



Kalume & another (Legal representatives of the Estate of the Late Moses Nyambu Mupe aka Mpe (Deceased)) v Kenya Electricity Transmission Co Ltd (Environment & Land Case E103 of 2022) [2024] KEELC 1682 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E103 OF 2022
EK MAKORI, J
MARCH 19, 2024**

BETWEEN

JOHN KASIWE KALUME 1ST PLAINTIFF

WILSON KAINGU 2ND PLAINTIFF

LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE MOSES NYAMBU MUPE AKA MPE (DECEASED)

AND

KENYA ELECTRICITY TRANSMISSION CO LTD DEFENDANT

RULING

1. As captured from the amended plaint dated 21st January 2022 paragraph 4, the plaintiff claims that on or about March 2020, the defendant trespassed on Land Parcel No. Kilifi/Kakuyuni/Madunguni/280, commenced erecting high-voltage power pylons and lines on a section of the plaintiffs' land without any colour of right or just compensation. The alleged trespass continues to date despite demand and notice from the plaintiffs.
2. A raft of prayers have been sought from this Court including an order for the demolition and removal of all the defendant's structures erected on the plaintiffs' suit property aforesaid. In the alternative, an order for fair compensation at the current market rates to be determined by the Court appointed valuer to be paid to the plaintiff for the area occupied by the power pylons and lines. Damages for trespass. An order for compensation for loss of user for the period the defendant has been in the use of the suit property without the approval of the plaintiff, and until the time the structures would be removed or compensation paid. The plaintiff also seeks costs.
3. The defendants raised a Preliminary Objection dated 18th March 2022 significantly questioning the jurisdiction of this Court that this matter falls within the purview of the Magistrates Court. A



valuation report has been filed by one Paul Wambua pegging the value of the property at Kshs. 1,700,000/-. No. Valuation has been filed by the plaintiff to show the property is valued over 20,000,000/, it has not been shown that the compensation sought will exceed 20,000.000/- which is the purview of the Magistrates Court.

4. The defendant in the filed submissions has quoted several authorities to support the PO – *Dakianga Distributors (K) Ltd v Seed Company Ltd* [2015] eKLR (on the binding nature of pleadings that the plaintiffs have not shown that the current matter has a monetary value of over 20,000,000/-, *Phoenix of E. A Co. Ltd v S.M- Thiga t/a Newspaper Service* [2019] eKLR (on jurisdiction being everything and whenever lacking the Court downs tools). The Supreme Court decision in *Samuel Kamau Macharia & Another v KCB Ltd & 2 Others* [2012] eKLR, is also quoted on the same point.
5. The defendant is of the view that this matter ought to have been filed in the Magistrates Court pursuant to Section 13 of the *Environment and Land Act* since the pecuniary jurisdiction of the suit property has been determined as 1,700,000/= see the decisions in *EACC V Solomon Lempere & 2 Others* [2021] eKLR, *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another* [2020] eKLR, and *Hassan Mohammed Noor & Another v Mohammed Abdi Karim & 5 Others* [2022] eKLR.
6. The defendant concludes that the plant is fatally defective and that the current suit is nullity ab initio as held in *Macfoy v United Africa Co. Ltd* [1963] 3 ALL ER.
7. In the written submissions by the plaintiffs in opposition to the defendant's PO, state that this matter is properly within the purview of this Court quoting the *Samuel Kamau Case* (supra) and *Paolo Di Maria & 5 Others v Alice M. Kuria & 5 Others* [2021] eKLR. Section 13 of the *ELC Act* as envisaged by Article 162(2)(b) of the *Constitution* confers jurisdiction on this Court, the prayers sought in the plaint are not limited to money or compensation per se, but also seek among other prayers demolition of the defendant's structures on the suit property, loss of user and trespass which can be categorized as non-liquidated claims whose monetary value cannot be determined summarily at this time via a PO. The matter has to proceed to trial to reckon the same.
8. There is also the aspect of compulsory acquisition which has to be determined by this Court. A similar PO was raised in *Nancy Wangari Kamau v National Land Commission & 2 Others* [2018] eKLR and was dismissed by the ELC sitting in Kajiado.
9. The issues that fall for the determination of this Court are whether a Preliminary Objection herein has been achieved, whether this Court has no requisite pecuniary jurisdiction to entertain the current matter as drafted and filed, and if to the negative whether the same is sustainable. And who should bear the costs of the suit?
10. Germane judicial precedents were cited on what a Preliminary Objection entails. A preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent management of time as a Court resource by summarily flagging out a frail and hopeless suit that if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable



or not, but look at the pleadings and discover that the suit is a none starter - see Ogola J. in *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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 the 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”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

11. According to the valuation report filed by the defendant, the suit property is valued at less than Kshs. 1,700,000/-, falling under the jurisdiction of the Magistrates Court.
12. The plaintiffs are of the contrary opinion that the suit raises mixed grill issues – pecuniary compensation, trespass, demolitions, and compulsory acquisition. One cannot detect from the pleadings the overall pecuniary measures that the Court may arrive at based on the PO and at this point. A trial has to be undertaken.
13. I agree with the plaintiffs that at this point one cannot determine the net pecuniary value of the suit unless evidence is taken. The PO cannot resolve that issue. In the end, the Preliminary Objection dated 18th March 2022 is hereby dismissed with costs to the plaintiff.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 19TH DAY OF MARCH 2024.

E. K. MAKORI

JUDGE

In the Presence of:



Mr. Mkomba for the Plaintiff

Mr. Chiboli for the Defendants

Court Assistant: Happy

