



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1389 OF 2016**

**SWAMINARAYAN FLATS LIMITED.....PLAINTIFF**

**-VERSUS-**

**KENYA POWER & LIGHTING COMPANY LTD.....1<sup>ST</sup> DEFENDANT**

**TBEA COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT**

**CHINA PETROLEUM & PIPELINE BUREAU.....3<sup>RD</sup> DEFENDANT**

**VODACOM NETWORKS LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff brought this suit against the defendants on 10<sup>th</sup> November, 2016 through a plaint dated 7<sup>th</sup> November, 2016 seeking a permanent injunction restraining the defendants from trespassing, encroaching on, dumping, excavating upon or in any other way interfering with all that parcel of land known as L.R No. 209/12854, I.R No. 76518(hereinafter referred to as “the suit property”) and a mandatory injunction compelling the defendants to refill the tunnels dug on the suit property and to return the property to its original topography. The plaintiff also claimed mesne profits and costs of the suit.

In its plaint, the plaintiff averred that it was at all material times the registered proprietor of the suit property. The plaintiff averred that in or about the month of July, 2016, the defendants illegally, unprocedurally and without any permission or consent of the plaintiff entered the suit property and dug thereupon deep trenches for installation of underground power cables; constructed power transmission lines and dumped thereon black cotton soil excavated from the said underground tunnels. The plaintiff averred that the said illegal activities by the defendants traversed or cut through the suit property thereby rendering the same economically unsuitable for the development for which it was intended at the time of acquisition.

Together with the plaint, the plaintiff filed an application for a temporary injunction to restrain the defendants from entering upon the suit property to dig trenches for the purposes of laying or installing underground or overhead cables pending the hearing and determination of the suit.

The defendants were served with a copy of the plaint and the said application for temporary injunction. The 1<sup>st</sup> defendant appointed a firm of advocates Munyaka & Company Advocates which filed a Notice of Appointment of Advocates and a Notice of Preliminary Objection both dated 13<sup>th</sup> December, 2016. The other defendants did not respond to the main suit and the application. A part from filing the said Notice of Preliminary Objection, the 1<sup>st</sup> defendant did not file any other pleading or affidavit in the matter. On 12<sup>th</sup> July, 2017, the court directed that the 1<sup>st</sup> defendant’s preliminary objection be heard first by way of written submission before the plaintiff’s application for injunction.

In its Notice of Preliminary Objection, the 1<sup>st</sup> defendant contended that this court lacks jurisdiction to entertain this suit under the provisions of sections 6(1), 63(1)(i), 107, 108 and 110(1) of the Energy Act, Chapter 314 Laws of Kenya (“the Act”) and Rules 2 and 4 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 (“the Regulations”). The 1<sup>st</sup> defendant contended that this suit is in the circumstances incompetent, incongruous, inept, vexatious and liable for dismissal.

The 1<sup>st</sup> defendant filed its submissions on 7<sup>th</sup> November, 2017 while the plaintiff filed its submissions in reply on 20<sup>th</sup> December, 2017. The 1<sup>st</sup> defendant argued that electricity supply and the works incidental thereto is regulated by the Act and the regulations made thereunder. The 1<sup>st</sup> defendant submitted that the proper forum for determination of disputes relating to installation of power lines and cables is the Energy Regulatory Commission (ERC).

The 1<sup>st</sup> defendant relied on the case of Mukisa Biscuits Manufacturing Co. Ltd. v West End Distributors Ltd (1969) E.A 696 where a preliminary objection was defined as a point of law which may dispose a suit. The court was also referred to the cases of The Owners of the Motor Vessel "Lilian S" v Caltex Oil(Kenya) Ltd. (1989) KLR 1 and Joseph Njuguna Mwaura & others v R, Nairobi Criminal Appeal No. 5 of 2008 in support of the 1<sup>st</sup> defendant's submission that a court must ascertain its jurisdiction first before embarking on the determination of any matter before it.

The 1<sup>st</sup> defendant referred to sections 5(a) (i), 6(1) and (2) and 38 of the Act and reiterated that electricity supply and installation works are regulated under the Act. The 1<sup>st</sup> defendant submitted that it is a mandatory requirement under the Act that all disputes arising from the activities regulated thereunder must be resolved through the ERC. The 1<sup>st</sup> defendant submitted further that under section 107 of the Act, appeals from the ERC lie with the Energy Tribunal. The 1<sup>st</sup> defendant also referred the court to Rules 2, 3(1) and 4(a) of the Regulations and submitted that complaints and disputes regarding supply of electrical energy should be dealt with as provided by the Act and Regulations.

The 1<sup>st</sup> defendant cited the cases of Anisminic Ltd. v Foreign Compensation Commission & another(1969)1 All ER 208, Joseph Njuguna Mwaura & others v R (supra), Alice Mweru Ngai v Kenya Power & Lighting Co. Ltd.(2015)eKLR, National Oil Corporation Ltd. v Real Energy & The Business Premises Rent Tribunal (Misc App. No 366 of 2016), R vs. Minister for Transport and Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others KLR(E&L)1, Joseph Gichuru Njoroge vs. Kenya Power & Lighting Co. Ltd. Githunguri PMCC No. 36 of 2016, James Mwaura Ndungu v Kenya Power & Lighting Co. Ltd. Nairobi HCCA No. 228 of 2011 and The Trustees Teleposta Pension Scheme v Mackenzie Mogere & the Retirements Benefit Authority Nairobi HCCA No. 141 of 2012 and submitted that courts cannot usurp the jurisdiction of tribunals and other statutory bodies.

