



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 87 OF 2016

EMILY N. MULANYA.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY.....DEFENDANT

RULING

1. On 2/8/2016, the Defendant – **KENYA POWER AND LIGHTING CO. LTD** – was sued here by the Plaintiff – **EMILY N. MULANYA** – for unlawfully erecting electric power supply line through her land – **SOUTH TESO/ANGOROMO/3763** (“suit property” hereafter). The Defendant’s alleged action was said to have rendered the suit property unfit for commercial activity and frustrated the Plaintiff’s development plans. As a result, the Plaintiff is said to have suffered loss and damages. The Plaintiff therefore craved the court for an order for removal of the said electric power line and/or for re-routing of the same. General and aggravated damages were also prayed for.

2. By a defence filed on 29/8/2016, the Defendant denied the Plaintiff’s entire claim.

3. Then on 18/5/2018, the Defendant filed a notice of preliminary objection wherein it was intimated that this court lacks jurisdiction to determine the matter as the suit offends the provisions of Section 6(1) and 63(1) of the Energy Act read together with Rule 2 and Rule 4(a) of the Energy (Complaints and Dispute Resolution) Regulations, 2012. The suit was therefore said to be an abuse of the court process, with a further averment that it was incompetent, vexatious, and inept thus meriting a dismissal. This ruling is on that preliminary objection.

4. On 22/5/2018 both sides agreed to canvass the application by way of written submissions. The Defendant’s submissions were filed on 30/5/2018. According to the Defendant, this court has no jurisdiction to entertain the suit. The jurisdiction is conferred on the Energy Regulatory Commission by Section 6(1) of the Energy Act read together with the relevant rules contained in Energy Regulations, 2012. And that being the case, the court ought to do the needful and down its tools as enjoined by the celebrated case of **THE OWNERS OF THE MOTOR VESSEL “LILIAN” Vs CALTEX OIL (KENYA) LTD [1989] I (CIVIL APPEAL NO. 50 of 1989)**. That position has been followed in several other cases including **JOSEPH NJUGUNA MWAURA & others Vs REPUBLIC: CA Cr. Appeal No. 5 of 2008, NAIROBI**.

5. The Defendant cited several cases including, **ANIMISTIC LTD Vs FOREIGN COMPENSATION COMMISSION & Another: [1969] I ALL ER, JOSEPH NJUGUNGA’S Case (supra), ALICE MWERU NGAU Vs KENYA POWER & LIGHTING CO. LTD [2015] eKLR** and **JAMES MWAURA NDUNGU Vs KENYA POWER & LIGHTING COMPANY: CIVIL APPEAL No. 228 of 2011**, to drive home the point that where enacted law provides a forum for handling disputes, courts of law should not entertain disputes that are properly for such forum. The case herein was said to be for Energy Regulatory Commission and its filing here was therefore a misguided endeavor. The court was asked to dismiss it.

6. The Plaintiff’s submissions were filed on 19/6/2018. It was submitted, *inter alia*, that what the Defendant has raised is not a proper preliminary objection. As defined in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD Vs WEST END DISTRIBUTORS LTD [1969] EA 696**, a preliminary objection raises a pure point of law which has been pleaded or which arises by clear implication in the pleadings, and which if argued as a preliminary point may dispose of the suit. The case of **GEORGE ORARO Vs BARAK ESTON MBAJA: HCC No. 85 of 1992, NAIROBI**, was cited to make the point that the point of law to be raised should not be blurred with factual details liable to be contested or proved through the process of evidence.

7. In the matter at hand, it was pointed out that the issue was not raised in the defence filed. Secondly, the Defendant has not admitted the facts pleaded by the Plaintiff. It is not therefore founded on agreed or admitted facts.

