



**Embakasi East Court Company Limited & another v Kenya Power & Lighting Company  
(Environment & Land Case 593 of 2015) [2019] KEELC 5103 (KLR) (19 June 2019) (Ruling)**

*Embakasi East Court Company Limited & another v Kenya Power & Lighting Company [2019] eKLR*

Neutral citation: [2019] KEELC 5103 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 593 OF 2015**

**BM EBOSO, J**

**JUNE 19, 2019**

**BETWEEN**

**EMBAKASI EAST COURT COMPANY LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**AARM INVESTMENTS COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING COMPANY ..... DEFENDANT**

**RULING**

1. On 26/6/2015, the plaintiffs, Embakasi East Court Company Limited and AARM Investments Company Limited, brought a suit claiming that they were the registered proprietors of Land Reference Numbers 209/13413, 209/13414 and 209/13417 (the suit properties). They contended that unnamed trespassers had unlawfully trespassed onto the suit properties and had illegally erected structures thereon. They further contended that the defendant had illegally trespassed onto the suit properties and had connected electric power to the other trespassers. They added that the defendant had continued to supply electric power to the said trespassers despite their objection. Consequently, they sought the following orders against the defendant:
  - a) An order declaring that the electric power connected and supplied to Land Reference Number 209/13413, Land Reference Number 209/13414 and Land Reference Number 209/13417 are illegal, unlawful and therefore null and void.
  - b) Mandatory injunction compelling the defendant to disconnect electricity supply to the plaintiffs parcels of land known as Land Reference Number 209/13413, Land Reference Number 209/13414 and Land Reference Number 209/13417.
  - c) The defendant do pay the costs of this suit.



- d) Any other or further relief that this Honourable court may deem fit to grant.
2. On 4/8/2015, the defendant filed a defence dated 30/7/2015 in which it contended that the plaintiffs did not have any cause of action against the defendant because they were not the registered proprietors of the suit properties. Further, the defendant contended that its entry upon the suit properties was pursuant to an easement by virtue of a caveat registered against the suit properties on 24/9/1990. The defendant also contended that the suit against it was misdirected, frivolous, vexatious, bad in law, and untenable. At paragraph 14 of the defence, the defendant admitted that this court had jurisdiction to entertain the dispute.
3. Subsequently, on 9/10/2018, the defendant brought a notice of preliminary objection seeking an order striking out this suit on the following verbatim grounds:
- 1) The suit is statute-barred;
  - 2) The suit violates the principles set in *Speaker of the National Assembly v The Honourable James Njenga Karume*, Civil Application Number NAI 1992 (NAI, 40/92 UR);
  - 3) This honourable court lacks jurisdiction to hear this claim;
  - 4) The suit is filed in contravention of the provisions of the *Energy Act* Cap 12 of 2006.
4. The said preliminary objection is the subject of this ruling. It was canvassed through written submissions.
5. The first point of preliminary objection is that this suit is statute - barred. I have carefully gone through the defendant's written submissions dated 22/2/2019. This ground was not canvassed in the written submissions presented by the defendant. Indeed, there is no mention of the ground in the entire body of the defendant's submissions. It was the duty of the defendant to clearly articulate the specific statute of limitation which the suit offends. The defendant did not discharge that obligation. I therefore dismiss that ground of preliminary objection without further consideration.
6. The 2nd, 3rd and 4th grounds of preliminary objection all focus on the jurisdiction of this court to entertain this dispute. The three grounds raise two jurisdictional questions. The first question is whether the dispute in this suit falls outside this court's jurisdictional purview as donated by Article 162 of the *Constitution* and Section 13 of the *Environment and Land Court Act*. The second question is whether this court's jurisdiction is divested by the provisions of Section 46 of the *Energy, Act* No 12 of 2006 as read together with the rules and regulations made thereunder. I will answer the two questions sequentially in that order.
7. It is noted that the plaintiffs' gravamen is that the defendant unlawfully entered into the suit properties without their consent and erected thereon electric power supply lines supplying electric power to trespassers on the suit properties. I understand this to be a grievance relating to alleged illegal entry onto and illegal use of land for the purpose of supplying electric power to the alleged trespassers. In my view, this is a dispute relating to occupation and use of land and one which consequently falls within the broad jurisdiction donated to this Court under Article 62 (2) (b) of the *Constitution*. Article 162 of the *Constitution* provides thus:

