of a decision, includes a refusal to take the decision;” state organ" has the meaning assigned to it under Article 260 of the Constitution; and "tribunal" means a tribunal established under any written law.”

In view of the above, this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act. The Preliminary Objection is upheld and the suit is struck out. Costs to the defendant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE