



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 442 of 2017

THOMAS SCHERING.....PLAINTIFF

VERSUS

1. NEREAH MICAH EL SAID

2. GERHARD HEIDUK

3. WOLFGANG GEORG JOHANN EHGARTNER

4. KENYA POWER AND LIGHTING COMPANY LTD.....DEFENDANTS

RULING

1. This ruling is in respect of the preliminary objection dated 30th April, 2018 by the 2nd and 3rd defendants that this court lacks jurisdiction to hear and determine this matter on the ground that the disputes relate to electricity which is a preserve of the Energy Regulatory Commission pursuant to the provisions of the Energy Act.

2. It was submitted by Mr. Abidha, counsel for the 2nd and 3rd defendants that the dispute in this case revolved around the plaintiff's attempts to seek the court's intervention so that his place of abode can have electric connection and blames the defendants for his misfortunes. It is their submission that any dispute or dissatisfaction concerning electricity connection or otherwise must be submitted to the Energy Regulatory Commission for hearing and determination pursuant to Sections 3, 4, 5 and 61 of the Energy Act. Counsel relied on the cases of **Alice Mweru Ngai –v- Kenya Power & Lighting Co. Ltd (2015)eKLR**, and **Michael Kamau Kinga –v- Kenya Power (2018)eKLR** and submitted that pursuant to the Energy Act and the Regulations thereunder, this court can only have jurisdiction over appeals from the Energy Tribunal and that the instant case is liable for striking out with costs for want of jurisdiction. He further submitted that Section 9 of the Fair Administrative Actions Act, 2015 provides that where other mechanisms of dispute resolution exist then the same must be exhausted before the person aggrieved moves to court and cited **Kenya Power & Lighting Company Limited –v- James Njue Njiru (2018)eKLR**.

3. The Preliminary Objection is supported by the 1st and 4th defendants. In their submissions, counsel for the 4th defendant submitted that the legal principle as to jurisdiction commands that a court of law can only exercise jurisdiction as conferred by the constitution or other written law adding that jurisdiction is everything. They cited the locus classicus decision in Kenya on jurisdiction, the celebrated case of **Owners of Motor Vessel “Lillian S” –v- Caltex Oil (Kenya) Ltd (1989) 1 KLR 1**. It was their submission that this court has no jurisdiction to entertain the applications and the suit by the plaintiff.

4. Counsel for the 4th defendant cited various provisions of the Energy Act, Cap 341, among them Section 4 of the Act which establishes the Energy Regulatory Commission; Section 5 which outlines some of the objects of the commissions as to regulate importation, exportation, generation, transmission, distribution supply and use of electricity energy, and Section 6 which provides that the powers of the commission include inter alia, investigating complaint or disputes between parties with grievance over any matter required under Act. They further cited Section 61(3) of the Act which provides for disputes that should be referred to the commission. It was their submission that all disputes concerning and arising in and pursuant to power supply are within the jurisdiction of the Energy Regulatory Commission. That this court is not open to the plaintiff as the Act gives the discretion to the commission at first instance and that the court should down its tools as it lacks jurisdiction to determine the present dispute arising out of and/or concerning electricity connection. They submitted that the plaintiff has not attempted to exhaust the laid down statutory procedures under the Energy Act and the application and suit before this court is untimely. The 4th defendant's counsel relied on the cases of **Dorcas Mbatia –v- Kenya Power & Lighting Co. Ltd (2017)eKLR**; **Royal Reserve Management Company Ltd –v- Kenya Power & Lighting Company Ltd (2017)eKLR**; **Joseph Nzyoki Mwanthi –v- Kenya Power & Lighting Company Ltd (2017) eKLR**; and **James Mwaura Ndung'u –v- Kenya Power & Lighting Company Ltd (2017)eKLR**.

5. The Plaintiff opposed the preliminary objection and submitted that the same has not met the threshold as stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969)EA 696**. That the parties have not agreed on the facts stated by the plaintiff as evident in the statement of defence filed by the defendants. The plaintiff's counsel further submitted that the claim before court is one for ownership, use and sale of land and touching on connection of electricity to the suit properties. Counsel submitted that from the

subject matter and prayers sought, the matter falls squarely within the jurisdiction of this court, and as such this court can and should determine the claim. Relying on the case of **Emily N. Mulanya –v- Kenya Power & Lighting Company (2018)eKLR**, the plaintiff's counsel submitted that the issues between the usage and its ownership are intertwined with electricity supply and connection to the suit land and for avoidance of multiplicity of suits, some in court and others in the Electricity Regulatory Commission, this court should determine the suit.