162. System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).



2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
    - a) employment and labour relations; and
    - b) the environment and the use and occupation of, and title to, land.
  3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
  4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.
8. Similarly, Section 13 (1) and (2) of the *Environment and Land Court Act* confers upon this court jurisdiction to adjudicate all disputes relating to land. It provides thus:
13. Jurisdiction of the Court
- 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 land administration and management;
    - 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
9. In light of the broad jurisdictional framework set out in Article 162 of the *Constitution* and the elaboration spelt out under Section 13 of the *Environment and Land Court Act*, I do not agree with the defendant’s contention that this court lacks jurisdiction to hear a dispute relating to entry onto and use of land for the purpose of supplying electric power.
10. The second jurisdictional question relates to the plaintiffs’ failure to exhaust the Alternative Dispute Resolution Mechanisms provided under the *Energy Act*, Act No. 12 of 2006 and the Rules and Regulations promulgated thereunder. The defendant argued that Section 46 of the *Energy Act* of 2006 as read together with the *Energy Complaints and Disputes Resolution Regulations 2012*, provide a forum for dispute resolution in relation to the dispute in this suit.
11. I have carefully considered this limb of the defendant’s objection. Firstly, dispute resolution under the *Energy Act* of 2006 (now repealed) would be initiated by defendant through its compliance with the requirements of Sections 46 and 47 of the repealed Act. Where the defendant failed to comply with the requirements of Sections 46 and 47 of the repealed Act, a claimant was not obliged to pursue a remedy



under the Act. The defendant as the party in default cannot therefore properly raise an objection premised on that framework .

12. More importantly, I note that the instant preliminary objection was brought on 9/10/2018 and argued through written submissions in February 2019. On 26/2/2019, the court reserved ruling on the preliminary objection for 19/6/2019. At the time of arguing the preliminary objection, Parliament was in the process of legislating a legal framework to among other objectives, consolidate the laws relating to energy and to establish an energy and petroleum tribunal vested with jurisdiction to hear and determine disputes and appeals relating to the energy and petroleum sectors. That legal framework is the current [Energy Act](#), Act No 1 of 2019. The said Act received presidential assent on 12/3/2019 and became operational on 28/3/2019.
13. Section 25 of the [Energy Act](#), Act No 1 of 2019, establishes the Energy and Petroleum Tribunal. Section 36 of the [Act](#) prescribes the jurisdiction of the Tribunal in the following terms:
  - “ 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.
  - 2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
  - 3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
  - 4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
  - 5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
  - 6) The Tribunal shall hear and determine matters referred to it expeditiously.”
13. The net effect of this new legal framework which came into force while the ruling on the preliminary objection was pending is that it repealed the [Energy Act](#) of 2006 upon which the preliminary objection was substantially predicated. To do justice to the parties in the circumstances, the Court is obligated to give the parties the opportunity to re-examine the issue of alternative statutory dispute resolution mechanisms in the context of the new legal framework and to take appropriate steps. In my view, it would be inappropriate to ignore the new legal framework on alternative dispute resolution mechanisms in the new [Energy Act](#) of 2019. Similarly, it would be inappropriate to make a determination based on the [Energy Act](#) of 2019 without giving the parties the opportunity to address the court on the new legal framework or to consensually refer the dispute to the alternative legal forum prescribed by the new law.
14. Lastly, it is observed that the issue of jurisdiction has been raised against a background where the defendant, through pleadings, expressly admitted that this court had jurisdiction. I do not think it would be proper if this Court were to ignore the admission in paragraph 14 of the defence and proceed to lock the plaintiff out of the seat of justice without prior amendment to paragraph 14 of the defence.
15. In light of the above findings, I dispose the preliminary objection dated 9/10/2018 in the following terms:



- a) The preliminary objection dated 9/10/2018 is rejected, partly because the Energy Act, Act No 12 of 2006, upon which it was predicated has since been repealed.
- b) Should it be deemed appropriate, parties to this suit are at liberty to bring an application to refer this dispute to the Energy and Petroleum Tribunal established under Section 25 of the Energy Act, Act No 1 of 2019, to hear and determine the dispute within the framework of Section 36 of the Energy Act, Act No 1 of 2019.
- c) Costs of the preliminary objection shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JUNE 2019.**

**B M EBOSO**

**JUDGE**

In the presence of:-

Ms Shumila holding brief for Mr Nyaburi for defendant

Court clerk - June Nafula

