Manjewa Station Limited v Kenya Electricity Transmission Co Ltd (Environment & Land Case 127 of 2021) [2024] KEELC 4144 (KLR) (26 April 2024) (Ruling)

Neutral citation: [2024] KEELC 4144 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE 127 OF 2021

AE DENA, J

APRIL 26, 2024

BETWEEN

MANJEWA STATION LIMITED ..... PLAINTIFF

AND

KENYA ELECTRICITY TRANSMISSION CO LTD ..... DEFENDANT

RULING

1. This suit was instituted vide an amended plaint dated 16/6/2021. It is the Plaintiff's case that it is the registered proprietor of all that Plot No Kwale/Mwavumbo/54 and Kwale/Mwavumbo/176 hereinafter referred to as the suit properties. That sometime in July 2012 the Defendant without the Plaintiff's authority entered into the suit parcels and started erecting transmission line towers. That the Plaintiff was deprived off use of the suit parcel by the Defendants actions and hence this suit seeking for compensation for loss of land at the tune of Kshs 12 million per acre for 29.92 acres and costs of the suit.

2. The Defendant's statement of defence was filed before court on 6/8/2021. According to the Defendant, it carried out due diligence before setting up the energy infrastructure project that was composed of a 400KV transmission line extending over a distance of approximately 482kms from Mariakani to Isinya through Kwale County. That its due diligence established that the suit properties were owned by Fredrick Mwachiti Johnson & the Public Trustee. It is stated that the Plaintiff only became the owner of the suit properties on10/9/2019 and hence lacked legal capacity to grant permission to the Defendant as of July 2012. They indicate that compensation over the land was not given to the family of Fredrick Mwachiti Johnson who is deceased as they did not respond to the offer letter sent. Further that the market value of the suit properties at the time of valuation was Kshs 14,000/- per acre. At paragraph 22 of the defence the Defendant states the amount it is willing to compensate the Plaintiff for the suit parcels and pray that the suit be dismissed with costs.

3. The Defendant has now filed a Notice of Preliminary Objection which is subject of this ruling. The same was filed before court on 24/11/2023. It seeks that the suit be struck out with costs to the defendant on the following grounds;

    1. Thatthe Plaintiff has not exhausted the alternative dispute resolution mechanisms under the *Energy Act* 2019 as read together with the *Energy [Complaints and Dispute Resolution] Regulations* 2012

    2. Thatpursuant to section 9[2] of the *Fair Administrative Action Act*,2015 this honourable court shall not review an administrative action or decision of the Defendant unless the mechanism including internal mechanisms for appeal and all remedies available under the *Energy Act* 2019 and the *Energy [Complaints and Dispute Resolution] Regulations* 2012 are exhausted.

4. In opposing the preliminary objection, the Plaintiff filed a replying affidavit sworn by its Counsel Grace A. Okumu. It is averred that pleadings in this matter were closed on 16/9/2021 and the matter came for pre-trial on 19/1/2022 with a hearing date set for 20/4/2022. That on 9/10/2023 the Plaintiffs case proceeded and was closed. The Defendant thereafter engaged the Plaintiff in an out of court settlement which has not been conclusive. The deponent states that the provisions of the *Energy Act* cited by the Defendant limits the right and access to justice guaranteed under Article 47 and 48 of the *constitution* as the same violate the provisions of Article 48 and 24 of the *Constitution*.

5. Referring to Article 259 of the *Constitution* the court is urged to promote the spirit values and principles of the *Constitution* as a mandatory duty. The court is further urged to invoke the provisions of article 159[d] of the *Constitution* which provides that justice should be served without any undue regard to technicalities and as such the preliminary objection should be dismissed.

6. The preliminary objection was canvassed by way of written submissions which the court has considered.

Determination

7. The Defendant has by the preliminary objection herein questioned this court's jurisdiction to determine the suit herein. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR held that jurisdiction is everything, without it a court should down its tools.

8. What amounts to a proper preliminary objection was stated in the case of *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".

9. I have reviewed the preliminary objection and the grounds thereof and find that there are no facts to be ascertained and it has met the threshold above.

