



Kenya Power & Lighting Company v Odongo (Environment and Land Appeal E001 of 2023) [2024] KEELC 4942 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**E ASATI, J
JUNE 13, 2024**

BETWEEN
KENYA POWER & LIGHTING COMPANY APPELLANT
AND
KEPHER OJIL ODONGO RESPONDENT

(Being an appeal from the ruling dated 25th September 2023 in VIHIGA PMC EL CASE NO. 34 OF 2023)

JUDGMENT

Introduction

1. The Appellant is the Defendant in Vihiga PMC ELC CASE NO. 34 OF 2023 wherein vide the plaint dated 5th June 2023, he has been sued by the Respondent herein over the erection of electricity supply poles and cables over land parcel known as BUNYORE/EKWANDA/1139 (the suit land). The prayers sought in the plaint are for an order that the appellant removes and/or relocates the electricity supply poles and cables from the suit land to the road reserve and that the exercise be undertaken at the cost of the appellant. The Respondent also sought for costs of the suit.
2. The record of appeal shows that in response to the Respondent's claim the appellant filed, inter alia, a Notice of Preliminary Objection dated 14/6/2023 on the grounds that the trial court lacked jurisdiction to hear and determine the dispute and sought to have the suit dismissed as it offended the provisions of sections 3(1), 10, 11(c), (f), (j), (k) & (l), 23, 24, 36, 40, 42 and 224(2)(c) of the *Energy Act* 2019 together with Regulations 2, 4, 7, 9 and 21 of the Energy (Complaints and Dispute Resolution) Regulations 2012 as read with articles 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 actions Act, 2015.



3. The proceedings show that the Preliminary Objection was heard by the trial court by way of written submissions. The trial court delivered its ruling on the same on 25/9/2023 vide which it found that the Preliminary Objection lacked merit and dismissed it with costs to the plaintiff (Respondent herein).
4. Aggrieved by the Ruling, the appellant filed the present appeal vide the Memorandum of Appeal dated 4th October 2023. The appellant seeks for orders that the appeal be allowed, the ruling and orders delivered on 25/9/2023 be set aside, the Preliminary Objection dated 14th June 2023 be allowed as prayed, the Respondents case in the lower court be dismissed and costs both in the lower court case and the appeal herein be borne by the Respondent.
5. The grounds of appeal as set out in the Memorandum of Appeal are that: -
 - i. The learned trial Magistrate erred in law and fact by failing to consider that the subject matter is purely under the purview of the [Energy Act, 2019](#).
 - ii. The learned trial Magistrate erred in law and fact in finding that the magistrate's court has jurisdiction on disputes from the [Energy Act, 2019](#) contrary to the applicable laws and case laws and in particular sections 25 and 36 of the [Energy Act, 2019](#) and the Court of Appeal ratio decidendi in Nicholus v. Attorney General & 14 others: National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) (Civil Appeal 42 of 2021) [20231 KECA 34 (KLR) (3 2023) (Judgment)].
 - iii. The learned trial Magistrate erred in law and fact in misinterpreting the Appellant's Preliminary Objection on record and arriving at a wrong conclusion.
 - iv. The learned trial Magistrate erred in law by abrogating jurisdiction to the Magistrate's Court to hear the matter, which is exclusively within the jurisdiction of the Energy & Petroleum Regulatory Authority and failing to appreciate the statutory provisions on the jurisdiction of the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal.
 - v. The learned trial Magistrate erred in law in failing to appreciate the facts and overwhelming laws and statutory provisions tendered to demonstrate that the trial court lacked the requisite jurisdiction.
 - vi. The learned trial Magistrate erred both in law and in fact when she ignored the fact that the crux of the matter against the Appellant in the suit and the application is about electricity wayleaves, easements and rights-of-way as set out in the [Energy Act, 2019](#) and the Energy (Complaints and Disputes Resolution) Regulations, 2012.
 - vii. The learned trial Magistrate erred in law in entertaining and/or delving into issues of fact while making a determination on the Preliminary Objection raised by the Appellant.
 - viii. The learned trial Magistrate erred in law by completely ignoring the submissions tendered by the Appellant, which were never controverted by the Respondent, but irregularly deployed craft in arriving at the decision that it had jurisdiction.
 - ix. The learned trial Magistrate erred in law and fact by ignoring the binding authorities of the superior courts adduced in the Appellant's submissions and thus breached the binding principle of stare decisis as similar issue have been conclusively determined by the Court of Appeal and therefore arrived at the wrong decision.
 - x. The learned trial Magistrate misdirected her mind by considering a single authority which had been overturned by the Court of Appeal judgment and without due regard to the provisions



