



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 797 OF 2018

GEORGE JOSEPH KANGETHE.....1ST PLAINTIFF

ELLAH KARWITHA KANGETHE.....2ND PLAINTIFF

VERSUS

THE KENYA POWER &

LIGHTING COMPANY LIMITED.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Preliminary Objection dated the 5th March, 2018 where the Defendant seeks to have the Plaintiff's suit dismissed since the Court does not have jurisdiction over the same as stipulated within the Energy Act 2006 (Complaints and Dispute Resolution 2012).

The Plaintiffs opposed the Preliminary Objection and filed Grounds of Opposition dated the 30th July, 2018 where they contended that the same is misconceived, fails to raise a valid point of law and is lacking in merit. They insist they filed the suit in accordance with Article 22 of the Constitution and the Environment and Land Court has jurisdiction to determine it. They reiterate that the Preliminary Objection is frivolous, vexatious and an abuse of the Court process.

Both the Plaintiffs and the Defendant filed their submissions that I have considered.

Analysis and Determination

Upon consideration of the Preliminary Objection and Grounds of Opposition including the submissions, the only issue for determination is whether the suit herein should be dismissed, on the ground that the Court lacks jurisdiction to hear and determine it.

I note in the Plaintiff, the Plaintiffs have claimed that the Defendant has trespassed on their land, cut down trees old trees and erected concrete poles with heavy duty electric cables. They seek various orders including injunction, general as well as compensatory damages. The Plaintiffs have not pleaded whether they had a license with the Defendant to enter their land. The Defendant filed a Defence and denied the averments in the Plaintiff but did not state whether it had a license with the Plaintiff.

The Defendant has contended in its Notice of Preliminary Objection that the Plaintiffs should have lodged their complaint with the Energy and Petroleum Tribunal for determination first; before filing this suit. It has relied on the case of **Ali Simbuchi Makokha (suing as a Legal Attorney of) Joseph Wekesa Nabiswa Vs Kenya Power & Lighting Co. Ltd & Another (2018) eKLR** to support its arguments. The Plaintiff has opposed the Preliminary Objection and relied on the case of **Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) EA at pg 700; Ayadem Company Limited V Kenya Power & Lighting Company Limited (2017) eKLR**; and **Rachel Nelima Wanyonyi V Kenya Power & Company Ltd (2018) eKLR** to buttress their arguments.

From a reading of the Plaintiff and the Defence, there is no indication that there was a proposal extended by the Defendant to the Plaintiffs, to enter into the suit land, cut down old trees and construct concrete poles with heavy-duty electric cables. Section 36 of the Energy Act 2009 gives jurisdiction to the Energy and Petroleum Tribunal to hear disputes relating to energy and petroleum arising under the said Act. It stipulates that the Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees. I opine that the said section envisages a situation where there was a license between the parties, which from the pleadings herein is not indicated.

Further, section 171 of the Energy Act provides that: 171. (1) **A person who wishes to enter upon any land, other than his own to undertake exploratory activities relating to exploitation of energy resources and development of energy infrastructure, including but not limited to laying or connecting electric supply lines, petroleum or gas pipelines, or drilling exploratory wells; carry out a survey**

of the land for the purposes of paragraph (a); shall seek the prior consent of the owner of such land, which consent shall not be unreasonably withheld: Provided that where the owner cannot be traced, the applicant shall give fifteen days' notice, through appropriate mechanisms including public advertisement in at least two newspapers of nationwide circulation and an announcement in a radio station of local coverage for a period of two weeks.'

Section 13 of the Environment and Land Court Act, which confers jurisdiction to the Environment and Land Court, provides as follows:

'(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) of the Constitution, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (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.'

These provisions are couched in mandatory terms and give exclusive jurisdiction to the Environment and Land Court to handle all disputes relating to land and environment.

In the case of Rachael Nelima Wanyonyi V Kenya Power Co. Ltd (2018) eKLR where the Court that: **' It is clear therefore that this Court can only decline jurisdiction where the Defendant has complied with the provisions of Section 46 and 47 of the Energy Act. Only then can the Court make a finding that any resultant dispute with regard to any compensation to an owner of land on which electric power lines have been laid be determined by the Commission established under Section 4 of the Energy Act.'**

In being persuaded by this case and from the facts presented above, since the Defendant has failed to demonstrate that it extended a proposal to the Plaintiffs', to enter their land as required by section 171 of the Energy Act 2019, which proposal they failed to respond to within the requisite time; I opine that the Environment and Land Court has jurisdiction to hear and determine the dispute herein.

It is against the foregoing that I find the Notice of Preliminary Objection dated the 5th March, 2018 unmerited and will disallow it.

Costs will be in the cause.

Parties are urged to comply with order 11 and set the suit down for hearing to enable the court determine the issues once and for all.

Dated signed and delivered in open court at Kajiado this 2nd day of May, 2019

CHRISTINE OCHIENG

JUDGE