



**Kerongo & another v Kisii County Government & 6 others (Petition E001 of 2023) [2024] KEELC 1210 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1210 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
PETITION E001 OF 2023**

**M SILA, J  
MARCH 7, 2024**

**BETWEEN**

**THOMSON KERONGO ..... 1<sup>ST</sup> PETITIONER  
WATCHDOG ORGANIZATION ..... 2<sup>ND</sup> PETITIONER**

**AND**

**KISII COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT  
KISII COUNTY ASSEMBLY ..... 2<sup>ND</sup> RESPONDENT  
URBAN DEVELOPMENT, KISII COUNTY ..... 3<sup>RD</sup> RESPONDENT  
KENYA POWER AND LIGHTING COMPANY ..... 4<sup>TH</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 5<sup>TH</sup> RESPONDENT  
LAND REGISTRAR KISII COUNTY ..... 6<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL ..... 7<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a preliminary objection raised by Kenya Power & Lighting Company Limited, the 4<sup>th</sup> respondent to this petition, contending that this court has no jurisdiction to hear this petition.
2. To put matters into perspective, this petition was filed on 23 March 2023. The petitioners contend that the land parcel Central Kitutu/Mwamanwa/698 registered in the name of Gusii County Council was earmarked for Nyakemini Cattle Tripping. It is averred that by a resolution of the Council held on 23 December 1986, it was agreed that the suit land be set aside for the construction of Jogoo Market. The complaint of the petitioners is that instead of constructing Jogoo Market, the Kisii County Government, the 1<sup>st</sup> respondent herein, has issued title to the 4<sup>th</sup> respondent who has proceeded to



set up structures on the land without due process being followed. They contend that the allocation of the land to the 4<sup>th</sup> respondent violated the legal procedures pertaining to allocation of public land for private development. They assert inter alia that there was no public participation and no change of user has been effected. In the petition the petitioners inter alia seek orders for a declaration that the allocation of the suit land to the 4<sup>th</sup> respondent was unconstitutional; and an order for the 4<sup>th</sup> respondent to vacate the suit land and be permanently restrained therefrom. None of the respondents has filed a substantive reply to the petition.

3. The 4<sup>th</sup> respondent lodged the preliminary objection that I alluded to in the following fashion:
  1. This Honourable Court lacks jurisdiction to hear and determine this petition as against the 4<sup>th</sup> respondent and together with all consequential orders should be dismissed with costs as the same offends the provisions of Sections 3, 10, 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42; 80 (7); 159 (3) ; 160 (3) ; 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 (sic).
  2. This Honourable Court lacks original jurisdiction to hear this matter and should be dismissed with costs, by ding of the appellate jurisdiction vested in this court vide Section 37 (3) & (4); and 80 (8) of the *Energy Act*, 2019 and Regulations 21 of the *Energy (Complaints and Disputes Resolution) Regulations*, 2012.
4. I directed the preliminary objection to be canvassed through written submissions and I have seen the submissions of counsel for the 4<sup>th</sup> respondent, the 2<sup>nd</sup> respondent, and those of the petitioner. I note that the 2<sup>nd</sup> respondent's submissions support the preliminary objection. I have taken these into account before arriving at my decision.
5. In his submissions, counsel for the 4<sup>th</sup> respondent submitted that the dispute herein falls under Section 170 of the *Energy Act* and that given that the statute provides for a remedy, the court needs to exercise restraint to allow other organs provided by statute to first deal with the dispute. He also referred me to Section 9 (2) and (3) of the *Fair Administrative Action Act* which also directs for exhaustion of alternative remedies before one comes to court. He submitted that the Energy and *Petroleum Act*, 2019 applies and directed me to Section 3 (1) of the said Act which inter alia provides that where there is a conflict between that Act and any other statute, the said Act shall prevail on matters of distribution and supply of electrical energy; exploration, production, transportation, distribution and supply of other forms of energy; and all works and apparatus for any of these purposes. He submitted that under the said statute it is the Energy and Petroleum Regulatory Authority and the Energy & Petroleum Tribunal that is vested with jurisdiction to handle this dispute. I was referred to many authorities where courts have upheld that it is the Authority and the Tribunal that are vested with jurisdiction and particularly the Court of Appeal decision in *Abidha Nicholas vs Attorney General & 7 Others*.
6. I already mentioned that the 2<sup>nd</sup> respondent filed submissions supporting the preliminary objection and their argument is more or less along the same lines as above.
7. The petitioner on his part asserted that this court has jurisdiction. He referred me to Article 162 (2) (b) of *the Constitution* and Section 13 (2) of the *Environment and Land Court Act*, which provide inter alia that this court has jurisdiction to hear disputes relating to occupation and title to land. He also thought that the preliminary objection does not raise pure points of law.
8. I have considered all the above. It is more or less the contention of the 4<sup>th</sup> respondent, and the respondents supporting the preliminary objection, that the dispute herein ought to be heard by the