In its submission in reply, the plaintiff submitted that the Preliminary Objection by the 1<sup>st</sup> defendant was intended to oust the jurisdiction of the court. The plaintiff cited the case of R v Public Procurement Administrative Review Board & another Ex parte Selex Sistemi Integrati Nairobi (2008) KLR 728 and submitted that a provision ousting the ordinary jurisdiction of the court must be construed strictly and if capable of two interpretations, the meaning preserving the ordinary jurisdiction of the court must prevail. The plaintiff also referred to the Tanzanian case of Mtenda v University of Dar-Es-Salaam that was cited in R vs. Kenya Revenue Authority Ex parte Webb Fontaine Group FZ-LLC & 3 others [2015]eKLR in support of its submission that a court will not lightly find its jurisdiction ousted and that for the protection of the public, the court must be jealous of its jurisdiction. The plaintiff referred to Articles 3, 165(3) (a), 162(2) of the Constitution and sections 4 and 13 of the Environment and Land Court Act, 2012 and submitted that this court has the overall jurisdiction to hear and determine all issues pertaining to the administration and management of land and that trespass to land was within the ambit of the jurisdiction of the court.

The plaintiff contended that the provisions of the Act and the Regulations made thereunder do not unequivocally oust the jurisdiction of this court on disputes relating to trespass to land. The plaintiff referred to Rule 3 of the Regulations and argued that the complaints envisaged by the lawmakers under that rule which were to be referred to the ERC for determination were those of consumers of services rendered by the 1<sup>st</sup> defendant. Lastly, the plaintiff submitted that the authorities cited by the 1<sup>st</sup> defendant were distinguishable in that this suit concerns a private land owner being prejudiced by acts of trespass into its land.

#### Determination:

The plaintiff's claim against the defendants is based on trespass. The plaintiff has claimed that the defendants entered the suit property without its permission and installed electric cables and transmission lines in addition to committing other acts of waste of the property. The 1<sup>st</sup> defendant has contended that the alleged acts of trespass complained of by the plaintiff involved the laying of electric cables and installation of electric transmission lines on the suit property which activities were being carried out by the 1<sup>st</sup> defendant in exercise of its mandate under the Act. 1<sup>st</sup> defendant has contended that distribution of electricity and the installation of electricity transmission lines and cables are matters which are regulated under the Act. The 1<sup>st</sup> defendant has contended that the Energy Regulatory Commission established under section 4 of the Act has power to investigate all complaints by parties with grievances over any matter required to be regulated under the Act and that any party who is aggrieved with the decision of the commission has a right to appeal against the same to the Energy Tribunal established under section 108 of the Act. The 1<sup>st</sup> defendant has contended that the plaintiff should have exhausted this dispute resolution mechanism provided under the Act before coming to court.

I have considered the 1<sup>st</sup> defendant's preliminary objection together with the authorities and provisions of the law cited in support thereof. I am not in agreement with the 1<sup>st</sup> defendant that this court has no jurisdiction to determine the dispute before it. As rightly submitted by the plaintiff, under section 13 of the Environment and Land Court Act, 2011, this court has original and appellate jurisdiction to hear and determine all disputes relating to the environment and use, occupation and title to land in accordance with Article 162(2)(b) of the Constitution of Kenya.

I am in agreement with the 1<sup>st</sup> defendant that there is a dispute resolution mechanism provided in the Energy Act for the determination of disputes arising from the activities regulated under the Act. There is however no provision in the Act ousting the jurisdiction of the court to determine the same disputes. I am of the considered opinion that the 1<sup>st</sup> defendant's argument should have been that the plaintiff should have exhausted the dispute resolution machinery provided for under the Act before coming to court rather that the court lacks jurisdiction to determine the dispute.

It is now settled that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. In the case of Narok County Council v Trans Mara County Council and Another, CA No. 25 of 2000 the court stated as follows:

**“Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law as the Court would have no jurisdiction to entertain the dispute.”**

In the case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille, CA No. 202 of 2015 the court stated as follows:

**“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”**

See also the case of, Speaker of the National Assembly v James Njenga Karume, Civil Application No Nai 92 of 1992 (Nai. 40/92 Ur).

