



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT & LAND CASE NO.146 OF 2016

RACHAEL NELIMA WANYONYI.....PLAINTIFF

VERSUS

KENYA POWER CO. LTD.....DEFENDANT

RULING

Section 4 of the Energy Act 2006 establishes the Energy Regulation Commission (the Commission) and Section 6 provides for the powers of the said Commission. One of those powers under Section 6(1) of the said Act is to:

“Investigate complaints or disputes between parties with grievances over any matter required to be regulated under this Act”
Emphasis added.

The Plaintiff moved to this Court by her Complaint filed on 28th November 2016 seeking an order that the defendant pay her general damages for trespassing onto land parcel No. NDISI/MUCHI/8409 (the suit land) and also to remove all the electric poles constructed thereon. The Plaintiff also sought costs and interest. Her claim is predicated on pleadings that whereas at all material times she is the registered proprietor of the suit land, the defendant trespassed thereon in January 2014 and dumped electric poles without her permission and has refused to remove them thus preventing the Plaintiff from using the land.

The defendant's response to the suit was to file a Preliminary Objection dated 10th July 2017 citing lack of jurisdiction by this Court to determine the dispute as it offends the provision of Sections 6(1) and 63(1) of the Energy Act and is therefore an abuse of the process of this Court and ought to be dismissed.

That Preliminary Objection has been canvassed by way of written submissions which have been filed both by Mr. WAMALWA instructed by WAMALWA SIMIYU & COMPANY ADVOCATES for the Plaintiff and Mr. MUNYAKA instructed by MUNYAKA & COMPANY ADVOCATES for the defendant.

I have considered the Preliminary Objection and submissions by Counsel.

It is the submission by the Plaintiff's Counsel that her suit relates to trespass to land and that is not among the complaints envisaged under rule 3(1) of the Energy (complaints and disputes resolution) regulations 2012 as read with rule 4(a). It is therefore the submission by Counsel for the Plaintiff that trespass to land is not among the disputes that the Commission can investigate. Counsel has cited the decision by **L. WAITHAKA J in OBADIAH K. MACHARIA V KENYA POWER & LIGHTING CO. LTD NYERI ELC NO.716 OF 2014 (2016 eKLR)**.

Counsel for the defendant has however submitted, citing Section 6(1) of the Energy Act, that disputes such as this one are to be determined by the Commission and therefore this Court lacks jurisdiction in this matter. Counsel has relied on my own decision in the Case of **ALICE MWERU NGAI V KENYA POWER & LIGHTING CO. LTD 2015 eKLR** and also the decision by **SERGON J in JAMES MWAURA NDUNGU V KENYA POWER & LIGHTING CO. LTD 2016 eKLR**.

The Preliminary Objection is on the jurisdiction of this Court to determine this dispute. An issue of jurisdiction is of course a proper issue to be raised as a Preliminary Objection which must be determined at the earliest opportunity because without jurisdiction, the Court must down its tools – **THE OWNERS OF MOTOR VESSEL ‘LILLIAN S’ V CALTEX OIL KENYA LTD 1989 KLR 1**. This Court must therefore determine that issue first.

It is common ground that the Plaintiff's claim against the defendant is for general damages for trespass on the suit land and an Order that the defendant removes the electric poles therefrom. The defendant has not filed any defence to that claim and so it is not clear what its response

is to that claim. It has been content with filing this Preliminary Objection in which it cites, among others, the provisions of Sections 5 and 6 of the Energy Act and the rules made thereunder and also the cases cited above. Section 5 of the Energy Act only deals with the Objects and functions of the Commission. It does not assist the defendant in this Case. Section 6(1) of the Energy Act which I have reproduced at the commencement of this ruling grants the Commission the powers to investigate complains or disputes **“between parties”**. I don’t think that provision mandates the commission to investigate a complaint or dispute in which the defendant is itself a party such as this one. Rather, that provision must have been intended to empower the Commission to act as an arbiter between other parties in any matter that requires to be regulated by it under the provisions of the Energy Act and the rules made thereunder.

In trying to persuade this Court that it has no jurisdiction to determine this dispute, Counsel for the defendant has cited my own decision in the Case of **ALICE MWERU NGAI (supra)**. However, that decision is distinguishable from this Case for the simple reason that in the **ALICE MWERU NGAI Case (supra)**, the Plaintiff had been served with a notice under Section 46 of the Energy Act to the effect that electric posts would be erected on her land, she had not objected to that notice within 60 days as required under Section 48(1) of the said Act and further, she had gone ahead and accepted compensation for the damage caused to her land. it was on the basis of that finding that I ruled in the **ALICE MWERU NGAI Case (supra)** that the Plaintiff’s grievance with regard to the damage to the crop on her land was a matter for the Commission and I therefore declined jurisdiction in the matter. The circumstances in this Case are very different. There is no suggestion that the Plaintiff was served with any notice by the defendant as provided under Section 46 of the Energy Act and that she accented to it as required under Section 47 of the said Act. The plaintiff’s claim is that the defendant trespassed onto the suit land and Section 46 of the Energy Act in fact prohibits such conduct. It states:

46(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 sub-section (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry”.

It is clear therefore that this Court can only decline jurisdiction where the defendant has complied with the Provisions of Sections 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. Indeed that is the position I took in the Case of **AYADEM COMPANY LTD V KENYA POWER & LIGHTING COMPANY LTD (2017 eKLR)** where I dismissed a Preliminary Objection such as the one raised herein and said:

“The circumstances in this Petition are different in that by failing to issue a notice to the Petitioner as required by the mandatory provisions of Section 46 of the Energy Act, the Petitioner had no opportunity either to assent to the Respondent’s proposal as required by Section 47 of the Act or object thereto as required by Section 48 of the Act. What the Respondent did therefore took this dispute out of the purview of the Commission as envisaged under the provisions of Sections 48, 49 and 50 of the Energy Act and therefore properly invoked this Court’s jurisdiction.”

The Case of **AYADEM COMPANY LTD (supra)** is on all fours with the matter now before me.

Counsel for the defendant also cited the Case of **JAMES MWAURA NDUNGU V KENYA POWER AND LIGHTING COMPANY LTD 2016 eKLR**. That Case does not assist the defendant because it related to a dispute over charges and **SERGON J** made a finding that under Section 61 of the Energy Act, such a dispute could only be determined by the Commission. The dispute now before me does not relate to charges. This dispute relates to trespass.

The up-shot of the above is that the Defendant’s Preliminary Objection dated 10th July 2017 is devoid of merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

26TH JULY 2018

Ruling dated, delivered and signed in open Court at Bungoma this 26th day of July 2018.

Mr. Kweyu for Mr. Wamalwa for plaintiff present

Mr. Wattanga for Mr. Munyaka for the defendant present

BOAZ N. OLAO

JUDGE

26TH JULY 2018