8. On the issue of jurisdiction of the Energy Regulatory Commission, the Plaintiff admitted the arguments of the Defendant but pointed out that the Commission may not be competent to handle the Plaintiff’s claim as remedies – such as general and aggravated damages – are sought which the Commission may not be competent to adjudicate on. Several cases including **JOSEPH ABRAHAM KAFWA Vs**

KENYA POWER & LIGHTING CO. LTD: ELC No. 1005 of 2012, ELDORET, JUSTUS MUTIGA & OTHERS Vs THE LAW SOCIETY OF KENYA & Another: Civil Appeal No. 141/2016, NAIROBI, and GLADYS MWANIKI & Others Vs GORDON OLUOCH & Others: HCC PETITION No. 334/2015, NAIROBI, were cited to show that the issue of awarding damages is the exclusive preserve of Courts of law. This court was therefore urged to dismiss the preliminary objection.

9. I have looked at the pleadings generally, the preliminary objection as raised and the rival submissions. My view is that while the Defendant's exposition of the law is generally sound, its appreciation of the facts and circumstances is wanting and so also is the approach taken to raise the preliminary objection.

10. As pointed out by the Defendant, a preliminary objection lacks competence or validity if raised against the background of contested or disputed facts. The Defendant filed a defence here and denied the Plaintiff's entire claim. How then could it proceed to raise a preliminary objection? On what admitted facts is the objection based? I think I need to make this point clearer. In **MUIRURI Vs KIMEMIA [2002] 2 KLR 677**, the court held, *inter alia*, that a preliminary objection is in the nature of a demurrer in that 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 has to be ascertained or if what is sought is the exercise of judicial discretion. Precisely this position was repeated in the case of **SIRMA Vs KIPRONO [2005] IKLR 197**. On this score therefore the Defendant is plainly wrong.

11. But there is also the manner in which the objection was raised. It was not raised or intimated in the defence. Instead, the Defendant gave intention to raise a different preliminary objection. The preliminary objection later raised came like a thunderbolt from the blues. No one was prepared to meet it and it was not based on pleaded issues. Again the Defendant was wrong.

12. In the case of **ACHOLA & Another Vs HONGO & Another: [2004] IKLR 462**, the appellant had filed a case against the respondents alleging, *inter alia*, the tort of fraudulent misrepresentation. The second respondent, the Municipal Council of Kisumu, which was second Defendant in the High Court, raised a preliminary objection that the suit against it was time barred since the alleged tort was said to have been committed in 1994 and the original plaint was only filed in 1997. A defence that had been previously filed by the 2nd respondent had neither pleaded the defence of Limitation nor specifically pleaded that the claim was time-barred under the Public Authorities Limitation Act. The High Court nevertheless allowed the issue of Limitation, upheld the preliminary objection and thus terminated the appellants' claim. The appellants appealed and it was held, *inter alia*, that the second Respondent having failed to plead Limitation in its defence was not entitled to rely on that issue and base a preliminary objection on it. The High Court was faulted for allowing the issue of Limitation to be raised and upholding the preliminary objection of the second respondent based on the issue of Limitation.

13. The point here is simple: the defence filed should first raise the issue upon which an objection can later be raised. It should also intimate an intention to raise such objection. I know of no other Court of Appeal decision that abrogates this position. The Defendant herein was therefore wrong to raise the objection in the manner it did.

14. The Plaintiff also raised another relevant point namely: That though a forum be vested with jurisdiction to handle an issue, a litigant would still be entitled to have recourse to court if some of the remedies sought cannot be granted by the forum. The Defendant has not responded to this point. In particular, the Court would have been interested to know whether the Energy and Regulatory Commission has the power to award general or aggravated damages. The position taken by the Plaintiff is both logical and commonsensical. It helps to obviate a situation where multiple or separate suits can be filed in different places, yet they can be handled at one forum. In this particular matter, if the Defendant's reasoning is upheld, the Defendant would have to file a dispute at the Energy & Regulatory Commission for issues that that entity can handle and then another dispute here to seek general and aggravated damages. In a scenario like that, the courts considered view is that a litigant is entitled to go to the one forum that can competently handle the dispute.

15. When all is considered therefore, the objection raised cannot be upheld and the same is hereby dismissed with costs.

Dated, signed and delivered at Busia this 18th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff.....

Counsel of Defendant.....