bodies established by the Energy and *Petroleum Act*, 2019. I have particularly been referred to the Energy and Petroleum Regulatory Authority and the Tribunal. I have looked keenly at the Act so as to see the functions and powers of these two institutions. Starting with the Energy and Petroleum Regulatory Authority (EPRA) Sections 10 and 11 set out the functions and powers of this Authority. The two sections provide as follows:-

10. Functions of the Authority

The functions of the Authority shall be to—

- (a) regulate—
  - (i) generation, importation, exportation, transmission, distribution, supply and use of electrical energy with the exception of licensing of nuclear facilities;
  - (ii) importation, refining, exportation, transportation, storage and sale of petroleum and petroleum products with the exception of crude oil;
  - (iii) production, conversion, distribution, supply, marketing and use of renewable energy;
  - (iv) exploration, extraction, production, processing, transportation, storage exportation, importation and sale of coal bed methane gas and other energy forms;
- (b) regulate, monitor and supervise upstream petroleum operations in Kenya in accordance with the law relating to petroleum, the regulations made thereunder and the relevant petroleum agreement;
- (c) provide such information and statistics in relation to upstream petroleum operations in Kenya to the Cabinet Secretary responsible for matters relating to petroleum as may be required from time to time;
- (d) collect, maintain and manage upstream petroleum data;
- (e) receive, review and grant an application for a non-exclusive exploration;
- (f) co-ordinate the development of upstream petroleum infrastructure and promote capacity building in upstream petroleum operations;
- (g) inspect and test any machinery or equipment that has been used, is used or shall be used in upstream petroleum operations;
- (h) assess field development plans and make recommendations to the Cabinet Secretary responsible for matters relating to petroleum for approval, amendment or rejection of the plans;
- (i) assess tail-end production and cessation of upstream petroleum operations and oversee decommissioning by a contractor;
- (j) verify the measurements of petroleum production to allow for estimation and assessment of royalties and profits of oil and gas due to the National Government;
- (k) verify the recoverable cost of oil and gas due to the parties to a petroleum agreement;
- (l) audit contractors for cost recovery;



- (m) monitor in consultation with the Competition Authority conditions of contractors' operations and their trade practices;
- (n) provide information to the relevant authority for the collection of taxes and fees from upstream petroleum operations;
- (o) set, review and approve contracts, tariffs and charges for common user upstream petroleum facilities;
- (p) make proposals to the Cabinet Secretary responsible for matters relating to petroleum in relation to regulations which may be necessary or expedient for the regulation of the upstream petroleum sector or for carrying out the objects and purposes of this Act;
- (q) work with the relevant statutory authorities to formulate, enforce and review environmental, health, safety and quality standards for the upstream petroleum sector;
- (r) develop guidelines, in consultation with other statutory authorities, in relation to the implementation of treaties, conventions or protocols affecting the upstream petroleum sector that have been ratified by Kenya;
- (s) regulate contracts on upstream petroleum operations not specifically provided for under the law relating to petroleum;
- (t) advice the Cabinet Secretary responsible for matters relating to petroleum in the evaluation of the bids and applications made for upstream petroleum blocks;
- (u) ensure that contractors uphold the relevant laws, regulations and petroleum agreement terms;
- (v) ensure optimal levels of recovery of petroleum resources;
- (w) promote well planned, executed and cost-efficient operations;
- (x) ensure optimal utilization of existing and planned facilities;
- (y) ensure the establishment of a central database of persons involved in upstream petroleum operations;
- (z) manage upstream petroleum data and provide periodic updates and publication of the status of upstream petroleum operations;
- (aa) take such action as is necessary to enforce the requirements in a petroleum agreement or any regulations and to protect the environment, the health and safety of workers and the public;
- (bb) ensure and facilitate competition, access and utilization of facilities by third parties;
- (cc) prescribe the form and manner in which any application for any authority, consent or approval under the law relating to petroleum shall be made;
- (dd) investigate complaints or disputes arising from petroleum operations;
- (ee) enforce local content requirements;
- (ff) issue operational permits and non-exclusive exploration permits in accordance with the law relating to petroleum;