of the [Energy Act](#), 2019 and the Energy (Complaints and Disputes Resolution) Regulations, 2012.

- xi. The learned trial Magistrate erred in law and in fact when she allowed herself to be guided by improper considerations, manifest bias, and subjective opinions and proceeded to dismiss the Preliminary Objection.

Submissions

6. The appeal was argued by way of written submissions. Written submissions dated 27th February 2024 were filed by Ochieng J. Advocates for the appellant. Counsel framed 11 issues for determination. On the first issue of whether the subject matter of the suit is purely within the purview of the [Energy Act](#) 2019, Counsel submitted that the appellant is licensed within the meaning of sections 2 and 117 of the [Energy Act](#) 2019 to undertake distribution of electricity. That pursuant to the license, section 139 of the Act authorizes the appellant to plan, build, operate and maintain a distribution system necessary for the conveyance of electrical energy from generating stations for purposes of enabling supply to customers. That the appellant is a public utility company engaged in the transmission, distribution and retail supply of electricity to consumers.
7. That if the act complained of by the Respondent of erecting the poles and wires was done by the appellant, the appellant was simply executing its mandate within section 139 of the [Energy Act](#), 2019 and in accordance with the license granted under the Act. That if there was any violation in that regard the applicable law must be the [Energy Act](#) 2019. That a reading of Part VII of the [Energy Act](#), 2019 shows that the claim herein is a complaint emanating from the development of energy infrastructures with regard to way leaves, easements or right-of-way in relation to the distribution of electrical energy as envisaged under the [Energy Act](#), 2019 and the Energy (Complaints and Disputes Resolution) Regulations 2012. That from the plaint, it is clear that the Respondent wishes that the alleged distribution infrastructure be removed from his alleged piece of land.
8. That the land is subject to overriding interests subsisting such as electric supply lines constructed pursuant to the power conferred by the [Energy Act](#) 2019 as stipulated in sections 28(1) and 26 (2) of the [Land Registration Act](#) 2012. That in addition any other written law, like the [Energy Act](#), could create overriding interests. Counsel relied on the case of Phyllis Katoti Maingi -vs Mwana Wiki Co-operative Society (2017) eKLR among others to Support the submissions.
9. That in regard to resolution of disputes and complainants within the Energy Sector, section 25 establishes the Energy & Petroleum Regulatory Authority and the Energy Tribunal respectively. That in relation to the Act, the Energy & Petroleum Regulating Authority has statutory mandate to investigate and determine complaints or disputes between parties over matters relating to licences and license conditions under the [Energy Act](#) and the Energy (Complaints and Disputes Resolution) Regulations 2012 particularly regulations 2 and 4 thereof. That whatever complaint the Respondent may have against the appellant with regard to the conduct, practice or operations of the appellant are all regulated by the [Energy Act](#) and the Regulations. That the Energy & Petroleum Regulatory Authority is the first port of call for complaints and disputes falling under Regulations 4 (a).
10. That the mandate of the Energy & Petroleum Tribunal is found in Section 30 of the Act and the procedure for handling disputes in Regulations 4 and 3(1). That the trial court's ruling of 25/9/2023 did not give any consideration whatsoever to the subject matter despite the same having been raised in the appellant's submissions. That the trial Magistrate erred in law by ignoring the fact that the complaint was governed by the [Energy Act](#) and the Regulations.



