



REPUBLIC OF KENYA



**Shelly Engineering Works Limited v Kenya Power and Lighting Company Plc (Environment & Land Case E062 of 2023) [2024] KEELC 4231 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4231 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E062 OF 2023**

**SM KIBUNJA, J**

**MAY 15, 2024**

**BETWEEN**

**SHELLY ENGINEERING WORKS LIMITED ..... PLAINTIFF**

**AND**

**KENYA POWER AND LIGHTING COMPANY PLC ..... DEFENDANT**

**RULING**

1. The defendant filed the notice of preliminary objection dated 22<sup>nd</sup> September 2023 raising the grounds that this court lacks jurisdiction to hear and determine this suit, as it offends:
  - a. Section 3 (1), 10, 11 (e), (f), (i), (k) & (l), 23, 24, 36, 40, 42 and 224 (2) (e) of the [Energy Act](#), 2019;
  - b. Regulations 2, 4, 7 and 9 of the [Energy \(Complaints and Dispute Resolution\) Regulations](#), 2012;
  - c. Articles 159 (2) (c) and 169 (1) (d) and (2) of the [Constitution](#) of Kenya, and
  - d. Sections 9 (2) and (3) of the [Fair Administrative Action Act](#), 2015.

On the 9<sup>th</sup> November 2023, the court issued directions on filing and exchanging submissions on the preliminary objection. The learned counsel for the plaintiff and defendant filed their submissions dated the 17<sup>th</sup> January 2023 [sic] and 22<sup>nd</sup> January 2024 respectively, which the court has considered.

2. In support of the preliminary objection, the Counsel for the defendant inter alia submitted that this court does not have jurisdiction since the dispute should first be determined by the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal. Counsel relied on two Supreme Court decisions in the cases of [Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others](#); SC Petition No. 3 of 2016, [2019] eKLR and [Ngugi vs Commissioner of Lands; Owindo & 63 others \(interested parties\)](#) (Petition 9 of 2019) [2023] KESC 20 (KLR) (Civ) (31<sup>st</sup> March 2023). Counsel cited



the provisions of law relied upon in making the instant application explaining that it should have been proper for this dispute to have gone through the proper channels as set out in Kisumu CA 42 of 2021, *Abidha Nicholus v Attorney General 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested parties)* (unreported) (Delivered on 3.2.23). The Court of Appeal explained the three tiers in determining disputes as follows:

- a. The first tier is to raise a complaint with the Energy and Petroleum Regulatory Authority (EPRA).
  - b. If dissatisfied a party can appeal to the Energy and Petroleum Tribunal (Tribunal) under section 36 of the *Energy Act*.
  - c. The third tier is if one party is still dissatisfied then he/she can appeal to the High Court.
3. The Counsel for the plaintiff among others submitted that the defendant has not satisfied the criteria for a notice of preliminary objection and relied on several authorities including the decisions in the cases of *Oraro v Mbaja* [2005] 1 KLR 141 and *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & Another (Interested parties)* [2021] eKLR which cited the *locus classicus* of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. Counsel argued that the facts herein have been disputed such as the ownership of L.R No. Mombasa/Mainland South/BlockIII/206, suit property, and trespass when connecting power to the alleged squatters on the suit property. Counsel countered the arguments of the defendant’s counsel that the dispute ought to have started before EPRA, and cited the provisions of section 13 of the *Environment and Land Court Act*, 2012. They also referred to section 23 (3) of the *Interpretation and General Provisions Act*, Chapter 2 of the Laws of Kenya) which was cited in *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd & 2 others* [2012] eKLR & *Commissioner of Income Tax v Pan African Paper Mills (EA) Limited* [2018] eKLR.
4. The issues for the determinations of the court are as follows:
- a. Whether the preliminary objection raises a pure point of law that if decided can be determine the suit.
  - b. What orders commends themselves to be issued by the court.
  - c. Who pays the costs?
5. The court has carefully considered the ground of preliminary objection as raised, the submissions by the counsel for the parties, the superior courts decisions cited thereon, the pleadings and come to the following findings:
- a. In the *locus classicus* case of *Mukisa Biscuit* [supra] 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. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”



In the celebrated case of *Owners of Motor vessel M.V. Lillians v Caltex Oil (Kenya) Limited* [1989] LLR 1653 page 10, the court held:

“Jurisdiction must be acquired before judgment. It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited...the moment the court determines that it has no jurisdiction it has to down its tools and proceed no further.”

- b. The court’s jurisdiction to hear and determine this suit has been challenged by the defendant on the basis that the plaintiff has not exhausted the statutory forums for dispute resolutions before filing this suit. The plaintiff has countered the arguments of the defendant and states that section 13 (1) of the *Environment and Land Court Act* has placed jurisdiction squarely in the arms of this court. The dispute in this suit is whether or not the defendant trespassed onto the suit property and erected electricity poles and powerlines. In the case of *Thaathini Development Company Limited v Kenya Electricity Transmission Company Limited (KETRACO)* (Environment & Land Case E084 of 2022) [2023] KEELC 19834 (KLR) (20 September 2023) (Ruling) this court dealt with almost a similar matter and upheld the preliminary objection in finding that EPRA has original jurisdiction when it comes such a dispute. In that suit the court cited with approval the case of *International Centre for Policy and Conflict and 5 Others v The Hon. Attorney-General & 4 Others* [2013] eKLR where the court observed as follows;

“ [109]An important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the *Constitution* in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or State organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.”

- c. In the KETRACO case above, this court cited several provisions regarding exhaustion through the statutory tribunals before filing disputes before the Court. 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.”

Based on the superior courts decisions cited above, it is without doubt that there are two statutory dispute resolutions forums that the plaintiff should have invoked before coming to this court. Those tiers of dispute resolutions are EPRA and the tribunal. The plaintiff came to this court without exhausting the statutory dispute resolution mechanism outlined above and this court is therefore without jurisdiction at this stage in time. As dictated by the decision in the case of *Owners of Motor Vessel “Lillian S”* [supra], the court has to down its tools as this suit was filed prematurely in court before it got seized of jurisdiction in the matter.



- d. That having found merit in the preliminary objection, the defendant is awarded costs in terms of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya that provides that costs follow the events unless otherwise directed for good reasons.
6. The determinations set out above leads the court to find and order as follows:
    - a. That the preliminary objection dated the 22<sup>nd</sup> September 2023 raised by the defendant has merit and is hereby upheld.
    - b. The plaintiff's suit, commenced through the plaint dated the 25<sup>th</sup> May 2023, is hereby struck out.
    - c. The plaintiff will pay the defendant's costs.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED ON THIS 15<sup>TH</sup> DAY OF MAY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**In The Presence Of:**

**Plaintiff : Mr Mwangunya for Mokaya**

**Defendant : M/s Molela**

**Leakey – Court Assistant.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

