



**Muigai v Kenya Power & Lighting Company (Environment & Land Case E039 of 2022) [2024] KEELC 3911 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3911 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E039 OF 2022**

**LC KOMINGOI, J**

**APRIL 25, 2024**

**BETWEEN**

**SAMSON GITAU MUIGAI ..... PLAINTIFF**

**AND**

**KENYA POWER & LIGHTING COMPANY ..... DEFENDANT**

**RULING**

1. The Preliminary Objection dated 7<sup>th</sup> July 2022 by the Defendant is on the grounds that this Court lacks jurisdiction to hear and determine this suit. This is because it offends the provisions of Sections 3(1); 10; 11(e), (f), (i), (k) & (l); 23; 24; 36; 40; 42 and 224(2) of the *Energy Act* 2019; and Regulations 2, 4, 7 and 9 of the *Energy (Complaints and Disputes Resolution) Regulations* as read together with Article 159(2)(c); 169(1)(d) and 2 of the *Constitution* of Kenya and Sections 9(2) and (3) of the *Fair Administrative Action Act*.
2. The application was canvassed by way of written submissions.

**The Defendant's Submissions**

3. Counsel for the applicant submitted that the *Energy Act* expressly provides for the Energy and Petroleum Regulatory Authority and Energy and Petroleum Tribunal as dispute resolution mechanisms, which the Plaintiff has not adhered to before filing the instant suit. Further, Section 9(2) and (3) of the *Fair Administrative Action Act* also provides for exhaustion of internal dispute resolution mechanisms before instituting proceedings. Citing the Supreme Court case in *United Millers Ltd vs Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 others* [2021] eKLR. Therefore, devoid of jurisdiction, the suit should be dismissed with costs citing *Owners of the Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd* (1989) KLR1 and *Phoenix of EA Assurance Ltd vs SM Thiga t/a Newspaper Service* [2019] eKLR



4. Counsel also submitted that the Plaintiff has knowingly and deliberately bypassed the Energy and Petroleum Regulatory Authority and also the Energy and Petroleum Tribunal in total disregard to the clearly laid down statutory provisions. He has put forward the case of Republic Vs. Energy Regulatory Commission & 2 Others (2018) eKLR where the court held;

“Article 159 of the Constitution which provides for principles governing courts and tribunals.....”imposes on the Judiciary the obligation to promote alternative dispute resolution hence the utilization of Tribunals such as the Energy Tribunal falls within this objective.”

The court further held: “It has been held that where a statute provides for a mode of resolving a dispute that procedure must be followed.”

5. It is further submitted that since there exist competent alternative dispute resolution mechanisms available to the plaintiff and this court ought to find that it lacks jurisdiction to entertain this matter. He has put forward the cases of James Mwaura Ngun’gu Vs. Kenya Power and Lightning Co. Ltd (2016) eKLR; Justin Karionji Nyaga Vs. Attorney General & 2 others (2021) eKLR ; Vitalis Ouma Osano Vs. Kenya Power and Lighting Company (2021) eKLR .

It prays that the Preliminary Objection be upheld and the suit be dismissed.

#### **The Plaintiff’s submissions**

6. Counsel for the Plaintiff/ Respondent submitted that, this dispute which emanated from the Applicant’s/Defendant’s act of erecting a transformer on his land without consent or compensation which is an act of trespass as defined by Section 3 of the Trespass Act and as such rightly before this court as provided under Section 13 and 150 of the Environment and Land Court Act and Article 162 of the Constitution. Moreso, wayleaves were a creation of the Land Act and thus within jurisdiction of this court as held in Eunice Nkirote Ringera v Kenya Power & Lighting Co [2020] eKLR and Cape Suppliers Ltd v Kenya Power & Lighting Co. PLC [2022] eKLR.

He prays for that the Preliminary Objection is dismissed.

#### **Analysis and determination**

7. I have considered the Preliminary Objection, the rival submissions, the authorities cited. The issues for determination are:
- i. Whether the Defendant’s Preliminary Objection is merited.
  - ii. Who should bear the costs.?
8. It is trite law that a Preliminary Objection should be on a pure point of law which can be discerned and determined on the face of the pleadings. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR pronounced itself as follows on the preliminary objection issue:

“(78) [78] ...Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.



(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

9. The Plaintiff’s case is that he is the owner of Land Reference No. Ngong/Ngong/2261 which the Defendant without consent entered and erected a transformer thereon which was an act of trespass. The Defendant then filed this objection on grounds that this court lacks jurisdiction to determine the dispute. The Plaintiff rebutted that the dispute stemmed from an act of trespass by the Defendant which is within this court’s jurisdiction.

10. I have considered the rival arguments and indeed the dispute stems from acts of installation of a transformer on the Plaintiff’s land. Section 13 (1) of the *Environment and Land Act* grants this court original and appellate the jurisdiction to hear and determine all disputes relating to environment and land in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya. Therefore, this court has jurisdiction to determine this dispute.

11. However, Section 11 (i) of the *Energy Act* establishes dispute resolution mechanisms through the Energy and Petroleum Regulatory Authority which has powers to investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under the Act. Section 24 of the *Energy Act* establishes the Energy and Petroleum Tribunal which has powers to hear and determine appeals from the Authority and Section 37(3) of the same Act provides a recourse of Appeal to the High Court for any person aggrieved by a decision of the Tribunal.

12. It is also settled in law under Section 9 of the *Fair Administrative Action Act* (FAAA) that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, then that procedure should be strictly followed. The Supreme Court in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others* [2019] eKLR 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 quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

13. Recently, the Supreme Court in *Abidha Nicholas v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR) buttressed this position by holding:

“94. 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.

...

99. In addition to, and turning to the provisions of the *Energy Act*, it is uncontested that the said Act provides for a dispute resolution mechanism for complaints to be determined by EPRA that is vested with such authority under Section 10 of the said Act. Should a party be dissatisfied with the decision of EPRA, then he or she has the right to file an appeal before the



EPT as provided for under Section 36 of the *Energy Act*. It is only when one is dissatisfied with the decision of the EPT that such a party can appeal the Tribunal’s decision to the ELC.”

14. However, the Supreme Court in the aforementioned case of *Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* went on to acknowledge that there are exceptions to the doctrine of exhaustion held that:

“105. 105. We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief.

...

107. Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant’s right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism.

...

110. As we stated earlier, there is nothing that therefore bars the appellant, reading the plain provisions of the law above, from filing a claim before the ELC as he had two options available to him once NEMA was unable to enforce the stop order against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The first option was to appeal to the NET, as was rightfully held by the Court of Appeal. The other option was to file a claim before the ELC, which the appellant did, as against both NEMA and KPLC for the claim under the *Energy Act*. The ELC was thereafter obligated to interrogate his claims on merit and render a determination one way or the other.”

15. Associating myself with the foregoing Supreme Court’s decision, I find that in the interests of justice, nothing bars this court from determining the claim herein.

16. The Preliminary Objection dated 7<sup>th</sup> July 2022 is hereby dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25<sup>TH</sup> DAY OF APRIL 2024.**

**L. KOMINGOI**

**JUDGE.**

In the presence of:

Ms. Wambui for the Plaintiff.



Mr. Maanzo for the Defendant.

Court Assistant – Mutisya.