6. I have considered the pleadings and the submission filed. The main issue in the preliminary objection raised is whether the court has jurisdiction to try the matter. In the case of **Owners of Motor Vessel "Lillian S" –v- Caltex Oil (Kenya) Ltd (1989)1 KLR 1** Nyarangi J.A. held as follows:

"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."

7. In the suit herein, the plaintiff seeks the following orders against the defendants jointly and severally:

a. A mandatory order directing the 4th defendant by itself, its agents, servants, employees and/or assigns to restore and/or reconnect electricity supply in the plaintiff's residence on KWALE/GALU KINONDO/2458 AND KWALE/GALU KINONDO/2459.

b. A permanent injunction restraining the 1st 2nd and 3rd defendants herein either by themselves, their agents, employees, assigns and/or servants from disposing, selling, leasing and/or otherwise dealing with all that parcel of land known as PLOT NO.KWALE/GALU KINONDO/2460.

c. An order directing the Lands Registrar Kwale to delete the entries entitling the 2nd and 3rd defendants to the property known as PLOT NO. KWALE/GALU KINONDO/2460.

d. In the alternative to prayers, (b) and (c) above, an order directing the 1st, 2nd and 3rd defendants, jointly and severally to remit the full purchase price to the plaintiff.

e. Costs of this suit with interest thereon.

f. Any other order the court may deem fit to grant.

8. From the pleadings filed the plaintiff's claim against the 4th defendant is for an order directing the 4th defendant to restore or reconnect electricity supply in the suit premises. There is no doubt that the dispute between the plaintiff and the 4th defendant revolves around the question of reconnection of electricity. This is expressly stated in paragraphs, 9, 10, 11, 12 and 16 as well as prayer (a) of plaint dated 21st October 2017. A reading of Sections 3, 6 and 61 (3) of the Energy Act clearly show that such a dispute is a preserve of the Energy Regulatory Commission. The first port of call in the circumstances should be the Energy Regulatory Commission which the plaintiff has apparently by passed.

9. From the provisions of the Energy Act, it is apparent that parliament in its wisdom wanted such disputes to be taken away from the mainstream courts to be handled by a specialized body known as the Energy Regulatory Commission. Article 162 (2) of the Constitution of Kenya provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title to, land. Subsequently, the Environment and Land Court Act was enacted. Section 13 (1) of the Environment and Land Court Act provides that this court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the constitution. Such disputes are provided in Section 13 (2) and they relate to the environment and land. The dispute between the plaintiff and the 4th defendant is about electricity connection. This does not fall within the purview of Article 162 (2)(b) of the Constitution and the Environment and Land Court Act. I therefore find that the suit against the 4th defendant is improperly before this court.

10. Having come to the above conclusion that the suit against the 4th defendant is improperly before this court, the only available remedy is to order which I hereby do that the plaintiff's suit against the 4th defendant be struck out.

11. From the pleadings filed in court, the dispute between the plaintiff and the 1st, 2nd and 3rd defendants is about ownership of **PLOT NOS.KWALE/GALU KINONDO/2458, KWALE/GALU KINONDO/2459 AND KWALE/GALU KINONDO/2460**. The dispute in the suit herein being over the said parcels of land falls within the purview of Article 162 (2)(b) of the Constitution and the Environment and Land Court Act. I therefore find that the suit against the 1st, 2nd and 3rd defendants is properly before this court and the court has jurisdiction to determine the dispute.

12. Ultimately therefore, upon considering all the matters herein, I uphold the defendants' preliminary objection to the extent that both the suit and application against the 4th defendant are struck out with costs. The objection raised cannot be upheld as against the 1st, 2nd and 3rd defendants and the same is hereby dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 23RD day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Abidha for 1st to 3rd defenants and holding brief for Kipkorir for 4th defendant

No appearance for Plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE

23/1/19