



Kenya Power & Lighting Company PLC v Gichure (Environment and Land Appeal 20 of 2023) [2024] KEELC 3333 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 20 OF 2023**

YM ANGIMA, J

APRIL 18, 2024

BETWEEN

KENYA POWER & LIGHTING COMPANY PLC APPELLANT

AND

JANE NJOKI GICHURE RESPONDENT

(Being an appeal against the ruling and order of Hon. D. Nyaboke (SRM) dated 17.03.2021 in Engineer CM ELC No. E002 of 2021)

JUDGMENT

A. Introduction

1. This is an appeal against the ruling and order of Hon. D. Nyaboke (SRM) dated 17.03.2021 in Engineer CMCC ELC No. E002 of 2021 – Jane Njoki Gichure (suing as the legal representative of the estate of James Gichure Kionga (deceased)). By the said ruling, the trial court held that it had jurisdiction to entertain the suit before it and proceeded to grant a temporary injunction against the Appellant pending the hearing and determination of the suit.

B. Background

2. The material on record shows that vide a plaint dated 22.02.2021 the Respondent sued the Appellant seeking the following reliefs:
 - a. Damages for loss of user, trespass and mesne profits to be assessed by the honourable court.
 - b. A permanent injunction against the defendant and/or its employees, servants and/or agents to cease the act of trespass and to remove all the erected poles and lines from the plaintiff's property known as Title No. Nyandarua/Passenga/1007.



- c. A mandatory injunction against the defendant herein to cease the act of trespass and remove all the erected poles and installed lines from the suit property known as Title No. Nyandarua/Passenga/1007.
 - d. Costs of the suit.
3. The Respondent pleaded that at all material times the deceased was the owner of Title No. Nyandarua/Passenga/1007 (the suit property). It was further pleaded that on diverse dates in the month of February, 2021 the Appellant had without the consent of the Respondent trespassed into the suit property, cut down some trees and erected some electric power transmission lines thereon.
 4. It was the Respondent's case that as a result of the Appellant's actions she had been unable to properly utilize the suit property in consequence whereof she had suffered loss and damage for which the Appellant was liable. It was also pleaded that despite issuance of a demand and notice of intention to sue, the Appellant had failed to make good her claim hence the suit.
 5. The record shows that the Appellant filed a defence dated 09.04.2021 denying the Respondent's claim in its entirety. It was denied that the deceased was the owner of the suit property. The Appellant denied that it had entered the suit property, cut down trees and erected power transmission lines thereon and put the Respondent to strict proof.
 6. The Appellant pleaded that if the said actions took place then they were done by unknown persons. The Appellant's further defence was that the Respondent's suit was premature in any event since she had not exhausted the alternative statutory dispute resolution mechanisms. In particular, it was pleaded that the body competent to handle the dispute was either the Energy and Petroleum Tribunal (the tribunal) or the Energy and Petroleum Regulatory Authority under the *Energy Act*, 2019 as read with the *Energy (Complaints and Disputes) Regulations*, 2012.
 7. The Appellant consequently denied the jurisdiction of the trial court to entertain the suit and gave notice that it shall raise a preliminary objection to the court's jurisdiction at the earliest opportunity. The court was consequently urged to dismiss the Respondent's suit with costs.

C. Respondent's Application before the Trial Court

8. The record shows that simultaneously with the filing of the suit the Respondent filed a notice of motion dated 22.02.2021 seeking, inter alia, an interim restraining injunction and a mandatory injunction pending the hearing and determination of the suit. The Appellant filed a notice of preliminary objection on jurisdiction and a replying affidavit in opposition to the application for interim orders.
9. The said application and preliminary objection were canvassed through written submissions and vide a ruling dated 17.03.2021 the trial court found and held that it had jurisdiction to entertain the suit and that the Respondent had also satisfied the requirements for the grant of the interim orders sought. As a result, the trial court granted a temporary injunction restraining the Appellant from trespassing or encroaching upon or in any way interfering with the suit property pending the hearing and determination of the suit. The court also granted an order for maintenance of the status quo obtaining at the date of the ruling but declined to grant the mandatory injunction sought by the Respondent.



D. Grounds of Appeal

10. Being aggrieved by the said ruling the Appellant filed a memorandum of appeal dated 29.03.2021 and amended on 14.08.2023 raising 11 grounds of appeal. The court has noted that all the 11 grounds boil down to the issue of the trial court's jurisdiction to entertain the Respondent's claim. It is not clear from the record why the Appellant decided to split its only grievance into eleven (11) paragraphs running into 2 pages.
11. In its memorandum of appeal, the Appellant sought the following reliefs:
 - a. That the ruling and order of the trial court dated 17.03.2021 be set aside.
 - b. That the Appellant's preliminary objection dated 02.03.2021 be allowed.
 - c. That the Appellant be awarded costs of the appeal and the suit before the trial court.