11. The second issue framed on behalf of the appellant is whether or not the trial Magistrate erred in law and fact in finding that the Magistrate's court had jurisdiction on disputes under the *Energy Act*. Counsel submitted that the trial court failed to give meaning to articles 50(1), 159(2) (c) and 169 (i) (d) and (2) of *the Constitution* of Kenya 2010 as well as section 9(2) and (3) of the *Fair Administrative Action Act*, 2015, That there is a sectoral internal mechanism under the *Energy Act*, 2019 aimed at resolving disputes and complaints as envisaged under article 159 of *the Constitution* of Kenya, 2010, and that the present complaint ought to be handled internally first before being brought to court. That there is no evidence that the internal mechanism failed or refused to deal with the complaint. Counsel relied among others, on the decision in *Nicholus vs Attorney General & 14 others, national Environment Complaint's Committee (NECC) & 5 Others (interested parties) (Civil Appeal 42 of 2021)* (2023) KECA 34 (KLR) (3 February 2023 (Judgment) where the Court of Appeal held, inter alia, that only upon exhaustion of the appellate process before the Energy & Petroleum Tribunal can a matter be escalated to the High court. That the Court of Appeal settled the issue of disputes resolutions in the Energy Sector and therefore the trial court had no jurisdiction to handle the matter.
12. That for all intents and purposes the appellant's preliminary objection was to bring to the attention of the trial court of the establishment of the most appropriate forum to handle the complaint at hand but that the trial court erred in failing to consider the provisions of law set out in the preliminary objection and dismissing the preliminary objection.
13. That the trial Magistrate erred by abrogating jurisdiction to the Magistrate's court to hear the matter, which is exclusively within the jurisdiction of the Energy & Petroleum Regulatory Authority and failing to appreciate the statutory provisions on the jurisdiction of the Energy & Petroleum Regulatory Authority and Energy & Petroleum Tribunal. Counsel submitted that jurisdiction has to exist at the onset of a suit and that the same cannot be conferred by any party or proceedings. That under the *Energy Act*, 2019, the initial jurisdiction for entertaining the Respondent's grievances in the first instance lay with Energy and Petroleum Regulatory Authority and if aggrieved, to prefer an appeal to the Energy & Petroleum Tribunal and finally to court.
14. Counsel relied on the definition of the doctrine of exhaustion as given in Black's Law Dictionary 10th Edition that:-

“The doctrine that if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that Courts will not be burdened by cases in which juridical relief is unnecessary”

Counsel submitted that where a distinct dispute resolution mechanism has been prescribed by the law such mechanism ought to be exhausted before a party can move to court. That the trial court ought to have downed its tools and direct the Respondent to the right forum.
15. That the trial court misdirected her mind by considering a single authority which had been overturned by the Court of Appeal and without regard to the provisions of the *Energy Act*, 2019 and the Energy (Complaints and Dispute Resolution) Regulations 2012. That the trial court erred in law and fact when it allowed itself to be guided by improper considerations, manifest bias and subjective opinions and proceeded to dismiss the preliminary objection. That the orders dated 25/9/2023 made by trial court which had no jurisdiction are void ab initio and should be substituted with an order upholding the appellant's preliminary objection. Counsel prayed that costs of the appeal be awarded to the appellant.



16. The Respondent filed written submissions dated 4th April 2024. He submitted that the Respondent was seeking for an order for the appellant to remove and/or relocate the electricity poles/cables from his plot to a road reserve at the cost of the appellant. That consent of the appellant was not obtained before the said exercise and no notice was served upon him. That the appellant has no right whatsoever to make an arbitrary decision for interference of private right of ownership without any corresponding relief.
17. He submitted further that article 40 of *the Constitution* shields him from the practices of the appellant of creating way leaves without reference to the land owner and without compensation whatsoever. That jurisdiction cannot be pegged on the appellant to deny the Respondent the right to fair hearing and determination of the case as enshrined in *the Constitution*.
18. That the Respondent engaged the appellant prior to filing the suit but that the appellant did not revert. That the doctrine of exhaustion only bars the presentation of controversy in court where the alternative forum is accessible and affective. The Respondent relied on the case of Mohammed Ali Baadi & Others vs Attorney General and 11 others (2018) eKLR to support his submissions. He submitted further that the right to peaceful enjoyment of the Respondent of his proerpty is protected by *the Constitution* and that the Appellant must follow the law. He prayed that the appeal be dismissed with costs.

