



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 16 OF 2019

LIVINGSTONE MAINA OMBETE.....APPLICANT

VERSUS

KENYA POWER & LIGHTING COMP. LTD..... RESPONDENT

JUDGEMENT

Livingstone Maina Ombete, the above named appellant being dissatisfied with the ruling and order of the learned Chief Magistrate delivered on 9th day of May, 2019 appeals to the Environment and Land Court at Kakamega Law Courts, Kakamega, against the said ruling and order and sets forth the following grounds of objection.

1. That the learned Chief Magistrate grossly erred in law and fact by holding that the court lacked jurisdiction by reason of sections 6, 48 and 55 of the Energy Act, 2006.
2. That the learned Chief Magistrate grossly erred in law and fact by failing to appreciate that the said provisions of law only applied where the respondent complies with the provisions of section 46 of the Energy Act, 2006.
3. That the learned Chief Magistrate grossly erred in law and fact by failing to appreciate that the case before the court was one of simple trespass upon the appellant's land for which the court had the jurisdiction to hear and determine.
4. That the learned Chief Magistrate grossly erred in law and fact by failing to hold that where the respondent fails to give a landowner the requisite notice and there is no existing contractual relationship between the parties the respondent has no legal right to enter into a landowner's parcel of land and therein lay or connect electric supply lines.

The appellant prays to this honourable court for orders:-

- (a) That the ruling and order of the trial court dated 9th May, 2019 and is hereby set aside and substituted with the order that the trial court has jurisdiction to hear and determine the suit and should do so.
- (b) That the appellant be awarded costs of this appeal.

This court has considered the appeal, submissions and authorities cited therein. The appellant submitted in the appeal that the learned Magistrate grossly erred in law and fact by holding that the court lacked jurisdiction by reason of sections 6, 48 and 55 of the Energy Act, 2006. That the basic principle of law is that the court of law has jurisdiction to hear any dispute that is within its jurisdiction. That the provisions of the Act applies to only players in the energy sector. The appellant's dispute was one of trespass.

This court has perused the record of appeal and the lower court file. The ruling emanated from a preliminary objection that the lower court lacked jurisdiction to entertain the matter and the Trial magistrate upheld the same dismissing the suit. In the locus classicus on this subject, Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)KLR the court held that;

"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 pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

This position was echoed by this Court in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR when the court

held that:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

The decision in Lillian 'S' Case as restated by the Supreme Court In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution- Constitutional Application No. 2 of 2011:-

“The Lillian ‘S’ case [[1989] KLR 1] 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 endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

In Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011, the Supreme Court delivered itself as follows on the issue of jurisdiction:-

“A court’s jurisdiction flows from either the Constitution or legislation or both.”

Dealing with the same issue of jurisdiction, J B Ojwang, J (as he then was) in the Boniface Waweru Mbiyu vs. Mary Njeri & Another expressed himself as follows:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

In the case of Abraham Mwangi Wamigwi vs. Simon Mbiriri Wanjiku & Another (2012) eKLR the court held that;

“The reason advanced by the applicant in seeking the transfer of Nairobi Chief Magistrate’s Court Civil Suit No. 229 of 2012 to the High Court is that the value of the disputed parcel of land exceeds the jurisdiction of that Court. This was the same position in Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others (supra). I have no reason to depart from the reasoning of the learned Judge in the said decision. Matters of jurisdiction, in my view, cannot be described as technicalities of procedure. They are matters of substance since without jurisdiction the Court cannot be said to be seized of the dispute. Accordingly, lack of jurisdiction cannot be cured either by overriding objective under sections 1A and 1B of the Civil Procedure Act or Article 159(2)(d) of the Constitution. It follows that this application has no merit.”

In the case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (2019) eKLR the court of appeal held that;

It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void

In the case of Joseph Njuguna Mwaura & others Vs. Republic C.A Criminal Appeal No. 5 of 2008, the Court stated that;

“It is incumbent upon any Court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction. The authority of Court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision making function”

The Court then went on to observe as follows:-

“In our understanding, Courts have no jurisdiction in matters over which other arms of Government have been vested with jurisdiction to act”

Section 4 of the Energy Act 2006 establishes the Energy Regulation Commission (the Commission) and Section 6 provides for the powers of

the said Commission. One of those powers under Section 6(1) of the said Act is to:

“Investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act”

Be that as it may, the situation in this case is more like that in the case of **Peter Mwangi Kabui Versus Rural Electrification Authority** [2016] eKLR where Olao J held as follows;

“In urging this court to decline jurisdiction in this matter in view of the provisions of the Energy Act, counsel for the defendant referred me to my own decision in the **Alice Mweru Ngai case** (supra). In that case however, it was not disputed that the Plaintiff therein had assented to the Defendant’s proposal to construct an electric supply line through her land and had even been paid compensation though she challenged the amount as being minimal and patry. I declined jurisdiction and stated that the dispute was the preserve of the Energy Regulation Commission since it related to the amount payable in compensation That case is distinguished from the circumstances obtaining in this case. In this case the Plaintiff has pleaded in paragraph five (5) of his plaint that the defendant has trespassed onto the suit plots “without his consent or permission.” The defendant on its part pleads in paragraph seven (7) of its defence that it “sought for and was granted wayleave consent by the Plaintiff to enter into and also to install the electric line.” As indicated above whether or not the Plaintiff consented to the installation of the electric lines on the said plots is a matter to be determined at the trial. Therefore, the preliminary object that this suit is the preserve of the Energy Regulation Commission established under the Energy Act is not well founded and must be similarly dismissed.” That though that decision is not binding to this court, it is spot on all the issues raised by the Defendant herein in their preliminary objection.

In the instant case also whether or not the respondent trespassed on the appellants’ land is a matter to be determined at the trial and this court has jurisdiction

In the case of *Mwanasokoni v Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was not judiciously arrived at. I find this appeal is merited and I allow the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE