

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELCLC NO. E096 OF 2024

ST. PATRICK'S HILL SCHOOL LIMITED.....

PLAINTIFF

-VERSUS-

KENYA POWER & LIGHTING COMPANY

LIMITED.....DEFENDANT

RULING

(In respect of the preliminary objection raised by the Defendant contesting this court's jurisdiction to hear and determine the Plaintiff's case)

Introduction

1. Before this court for determination is the Defendant's (Kenya Power and Lighting Company Ltd) preliminary objection dated 11th November 2024, challenging the jurisdiction of this Honourable Court to entertain and determine the suit filed by the Plaintiff, St. Patrick's Hill School Limited (hereinafter referred to as "the Plaintiff").
2. The Defendant contends that the Plaintiff's suit contravenes various statutory and constitutional provisions, including the Energy Act, 2019 (Sections 3, 10, 11(e), (f), (i), (k) & (l), 23, 24, 25, 36, 40, 42, 159(3), 160(3), and 224(2)(e)), the Energy (Complaints and Dispute Resolution) Regulations, 2012 (Sections 2, 4, 7, and 9), and the Fair Administrative Action Act, 2015 (Sections 3 and 9(2)), as well as Articles 159(2)(c) and 169(1)(d) and (2) of the Constitution of Kenya, 2010.

3. The Defendant therefore prays that Plaintiff's suit be struck out with costs, asserting that statutory and constitutional provisions have conferred exclusive jurisdiction elsewhere other than this court for the resolution of disputes arising under the Energy Act.
4. In response, the Plaintiff has filed Grounds of Opposition to the Defendant's preliminary objection asserting that the objection is misconceived, devoid of any valid point of law, and lacking merit. The Plaintiff contends that:
 - a) The Defendant neither served the Plaintiff with a notice regarding intrusion upon its land nor obtained the Plaintiff's consent as required under Sections 171 and 173 of the Energy Act, 2019.
 - b) The Defendant has committed acts of trespass on the Plaintiff's property, which constitutes a fundamental illegality actionable under the Constitution and other relevant laws.
 - c) The Plaintiff has exercised its constitutional right under Article 22 to institute court proceedings, claiming that its right to property under Article 40 of the Constitution has been violated, denied, or infringed upon by the Defendant.
 - d) The Environment and Land Court possesses inherent powers under Section 3A of the Civil Procedure Act to make orders necessary to serve the ends of justice and prevent abuse of court process.
 - e) The suit falls within the jurisdiction of this Court as envisaged under Article 162(2)(b) of the Constitution, which empowers the High Court and courts of concurrent status to hear and determine disputes regarding the environment and the use or occupation of land.

f) The Plaintiff asserts that the Preliminary Objection is frivolous, vexatious, and constitutes an abuse of the court process.

Directions

5. The court directed that the preliminary objection be canvassed by way of written submissions. The parties filed their respective written submissions and the same have been duly considered in the writing of this ruling.

Analysis and Determination

6. Broadly speaking, a preliminary objection is a procedural tool by which a party seeks to have a matter dismissed or a claim barred on a pure point of law, without the necessity of examining the factual matrix of a dispute. The question as to what constitutes a preliminary objection was well articulated in the locus classicus case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**, where the court stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. A preliminary objection is in the nature of what used to be a demurrer. 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 is to be ascertained or if what is sought is the exercise of judicial discretion.”

7. The validity of a preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing of the dispute at once. It is therefore incumbent upon this Court to first establish whether the issues raised in the instant preliminary objection fall within the permissible scope of a preliminary objection and whether they can dispose of the entire suit without recourse to further evidence.
8. I must hasten to add that the preliminary objection as framed is lacking in precision and particulars to enable the Plaintiff and indeed the court to know exactly the nature of the preliminary points of law being raised. To state that the Plaintiff's suit contravenes various statutory and constitutional provisions without stating more does not assist the other party nor the court to sufficiently prepare to meet the challenge.
9. What the court discerns the Defendant to be saying, I would say, with a bit of struggle, is that this Court lacks jurisdiction because the dispute should first be dealt with under the regulatory scheme of the Energy & Petroleum Regulatory Authority (EPRA) and the Energy & Petroleum Tribunal (EPT) pursuant the Energy Act, 2019 and its Regulations. The Plaintiff on the other hand contends that the claim is one of trespass and infringement of its property rights (under Article 40 of the Constitution) and that this Court accordingly has jurisdiction.
10. The statutory foundation for this Court's jurisdiction is found in the Environment and Land Court Act, 2011 (ELCA). Section 13 thereof provides:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution

and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) the Court shall have power to hear and determine disputes ... (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”

11. The Defendant’s case is that the regulatory scheme displaces this Court’s jurisdiction when the dispute arises under the Energy Act, 2019. The Act, inter alia, provides for the creation of EPRA, the licensing, regulation and oversight of energy activities, and establishes the Tribunal. These include:

- Section 9 of the Act which establishes the Authority (EPRA).
- Section 11(i) which confers powers upon the Authority “to investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act.”
- Section 36 of the Act which provides for the jurisdiction of the Tribunal:
“(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.
(3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party...”

- Part VII of the Act deals with “Rights of way, way-leaves and use of land for energy resources and infrastructure.” For instance Section 171(1) provides:

“A person who wishes to enter upon any land, other than his own, to ... lay or connect an electric supply line ... shall seek the prior consent of the owner of such land...

- And Section which 173 provides for consent to a proposal and compensation:

“After receipt of Notice and statement of particulars of entry, the owner may assent in writing to the construction of the Electric supply line upon being paid compensation as may be agreed between parties.”

12. Indeed, the Energy Act does provide a mechanism for complaints and disputes as to energy infrastructure on land (way-leaves, easements, compensation) to be handled by EPRA/EPT.

13. The key question then is whether the Plaintiff’s dispute herein falls within the regulatory scheme (and thus must be referred to EPRA/Energy Tribunal) or whether it falls outside and remains within the Court’s original jurisdiction. The Plaintiff alleges unauthorised entry and installation of lines, without notice or consent, in direct breach of sections 171 and 173 of the Energy Act. Accordingly the Plaintiff characterises the acts of the Defendant as outright trespass, and a fundamental illegality, rather than a regulated dispute of compliance or compensation.

14. This very distinction has been drawn in recent decision in the case of *Ndura & Another v Kenya Power and Lighting Company Limited (Environment & Land Court Case E001 of 2023) [2024] KEELC 6693 (KLR)*, where the Court held that:

“The claim in the lower Court was that the Respondent, through its servants and or agents trespassed onto his land. The question is: is trespass an activity, practice or service regulated under the Act? Not so. These are acts that are illegal and actually border on criminal liability. When a party does an act outside of the ones permitted by the Act, or indeed any other law, it is an illegality, Period! Can a party negotiate an illegality or move the Authority over an illegality? In my view that would not accord the Authority jurisdiction to handle. He can only move the proper forum that deals with determinations on illegalities, and that is the Court, except if the Authority had been specifically granted by the statute that created it that power to deal with it. This is a nuanced jurisprudential approach which a mind not keen may not discern. Therefore, the Respondents was right in moving the Court as he did and the Court had jurisdiction to deal with the matter.”.....The Court continues to hold the view that acts of trespass by the Kenya Power and Lighting Company do not fall under the original (and appellate) jurisdiction of another body than the Environment and Land Court. Thus, this Court is clothed with the jurisdiction to determine herein the allegations of trespass by the Defendant. The Preliminary Objection is wholly unmeritorious. It is hereby accordingly dismissed with costs to the Plaintiff’s.”

15. In the present case the Plaintiff alleges that the Defendant neither served a notice for intrusion nor obtained the Plaintiff's consent following the statutory requirements (sections 171 and 173 of the Energy Act, 2019). The Plaintiff further alleges an act of trespass on the property, impairment of its use, and violation of its constitutional right to property under Article 40 of the Constitution. These are contested facts which this Court must determine. Since the Plaintiff's case is premised on alleged unauthorized entry and installation—rather than a regulated dispute over licence, tariff, connection or compensation by consent—the dispute squarely engages the use and occupation of land and whether the statutory steps were observed. That places the matter within this Court's original jurisdiction, under Section 13 of the ELCA and Article 162(2)(b) of the Constitution.

16. The Defendant's reliance on the statutory path is weakened by the Plaintiff allegation that the regulatory steps were not followed (e.g., notice/consent). This court agrees with the reasoning in *Ndura & Another v Kenya Power and Lighting Company Limited (Environment & Land Court Case E001 of 2023) [2024] KEELC 6693 (KLR)*; if the statutory prerequisites are not met, the dispute is not one for EPRA/EPT but remains for the Court.

17. From the Defendant's Preliminary Objection, it is further apparent that a number of contested factual issues arise, specifically whether the Plaintiff consented to the Defendant's entry, whether proper notice was given, and whether acts of trespass occurred on the suit property. These are matters of fact that cannot be resolved on the basis of law alone, as they require an assessment of evidence to determine the competing claims. As was observed in **Mukisa Biscuit Manufacturing Co. Ltd v West End**

Distributors Ltd [1969] EA 696, a preliminary objection can only be properly upheld if it raises pure points of law and no facts are in dispute.

18. In the present case, the objection is interwoven with factual disputes that go to the heart of the Plaintiff's cause of action. It is therefore both necessary and prudent that the matter proceeds to a full hearing so that the evidence can be properly examined, and the rights of the parties adjudicated on their merits. Accordingly, the Defendant's preliminary objection is hereby dismissed with costs to the Plaintiff.

It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 13th Day of November 2025.

M.D. MWANGI
JUDGE

In the virtual presence of:

Mr. Kiptoo for the Plaintiff

N/A by the Defendant

Court Assistant: Mpoye

M.D. MWANGI
JUDGE