



Fadhil v Kenya Power & Lighting Company Limited (Environment & Land Case 49 of 2017) [2024] KEELC 5673 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5673 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 49 OF 2017**

FM NJOROGE, J

JULY 31, 2024

BETWEEN

AZIZ OMAR FADHIL PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. For determination is the Preliminary Objection dated 13/3/24 brought on the following grounds, namely:
 - a. That this honourable court the jurisdiction to hear this suit as it offends the provisions of Section 3 (1), 10, 11 (e), (f), (i), (k) & (l), 23, 24, 36, 40, 42 and 224 (2) (e) of the Energy Act 2019, Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations 2012 as read with Articles 159 (2) (c) and 169 (1) (d) of the Constitution of Kenya 2010 and Sections 9 (2) and (3) of the Fair Administrative Act, 2015.
 - b. That this suit be struck out with costs to the Defendant.
2. The Preliminary objection was canvassed by way of written submissions.
3. The Defendant submitted that the dispute between the Plaintiff and the Defendant emanates from wayleaves that were granted by the previous proprietor of the suit land to the Defendant to erect an electricity pole; that this dispute falls squarely under Energy Act, 2019 and as such this suit out to have been referred to the Energy and Petroleum Regulatory Authority or the Energy Petroleum Tribunal established under Section 25 of the Energy Act 2019.
4. The Plaintiff submitted that this suit was filed on 6th March 2017 two years prior to the enactment of the Energy Act 2019 thus the provisions of the Energy Act 2019 cannot apply retrospectively. Further, that the issue of jurisdiction of this court is not pleaded in the statement of defence filed on 10th May



2017 where, in the plaintiff's view, the defendant correctly admitted that this honourable court has jurisdiction to hear and determine this matter.

Disposition

5. On the issue of what constitutes a preliminary objection, I refer to the celebrated case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 where their Lordships observed thus:

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

6. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. The jurisdiction is challenged on the grounds that the dispute herein ought to have been referred to the Energy and Petroleum Authority or the Energy and Petroleum Tribunal. Indeed, the locus classicus case on the question of jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” (supra) where the Court held:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

7. From the Mukisa Biscuit case (supra), it is clear that a preliminary objection should be a pure point of law and on assumption that the facts pleaded by the other sides are correct.
8. The Plaintiff has challenged the objector's position on grounds that the suit was filed before the enactment of the [Energy Act](#) 2019 and thus the law cannot operate retrospectively.
9. In my view, this argument invites evidentiary proof to ascertain the facts which goes against the objective of a preliminary objection and for that reason the preliminary objection cannot be sustained. In any event the defence filed admits jurisdiction of this court and the suit is already partly heard.
10. The preliminary objection dated 13th March 2024 is hereby struck out with costs to the Plaintiff. This suit shall be mentioned on 30th September 2024 for the issuance of a hearing date.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31ST DAY OF JULY 2024.

MWANGI NJOROGE



JUDGE, ELC MALINDI