- (gg) ensure enforcement and compliance with the national values and principles;
- (hh) protect consumer, investor and other stakeholder interests;
- (ii) provide such information and statistics to the Cabinet Secretary as the Cabinet Secretary may from time to time require;
- (jj) collect and maintain energy data;
- (kk) develop guidelines on applicable treaties, conventions and protocols affecting the energy sector in consultation with other statutory authorities except those relating to nuclear energy;
- (ll) co-ordinate the development and implementation of a national energy efficiency and conservation action plan, in consultation with relevant statutory authorities and other stakeholders;
- (mm) develop testing and certification procedures, in conjunction with relevant statutory agencies, for certification and testing for energy consumption of equipment and appliances;
- (nn) ensure, in collaboration the Kenya Bureau of Standards, that only energy efficient and cost effective appliances and equipment are imported into the country;
- (oo) certify energy managers and license energy auditors;
- (pp) promote, in consultation with the Kenya National Accreditation Service, the establishment of accredited laboratories for energy efficiency; and
- (qq) perform any other function that is incidental or consequential to its functions under this Act or any other written law.

11. Powers of the Authority

The Authority shall have all powers necessary for the performance of its functions under this Act and in particular, the Authority shall have the power to—

- (a) issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector;
- (b) set, review and approve contracts, tariffs and charges for common user petroleum logistics facilities and petroleum products;
- (c) set, review and adjust electric power tariffs and tariff structures and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment;
- (d) prescribe the form and manner in which any application for any authority, licence, consent or approval under this Act shall be made and the fees payable in respect of such application;
- (e) make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under this Act;
- (f) issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates



upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled;

- (g) formulate, set, enforce and review environmental, health, safety and quality standards for the energy sector in coordination with other statutory authorities;
- (h) approve electric power purchase and network service contracts for all persons engaging in electric power undertakings;
- (i) investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;
- (j) enter, inspect and search any premises where an offence is being committed or is suspected to have been committed;
- (k) issue orders or directions to ensure compliance with this Act;
- (l) impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;
- (m) enter, inspect and search any premises at which any undertaking relating to petroleum operations is carried out or an offence is being committed or is suspected to have been committed;
- (n) issue orders either requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled in furtherance of its powers under the law relating to petroleum;
- (o) impose such sanctions and civil fines not exceeding five hundred thousand shillings per violation per day to secure compliance with orders issued under the law relating to petroleum;
- (p) take or remove, for analysis, testing or for use in evidence in connection with the commission of an offence under the law relating to petroleum, samples of petroleum or other substances from any area where any upstream petroleum operations are being carried on; and
- (q) inspect, take extracts from, or make copies of any document relating to any upstream petroleum operations.

9. I have taken acres of space to set out the whole of Sections 10 and 11 of the Act so that there is no doubt on what the mandate of EPRA is. It is apparent that Section 10 gives EPRA the mandate to regulate and supervise the petroleum and energy sector, and at Section 10 (dd) it can investigate complaints or disputes arising from petroleum operations. Under Section 11, EPRA inter alia has power to set tariffs, issue licences, investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act; and impose sanctions. As far as I can see EPRA will deal with matters relating to the regulation of business in the energy and petroleum sector and settle the disputes that arise within the operations of this sector.