10. It is the Defendant's case that the Plaintiff has not exhausted the alternative dispute resolution mechanisms stipulated under the *Energy Act*, 2019 as read together with the *Energy (Complaints and Dispute Resolution) Regulations,* 2012. The objection is brought under Section 11 of the *Civil Procedure Act*, Section 3(1), 10, 11 (e, f, I, k & l), 23, 24, 36,40, 42 and 224(2)(e) of the *Energy Act*, 2019 read together with Regulations 2, 4, 7 and 9 of the *Energy (Complaints and Dispute Resolution) Regulations*, 2012).

11. I will proceed to review the above provisions with a view to determine the extent to which they apply in the present case to warrant the downing of my tools.

Section 3 of the *Energy Act* 2019 (herein the Act) provides that if there is a conflict between the *Act* and any other Act, the *Act* shall prevail on matters related to;

> "(a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy,
>
> (b) ....
>
> (c) all works and apparatus for any or all of these purposes."

12. Section 10 of the *Act* is on the functions of the of the Energy and Petroleum Regulatory Authority encompassing regulating generation, importation, exportation, transmission, distribution, supply and use of electrical energy except licensing facilities. Section 11 donates *inter alia* powers to the Energy and Petroleum Regulatory Authority (the Authority) to make directions, orders and enforcement with regard to licences under the *Act*.

Section 23 is on decisions of the Authority, timelines for determination, communication and remedy where no decision is made. Section 24 is on appeals of the decisions of the Authority which lie to the Energy and Petroleum Tribunal. Section 36 deals with the Jurisdiction of the Tribunal key among them power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific Performance. Section 40 is on Appeals from decisions of the Authority and is to the effect that all appeals shall be made to the Tribunal, in accordance with the provisions of this *Act*. Section 224(2)(e)reserves any subsidiary legislation issued before commencement of the *Energy At* 2019 not revoked or repealed and which shall be deemed to have been made under the *Act*.

13. The above sections are to be read together with the Regulations 2, 4, 7 and 9 of the *Energy (Complaints and Dispute Resolution) Regulations*, 2012). Regulation 2 is on the application of the Act while regulation stipulates complaints and disputes to which the regulations apply among them electrical installations, wayleaves, easements in relation to interalia transmission of electrical energy. Regulation 7 is on declaration of dispute and reference to the Commission by a party dissatisfied with the decision made under the rules established under regulation 5. Regulation 9 is on procedure for filing such dispute to the Commission.

14. The above clearly set out an alternative dispute resolution mechanism.

15. Looking at the amended Plaint, the Plaintiff alleges that the Defendant without the Plaintiff's authority entered into the suit parcels and started erecting transmission line towers. The Plaintiff seek compensation for the loss of the land from the Defendant for the illegal construction of the power transmission lines. These are wayleaves for the transmission of energy. Clearly the same fall under the provisions of the *Act* and the *Regulations* highlighted above.

16. The issues raised in this preliminary objection are not new in our courts and have been a subject of many proceedings.

17. The court in Mombasa through Justice Kibunja when tasked with determination of a matter of a similar nature to the instant suit in *Thaathini Development Company Limited v Kenya Electricity Transmission Company Limited* (Environment & Land Case E084 of 2022) [2023] KEELC 19834 (KLR) (20 September 2023) (Ruling),simplified the process to be undertaken in disputes of similar nature to the present suit and stated that any dispute relating to the Defendant's mandate to acquire wayleaves, easements, or rights of way in relation to generation, transmission, distribution, supply

and use of electrical energy ought to have been raised first with the Energy and Petroleum Regulatory Authority [EPRA], which is the successor of the Energy Regulatory Commission [ERC], pursuant to Regulation 4(a) of the Energy [Complaints and Dispute Resolution] Regulations 2012.

18. The court further stated that any party not satisfied would then lodge an appeal to the Energy and Petroleum Tribunal established under Section 25 of the *Energy Act* 2019. The Tribunal has powers to hear and determine all disputes and appeals from EPRA in matters relating to energy and petroleum and can grant equitable reliefs including injunctions, penalties, damages, specific performance under Section 36(1) and (5) of the *Energy Act* 2019. That the decisions of the Tribunal are appealable to this court in accordance with Section 37(3) of the said *Act*.