E. Directions on Submissions

12. When the appeal was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed written submissions dated 16.01.2024 whereas the Respondent filed submissions dated 14.02.2024.

F. Issues for Determination

13. Although the Appellant raised 11 grounds in its amended memorandum of appeal, the court is of the opinion that the same may be summarized into the following 2 issues:
 - a. Whether or not the trial court had jurisdiction to entertain the dispute.
 - b. Who shall bear costs of the appeal and the suit before the trial court.

G. Analysis and Determination

Whether or not the trial court had jurisdiction to entertain the dispute

14. The court has considered the material and submissions on record on this issue. Whereas the Appellant submitted that the trial court had no jurisdiction to entertain the dispute since it involved a matter reserved for the tribunal, the Respondent supported the decision of the trial court on jurisdiction and contended that it involved normal trespass to land which was actionable before civil courts.
15. Section 36 of the [Energy Act](#) No. 1 of 2019 which defines the jurisdiction of the tribunal stipulates as follows:
 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.
16. The court is satisfied that the Respondent's claim relates to a matter regulated under the *Energy Act*, 2019, (the Act) as it concerned a dispute between a licensee (Appellant) and a third party (the Respondent) on the Appellant's alleged action of constructing a power transmission line over the suit property. The court has noted that Part VII of the said *Act* deals with rights of wayleaves, and use of land for energy resources and infrastructure. It is evident that entry into private land for the purpose of survey, inspection or installation of energy infrastructure is regulated under the Act. The court is thus of the opinion that the Appellant's alleged wrongful actions fell within the jurisdiction of the tribunal as set out in Section 36 of the *Act*.
17. The court agrees with the Appellant's submissions that where a statutory mechanism exists for resolution of a dispute such procedure ought to be followed and exhausted before the aggrieved party can consider moving to court. In the case of *Justin Karionji Nyaga -vs- Attorney General & 2 Others* [2021] eKLR it was held, inter alia, that:

“The tenor and import of the doctrine of exhaustion of remedies is that, where a dispute resolution mechanism has been established by a statute outside the mainstream courts, that mechanism should be exhausted before the jurisdiction of the mainstream courts is invoked. Put differently, where there exists a legitimate statutory primary dispute resolution mechanism, such as a tribunal, the mainstream courts should be the fora of last resort and not the first port of call.
18. There is no contestation about the fact that the 3rd Respondent was a licensee within the meaning of Section 2 of the Act. It therefore follows that the dispute resolution forum established by the Act for the resolution of the present dispute, as at the time of initiating the petition herein, was the Energy and Petroleum Tribunal established under Section 25 of the *Act*. The petitioner, for unexplained reasons, did not utilize that primary dispute resolution mechanism. No explanation has been tendered to justify the petitioner's failure to exhaust the dispute resolution mechanism provided under the Act.
19. In the circumstances, the court finds that the petition herein offends the doctrine of exhaustion of remedies. The net result is that the petition herein stands to be struck out. The petitioner will have the right to seek redress in the Tribunal, as prescribed under the Act, subject to the relevant law on limitation.
20. In the end, the 2nd Respondent's preliminary objection dated 29/6/2020 is upheld to the extent that the petition herein is struck out on the ground that the petitioner has not exhausted the primary dispute resolution mechanism established under the *Energy Act*, No. 1 of 2019.”
21. The court is thus of the view that the Respondent in this appeal did not exhaust the stipulated statutory dispute resolution mechanism before filing suit before the trial court. The court does not agree that the Appellant's alleged conduct simply constituted simple trespass which entitled her to file suit directly. The purpose of the alleged trespass is important because it may determine whether the dispute falls within or without the jurisdiction of the tribunal. The material on record reveals that the Appellant's entry into the suit property was for the purpose of installation of electric power transmission infrastructure, a matter regulated under Part VII of the Act. It would have been a different case if the Appellant's entry was for the purpose of constructing a pig-sty, granary, or a cattle dip for those are not matters regulated under the Act.



Who shall bear costs of the appeal and the suit before the trial court

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Appellant shall be awarded costs of the appeal and of the suit before the trial court.

H. Conclusion and Disposal Orders

23. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. As a consequence, the court makes the following orders for disposal thereof:
- a. The appeal be and is hereby allowed.
 - b. The ruling and orders of the trial court dated 17.03.2021 in Engineer CMCC ELC No. E002/2021 are hereby set aside for lack of jurisdiction.
 - c. The Respondent's suit before the trial court is hereby struck out with costs to the Appellant.
 - d. The Appellant is hereby awarded costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 18TH DAY OF APRIL, 2024.

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Maanzo for the Appellant

Ms. Gatei for the Respondent

C/A - Carol