I am in agreement with the 1<sup>st</sup> defendant that the activities complained of by the plaintiff are regulated under the Act and that the Act provides a mechanism for resolving disputes arising from such activities. What I need to determine is whether the said dispute resolution mechanism was available to the plaintiff in the circumstances of this case. The relevant provisions of the Act are sections 46, 47 and 48 which I reproduce herein below:

**“46. *Permission to survey and use land to lay electric supply lines***

**(1) No person shall enter upon any land, other than his own—**

**(a) to lay or connect an electric supply line; or**

**(b) to carry out a survey of the land for the purposes of paragraph (a), except with the prior permission of the owner of such land.**

**(2) The permission sought in subsection (1) shall be done by way of notice**

**which shall be accompanied by a statement of particulars of entry.**

**47. *Assent to proposal***

**(1) An owner, after receipt of the notice and statement of particulars under section 46, may assent in writing to the construction of the electric supply line upon being paid such compensation as may be agreed and any assent so given shall be binding on all parties having an interest in the land, subject to the following provisions—**

**(a) that any compensation to be paid by the licensee giving notice to the owner, in cases where the owner is under incapacity or has no power to assent to the application except under this Act, shall be paid to the legal representative of the owner;**

**(b) that an occupier or person other than the owner interested in the land shall be entitled to compensation for any loss or damage he may sustain by the construction of the electric supply line, so long as the claim is made within three months after the construction of the electric supply line.**

**(2) No assent expressed in writing in accordance with subsection (1) shall be void by reason only of non-compliance with any statutory requirements as to registration.**

**48. *Objection to proposal***

**(1) An owner shall be deemed to have assented to a proposal to construct an electric supply line on his land if he fails to notify, in writing, the person desiring to construct an electric supply line, of his objection thereto within sixty days after the service on him of the notice required by section 46 and in the event of an objection, the Commission, on application by the licensee, shall determine—**

**(a) what loss or damage, if any the proposed electric supply line will cause to the owner, or to the occupier or other person interested in the land;**

**(b) whether any loss or damage that may be caused is capable of being fully compensated for by money.**

**(2) The result of a determination under subsection (1) shall be as follows—**

**(a) if the Commission determines that loss or damage will be caused to the owner, occupier or other party interested in the land and that the loss or damage is—**

**(i) of a nature that may be fully compensated for by money, the Commission shall proceed to assess the compensation and to apportion it amongst the owner, occupier and other parties who may in the judgment of the Commission be entitled to compensation and on payment of the sum so assessed the person giving notice may proceed to construct or lay the proposed electric supply line;**

**(ii) not of a nature that may be fully compensated for by money the person giving notice shall not be entitled to construct or lay the proposed electric supply line;**

**(b) if the Commission determines that no loss or damage will be caused to the owner, occupier or other party interested in the land the person giving notice may forthwith proceed to construct or lay the electric supply line”.**

It is clear from the foregoing that the 1<sup>st</sup> defendant had no right to enter the suit property without the permission of the plaintiff to lay or connect electric supply lines or cables. The 1<sup>st</sup> defendant had to seek the plaintiff's permission to enter the suit property by serving the plaintiff with a notice of its intention to enter the suit property accompanied by a statement of what it intended to do therein. The plaintiff had a right to grant the 1<sup>st</sup> defendant permission to enter the suit property for the purposes of the said activities or to refuse to give its consent. In the event that the plaintiff had objected to the 1<sup>st</sup> defendant's entry onto the suit property, it was for the 1<sup>st</sup> defendant to apply to the Energy Regulatory Commission (ERC) under section 48(1) of the Act to determine the dispute. The plaintiff has contended that the defendants entered the suit property without its permission or consent. There is no evidence before me that before the 1<sup>st</sup> defendant entered the suit property, it served upon the plaintiff a notice under section 46 of the Act requesting for permission of the plaintiff to be allowed to make such entry. There is also no evidence that the plaintiff consented to or rejected such an application. There is no evidence therefore that the dispute resolution mechanism provided for under the Act was invoked by the 1<sup>st</sup> defendant. I am of the considered opinion that where the 1<sup>st</sup> defendant enters into a parcel of land without the permission of the owner, it becomes a trespasser and where after such entry it fails to invoke the dispute resolution mechanism provided for under the Act, the land owner has a right to approach the court for a remedy against the 1<sup>st</sup> defendant being a trespasser. Section 52 of the Act provides as follows:

**“52. Liability of licensee to make compensation for damage**

**The provisions of this Act shall not relieve a licensee of the liability to make compensation to the owner or occupier of any land or the agents, workmen or servants of the owner or occupier of any land which is the subject of the provisions of this Act, 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 other wrongful proceeding in the execution of this Act, or by the loss or damage or breaking of any electric supply line, or by reason of any defect in any electric supply line.”**

The plaintiff's complaint is that the defendants entered the suit property illegally. There is no evidence so far placed before the court showing that the 1<sup>st</sup> defendant followed the procedure provided for under the Act when entering the suit property. There is no evidence before the court that the defendants did not trespass on the suit property. I am of the view that the plaintiff has a right under section 52 of the Act to bring this suit against the defendants in the circumstances as the procedure provided for in the Act for dispute resolution was not available to it.

For the foregoing reasons, I find no merit in the 1<sup>st</sup> defendant's preliminary objection dated 13<sup>th</sup> December, 2016. The objection is dismissed with costs to the plaintiff.

**Delivered and Dated at Nairobi this 28<sup>th</sup> day of February 2019**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Washika h/b for Mr. Kairu for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Catherine-Court Assistant