



Munene v Kenya Power & Lighting Company PLC (Environment & Land Case E027 of 2023) [2024] KEELC 1398 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E027 OF 2023**

JG KEMEI, J

MARCH 14, 2024

BETWEEN

KENNETH KAHIGA MUNENE PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY PLC DEFENDANT

RULING

1. By way of Plaint dated 15/3/2023 the Plaintiff, as the registered proprietor of parcel of land known as L.R No 12861/324 (IR. 205857), sues the Defendant for trespass and illegal erection of electricity poles on his land without his consent and inter alia prays for Permanent injunction against the Defendant from remaining on his land; Permanent injunction compelling the Defendant to cease the trespass and remove all the concrete poles and cables from his land; general damages for trespass and compensatory damages.
2. Resisting the claim, the Defendant filed its defence and raised a Preliminary Objection dated 20/4/2023, the subject of this Ruling. The Preliminary Objection is expressed in the following terms;
 - a. This Honorable Court lacks jurisdiction to hear and determine this dispute and suit as against the Defendant and together with all consequential orders should be dismissed with costs as the same offends the provisions of Sections 3(1), 10, 11, (f), (i), (k) & (l); 23; 24; 36; 40; 42 and 224(2)(e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159(2) (c) and 169(1)(d) and (2) of *the Constitution* of Kenya, 2010 and Sections 9(2) and (3) of the Fair Administration Act, 2015.
 - b. This Honorable Court lacks original jurisdiction to hear this matter, and should be dismissed with costs, by dint of the appellate jurisdiction vested in this Court vide Section 37(3) of the



[Energy Act](#), 2019 and Regulations 21 of the Energy (Complaints and Disputes Resolution) Regulations, 2012.

3. Opposing the Preliminary Objection, the Plaintiff Dr. Kenneth Kahiga Munene filed his Replying Affidavit sworn on 30/5/2023. He averred that the Preliminary Objection is frivolous and defective because his suit is based on a claim of trespass upon his land in violation of the mandatory provisions of Section 46 and 47 of the [Energy Act](#). That the Defendant did not serve him with any notice as required under the said provisions and neither did he ascent to any consent before the Defendant committed trespass on his land. That the issue of trespass therefore falls within the jurisdiction of Environment and Land Court (ELC) as provided for under Section 13 (2)(e) of the [Environment and Land Court Act](#) (ELCA) together with the ELCs original and appellate jurisdiction donated by Article 162 Constitution of Kenya, and since the Defendant has violated Sections 46 and 47 [Energy Act](#), the dispute cannot be referred to the Commission established under Section 4 of the [Energy Act](#). He urged the Court to dismiss the Preliminary Objection with costs.
4. On 24/5/2023 directions were taken and parties agreed to canvass the Preliminary Objection by way of written submissions.
5. The Defendant through his Counsel on record Ochieng J Advocate filed submissions dated 18/7/2023. The Defendant extensively submitted on the scope of a Court's jurisdiction to determine a matter before it in light of the Supreme Court decisions in Albert Chaurembo Mumbo & 7 Others Vs. Maurice Munyao & 148 Others [2019] eKLR, United Millers Ltd Vs. Kenya Bureau of Standards, Directorate of Criminal Investigation & 5 Others and Ngugi Vs. Commissioner of Lands; Owindo & 63 Others [2023] KESC 20. That this Court lacks jurisdiction to entertain the suit which is purely about wayleaves in view of the Energy & Petroleum Regulatory Authority (EPR) and Energy & Petroleum Tribunal (EPT) as set out in the [Energy Act](#), 2019. That a Court exercises jurisdiction donated to it either by [the Constitution](#) or Statute.
6. The Defendant set out the provisions of the [Energy Act](#) creating the alternative dispute resolution mechanisms under Sections 9, 11, 25, 36 and 37; Regulations 2, 4, 7, 9, 21 of the Energy (Complaints & Disputes Resolution) Regulations 2012. Section 9(2) and (3) of the Fair Administrative Actions Act (FAAA) was also cited to urge the Court to allow exhaustion of the internal mechanisms for dispute resolutions in this case the EPR and EPT clothed with requisite expertise and capacity to entertain the suit. The Defendant highlighted the Court of Appeal's case in Nicholus Vs. Attorney General & 14 Others; National Environmental Complaints Committee (NECC) & 5 Others [2023] eKLR where the Court emphasized the need to exhaust the internal mechanisms before invoking the Court's jurisdiction and in particular held that a complaint against Kenya Power & Lighting Company (KPLC) touching on way leaves must first be ventilated at the EPR.
7. On the other hand the firm of SOK Law filed submissions dated 30/5/2023 on behalf of the Plaintiff. The Plaintiff argued that the gist of his claim is on the issue of trespass which purely falls within the jurisdiction of this Court as conferred by Section 13 ELCA and Article 162 Constitution of Kenya and cited the cases of Cape suppliers Vs. Kenya Power and Lighting Company PLC [2022] eKLR and Swaminarayan Flats Limited Vs. Kenya Power and Lighting Company & 3 Others [2019] eKLR. He accused the Defendant of failing to serve him with any notice pursuant to Section 46 of the [Energy Act](#). That accordingly this Court can only decline its jurisdiction where it is shown that the Defendant has complied with Section 46 & 47 of the [Energy Act](#) upon which such a dispute can then be referred to the Commission created under Section 4 of the [Energy Act](#). Reliance was placed on the case Kiragu Vs. Kenya Power and Lighting Company [2022]eKLR where the Court dismissed a Preliminary Objection similar to the instant one for lacking in merit.



8. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit. See the case of Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] E.A. 696.

9. In the case of Avtar Singh Bhamra & Another Vs. Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, the Court held that:-

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

10. Applying the above test, the Defendant raised a Preliminary Objection impugning this Court’s jurisdiction to entertain this suit as filed. The Supreme Court in Mary Wambui Munene Vs. Peter Gichuki Kingara and 2 Others, [2014] eKLR, citing with approval the dictum of Nyarangi J.A in the case of Owners of Motor Vessel “Lilian S” Vs. Caltex oil (Kenya) Ltd [1989] eKLR agreed that jurisdiction is a pure question of law and must be determined from the start and that if a Court has no jurisdiction it must down its tools.

11. This Court is established pursuant to Article 162 (2)(b) Constitution of Kenya which states;

“ 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.”

12. Section 13 of the ELCA elaborately provides for the jurisdiction of the Court that;

“ 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 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.”

13. In the celebrated case of Motor Vessel “Lillian S” (supra) Nyarangi JA stated that jurisdiction is everything. Without it a Court must down its tools. This decision has been rehashed severally by our Courts. The Court of Kenya in Phoenix of EA Assurance Company Limited Vs. S. M. Thiga T/A Newspaper Service [2019] eKLR in allowing an appeal that challenged the High Court decision that dismissed the Appellant’s application impugning a suit filed in a Principal Magistrate’s Court. The Appellant’s case was that the suit filed in the Principal Magistrate’s Court exceeded the pecuniary jurisdiction of a Principal Magistrate and therefore it was incapable of being transferred to the High Court. The appellate Court held;

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the Court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate Court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction ...”

14. Earlier on the Appellate Court in the case of Joseph Njuguna Mwaura & 2 Others Vs. Republic [2013] eKLR while discussing the relevance of a Court’s jurisdiction had this to say;

“It is incumbent upon any Court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the Court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision-making function.

In our understanding, Courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act”

15. The preamble of the [Energy Act](#) 2019 inter alia states that it is an Act of Parliament aimed at consolidating the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities. The entities envisioned under Part III of the Act include the EPRA (Section 9), EPT (Section 25), Rural Electrification and Renewable Energy Corporation (Section 43) and Nuclear Power and Energy Agency (Section 54).

16. Under Section 11 of the [Energy Act](#), the powers of EPRA include to investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act. The nature of disputes under this section are further elaborated in the Energy (Complaints & Disputes Resolution) Regulations 2012. See Regulations 2, 4, 7, 9 and 21. They elaborate the nature of disputes, manner of hearing and appeal process to the Tribunal where a person is aggrieved.