Issues for determination

19. From the grounds of appeal, the submissions made and the record of appeal generally, I find that the issue that arises for determination is whether or not the trial court erred in law and fact in holding that she had jurisdiction to handle the suit and thereby dismissing the preliminary objection.

Analysis and determination

20. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
21. I have considered the Notice of Preliminary Objection, the submissions that were made thereon before the trial court, the Ruling appealed against, the Memorandum of Appeal and the submissions made herein. The appellant's objection to the jurisdiction of the trial court was based on several provisions of the *Energy Act, 2019* and Energy (Complaints and Disputes Resolution) Regulations, 2012. Section 9 of the *Energy Act* 2019 establishes the Energy and Petroleum Regulatory Authority (the Authority). Section 11(i) of the Act provides that the Authority has the mandate to:

“ to investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;”
22. Section 23 (1), (2) and (3) of the Act provides that 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 in writing and shall communicate the same to the parties within 7 days. Section 23(5) as read with Section 24(1) of the Act gives a party aggrieved with the decision of the Authority a right to appeal to the Energy and Petroleum Tribunal within 30 days of receipt of the decision.



23. The Tribunal is established under Section 25 of the Act for the purposes of hearing and determining disputes and appeals in accordance with the Act or any other written law. The jurisdiction of the tribunal is set out in Section 36 of the Act provides 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.”

Section 37(3) of the Act gives any party aggrieved by the decision of the tribunal a right to appeal to the High Court within 30 days of the date of the decision or order of the tribunal.

24. Regulation 4 of the Energy (Complaints and Disputes Resolution) Regulations 2012 (Regulations) provides that the regulations apply to complaints and disputes in the following areas:

- “a) billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
- b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products;
- c) and any other activity and/or matter regulated under the Act.”

25. The dispute as filed in the lower court concerned the positioning of the power supply poles and cables; whether or not they were placed on or over the Respondent’s land or whether or not the appellant had any way leaves or overriding interests over the land where the poles and cables were claimed to have been placed. Disputes on way leaves and easement are part of the disputes listed under Regulation 4. Under section 11(i) and 36(4) of the Act it is the Tribunal which has the original jurisdiction to determine disputes between a licensee and a third party.



26. The Respondent ought to have exhausted the dispute Resolution Mechanism provided by the Act and the Regulations before approaching the court. – See case of Speaker of National Assembly vs Karume (1992) eKLR. where it was held that:

“In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

27. Though the Respondent submitted that he had tried to contact the appellant before filing suit to no avail, there is no evidence that he filed his dispute with the Tribunal as provided by the Act

28. The record shows that these matters were placed before the trial court vide the submissions by the appellant (defendant). But in its ruling, there was no reference to the submissions or the provisions of the law cited therein. The trial court proceeded to find that it had jurisdiction and dismissed the preliminary Objection.

29. Regarding costs, the Respondent ‘s complaint is yet to be heard substantively, I find it to be in the interest of justice that each party bear own costs.

30. The upshot is that I find that the decision of the trial court was erroneous. I find that the appeal herein has merit and allow it as follows:

- i. The ruling of the trial court dated 25/9/2023 dismissing the appellant’s preliminary objection is hereby set aside and substituted with an order upholding the preliminary objection and striking out the suit for lack of jurisdiction on the part of the trial court.
- ii. Each party to bear own costs of the suit and the appeal herein.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI,

JUDGE.

In the presence of:

Ajevi: Court Assistant.

No appearance for the appellant.

The Respondent present in person.