19. Tied to the above discussion is the principle of exhaustion. It is the Defendant stand the above mechanism ought to have been exhausted. Referring to the dictum of the Supreme court of Kenya in the case of *Abidha Nicholus v The Attorney General & 8 Others* Petition No.007 of 2023 the Plaintiff contends that exhaustion of remedies is not mandatory under the *EMCA* and the *Energy Act*. That the court is obligated to interrogate the claims on merit and render a determination either way.

20. Before I delve into the above proposition I find it necessary to briefly discuss the rationale behind on the doctrine of exhaustion. Again this has been subject of many decisions as enumerated by the Supreme Court of Kenya in the case of *Abidha Nicholus v Hon The Attorney General & Others* (*supra*).

    81. On our part, in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute* (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (NGOs Co-ordination Board) we outlined the doctrine of exhaustion of administrative remedies and adopted our finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others*; SC Petition No 3 of 2016, [2019] eKLR where we held that:

        > " ..... even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasijudicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

    82. In the above decision, we furthermore emphasized that, where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by the Constitution and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.

    83. This position was also adopted by the Court of Appeal in *R v National Environmental Management Authority*, CA No 84 of 2010; [2011] eKLR that we persuasively relied on in *NGOs Co-ordination Board* (*supra*). The Court of Appeal in doing so, observed that;

        > " The principle running through these cases is where there was an alternative remedy and especially <u>where parliament had provided a statutory appeal procedure</u>, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, <u>it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...</u>". [Emphasis ours]

84. The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law.

21. Arising from the above it is clear that the alternative disputes resolution mechanisms must be exhausted and which I have already shown they do exist and apply in the present case. Why then is counsel for the Plaintiff contending that it is not mandatory? The above decision of the Supreme Court should be read in its entirety and not in isolation. The court is very clear that jurisdiction is not ousted but room should be accorded for the established forums to thrive. And this should be looked at against the provisions of Article 159 (2) (c) of the *Constitution of Kenya* 2010 which espouses alternative dispute resolution mechanism. I do not think the Supreme Court departed from the foregoing position. The only instance that I see being introduced is the aspect of exceptional circumstances that the court can resort to any other process known to law.

22. Are there any special circumstances to warrant a departure? I hear the Plaintiff stating that there was an attempt to negotiations with the Defendants which failed but I will quickly add the Act is very specific the various steps to be taken. The fact that the matter is partly heard cannot be a special circumstance. What has been attempted is a form of negotiation and must be escalated in accordance to the *Act.* There must have been a good reason for the said procedure and which to me is the involvement of a neutral party. I respectfully disagree with the Plaintiff that they are being locked out and or limited from accessing to justice for there is still an opportunity to approach the Court on Appeal.

23. Guided by the above, it is rather straightforward that the instant suit was indeed filed before the court prematurely. In the case of *Speaker of National Assembly v James Njenga Karume* [1992] KLR 21 the court held that;

> "Where there is a clear procedure for redress of any particular ground prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure."

24. The upshot is that the preliminary objection herein is merited to the extent that the alternative mechanisms are available and should be exhausted. But should the suit be struck out as proposed by the Defendant? I have noted the invitation by Counsel to stay the proceedings herein. Guided by the dictum of the Supreme Court above I think this plea should be considered. I say so because the Supreme Court did not state the residual and original jurisdiction as conferred by Article 162(2) (b) of the *Constitution* read together with Section 13 (1) and (2) of the *Environment and Land Court Act* is ousted. For me it is only suspended to allow for the exhaustion of the other mechanisms. In any event this matter is partly heard should the Plaintiff be aggrieved the court may pick up from where it left as it may deem appropriate.

25. Consequently these proceedings shall be stayed pending the exhaustion of the Dispute Resolution mechanism stipulated under the *Energy Act.*

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED THIS 26TH DAY OF APRIL 2024.

A.E DENA

JUDGE

RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM IN THE PRESENCE OF:

Ms. Okumu for the Plaintiff

Mr. Wachira for the Defendant

Mr. Daniel Disii - Court Assistant