10. If a person has an issue arising out of the operations in this sector he can lodge a complaint to EPRA under Section 23 which provides as follows:-

23. Decisions of the Authority



- (1) The Authority shall within sixty days from the date of receipt of a request by an applicant, make its decision on any matter before it.
- (2) A decision of the Authority shall be in writing and any order given and reasons thereof shall be served upon all parties to the proceedings, and may be published in the Gazette as prescribed by regulations.
- (3) The Authority shall, within seven days of making a decision, communicate such decision to the parties involved.
- (4) All orders of the Authority shall become effective on the date of entry thereof, and shall be complied with within the time prescribed therein.
- (5) Where the Authority does not make a decision as provided in subsection (1) the appellant may appeal to the Tribunal within seven days of the expiry of the prescribed period.

11. The Tribunal referred to in Section 23 above is the Energy and Petroleum Tribunal which is established in Section 25 of the Act. Its jurisdiction set out in Section 36 which provides as follows:-

36. Jurisdiction of the Tribunal

- (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.

12. From the above it is discernible that the Energy and Petroleum Tribunal (hereinafter simply referred to as 'the Tribunal') deals with disputes flowing from the regulation and operations arising from the energy and petroleum sector, issue arising from licences issued in the said sector, and appeals from the decisions of EPRA.

13. In this petition, the petitioners' core complaint is that the 4<sup>th</sup> respondent was irregularly granted land. The grant of land under lease or any other form of land tenure must be separated from operations within the energy and petroleum sector. Grant of land is not similar to a licence to distribute petroleum or energy. I have not seen anywhere in the provisions that I have set out above where EPRA or the Tribunal is mandated to issue grants of public land for players in the energy sector. As far as I can see the mandate of EPRA is restricted to giving directions on the operation and regulation of the energy and petroleum sector. I do not therefore see the argument that the dispute herein relates to anything that falls under the mandate of EPRA. The dispute herein cannot also be argued to be a dispute falling within the jurisdiction of the Tribunal. The dispute has nothing to do with any licence to operate an energy or petroleum business and neither is it an appeal from a decision of EPRA. The issue in this



case is whether the procedure for grant of land to the 4<sup>th</sup> respondent followed the provisions of *the Constitution* and the law relating to issue of leasehold titles or conversion of public land from one user to another. I have seen nothing within the jurisdiction of the Tribunal that gives it mandate to hear a dispute relating to grants of land.

14. It is pretty far-fetched for the 4<sup>th</sup> respondent to purport that it is EPRA or the Tribunal that has jurisdiction to hear the matters that are in issue in this case. Jurisdiction lies with this court which is the court mandated under Article 162 (2) (b) to hear disputes related to the environment and the use and occupation of and title to land. The dispute herein directly attacks the leasehold title issued to the 4<sup>th</sup> respondent and has nothing to do with the manner of operation of the 4<sup>th</sup> respondent or the distribution, supply or use of electrical energy. It is a dispute over title to land. All the authorities that counsel for the 4<sup>th</sup> respondent provided are therefore irrelevant. None of them touched on any matter relating to grant of a leasehold title to the 4<sup>th</sup> respondent.
15. I find that this petition is properly before this court. There is no substance in this preliminary objection. It is in fact my considered view that it was a frivolous and completely unnecessary objection. It is dismissed with costs to the petitioner, and since I think that it was a petty and completely unreasonable objection, I will straight away, in my discretion, assess the costs thereof at Kshs. 25,000/= payable to the petitioner by the 4<sup>th</sup> respondent within the next 14 days. In default the petitioner is at liberty to proceed and execute for this sum.

**DATED AND DELIVERED THIS 7 DAY OF MARCH 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

**In presence of:-**

1<sup>st</sup> Petitioner – Present

No appearance for County Attorney for 1<sup>st</sup> & 3<sup>rd</sup> respondent

Ms. Muma holding brief for Mr. Onserio for 2<sup>nd</sup> respondent.

Mr. Maanzo holding brief for Mr. Ochieng for the 4<sup>th</sup> respondent.

Mr. Wabwire, State Counsel, for the 6<sup>th</sup> & 7<sup>th</sup> respondents

No appearance for the 5<sup>th</sup> respondent.

Court Assistant – David Ochieng.