17. Section 24 allows a person aggrieved by a decision of the EPRA to appeal to EPT within 30 days of the receipt of the decision.
18. The Plaintiff accuses the Defendant for trespassing unto his parcel of land and erecting electric poles thereon without his consent or permission. Further that the Defendant failed to notify him of its intention to create a way leave. The Defendant objects to the claim and avers that the Court's jurisdiction has been prematurely invoked in light of the alternative dispute resolution mechanisms established under the *Energy Act*.
19. Additionally, he submitted that this Court can only decline jurisdiction only if the Defendant has complied with the provisions of Section 46 and 47 *Energy Act*. A plain reading of the said provisions relate to the appointment of the Chief Executive Officer (CEO) of the Rural Electrification and Renewable Energy Corporation and conduct of its business. Nothing turns on issuance of a notice in the said provisions.
20. The Court of Appeal in *Kibos Distillers Limited & 4 Others Vs. Benson Ambuti & 3 Others* [2020] eKLR laid down the following principle relevant to these objections:

“ Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legitimately been mandated to hear and determine a dispute.”
21. The Supreme Court of Kenya in *Benson Ambuti Atega Vs. Kibos Distillers Ltd & 5 Others* [2020] eKLR emphasized that, where appropriate, the superior Courts should remit the dispute to the relevant bodies for adjudication.
22. The Defendant submitted and relied on the Court of Appeal case of *Nicholus Vs. Attorney General & 14 Others* [2023] KECA 34 (KLR). The Appellate Court having affirmed the trial Court's ruling that Environment and Land Court lacked jurisdiction to entertain the Petitioner's case, the Appellant filed a further appeal to the Supreme Court. In allowing the petition the Supreme Court in *Nicholus Vs. Attorney General & 7 Others; National Environmental Complaints Committee & 5 Others (Interested Parties)* [2023] KESC 113 (KLR) inter alia held that the alternative dispute resolution mechanism under the *Energy Act* could not adequately remedy the Appellant's grievances which revolved on violation of his constitutional rights. In this case the Plaintiff does not allege any constitutional violations and in light of the decision in *Kibos* (supra), I am of the view that the issues raised herein fall within the jurisdiction of EPRA.
23. Indeed, the Court of Appeal in the case of *Nicholus* (supra) recognized the three-tier dispute resolution mechanism contained in the *Energy Act* as follows. An aggrieved person first launches his complaint with the EPRA in the manner outlined in the Regulations under Regulations 4 and 7 which are to the effect that;

“ 4. These regulations shall apply to complaints and disputes in the following areas-

 - a. Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service. Quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmissions, distribution, supply and use of electrical energy.



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- (1) In the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to regulation 5, the parties may declare a dispute, and both or any one of them may refer it to the commission for recourse.
2. A party to a dispute may refer to the commission in form S-2 as set out in the second schedule.”

24. Where a party is dissatisfied with the decision of EPRA, the second tier is a right to appeal to the EPT whose jurisdiction is provided in Section 36 of the [Energy Act](#) as follows;
- a. 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.
 - b. The jurisdiction of the Tribunal shall not include the trial of any Criminal offence.
 - c. The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
 - d. 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.
 - e. The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
 - f. The Tribunal shall hear and determine matters referred to it expeditiously.
25. The third and last tier involves right to appeal against a decision of the EPT to the ELC within 30 days of the decision on a point of law only. See section 37 [Energy Act](#) which provides;

“ 36.

- (1) The Tribunal may, on its own motion or upon application by an aggrieved party, review its judgments and orders.
- (2) Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of a Court of law.
- (3) Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.
- (4) The law applicable to applications for review to the High Court in civil matters shall, with the necessary modifications or other adjustments as the Chief Justice may direct, apply to applications for review from the Tribunal to the High Court.”



26. The Court of Appeal in the case of Speaker of the National Assembly Vs. Karume [1992] KECA 42 (KLR) underscored the relevance of exhausting alternative dispute resolution mechanism created in law by stating;

“ 15. In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

27. In his Plaintiff, the Plaintiff inter alia prays for Permanent injunction to restrain the Defendant from remaining on his property and general and compensatory damages thereto. A compliance of this nature being a complaint against KPLC respecting a way leave for transmissions then the first forum is EPRA. Section 36 (5) *Energy Act* empowers the Tribunal to grant vast equitable reliefs including but not limited to injunctions, penalties, damages and specific performance.

28. Guided by the above binding decisions I find that the Preliminary Objection is merited and it is hereby upheld. Consequently the suit be and is hereby dismissed.

29. Each party to bear their own costs.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 14TH DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kiranda for Plaintiff

Defendant – Absent but date taken in the presence of its Counsel on 9/11/2023

Court Assistants – Phyllis/Oliver

