



Kariuki v Kenya Power & Lighting Co Ltd (Environment and Land Appeal E001 of 2024) [2024] KEELC 5296 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E001 OF 2024**

**SM KIBUNJA, J
JULY 17, 2024**

BETWEEN

EDWARD MBURU KARIUKI APPELLANT

AND

KENYA POWER & LIGHTING CO LTD RESPONDENT

(Being an appeal against the ruling of Hon. G. Kiage, SRM, delivered on 25th February 2022, in Mombasa CMELCC No. 579 of 2020)

JUDGMENT

1. The appellant commenced this appeal through the memorandum of appeal dated the 16th March 2022, seeking for the appeal to be allowed, ruling of 25th February 2022 be set aside, appellant’s suit reinstated for hearing and cost of the appeal. The appellant relies on the six (6) grounds set out in the memorandum of appeal summarized into one that the learned trial magistrate erred in law and in fact by finding that the court did not have jurisdiction in the suit despite the clear provisions of the applicable law in compulsory acquisition.
2. The appeal was initially filed before the High Court and the proceedings of 31st July 2023 shows that directions on filing and serving submissions were issued. The matter was on 12th January 2024 set down for judgement on the 29th February 2024. On that date, the Hon Mr. Justice H. M. Chemitei ordered as follows:
 - a. “The court has perused the appeal herein and in particular the contents of the plaint and defence at the trial court and it is of the considered opinion it has no jurisdiction to determine the same.
 - b. In view of this fact this matter is hereby referred to the Deputy Registrar who shall allocate it to the Environment and Land Court. In essence it was erroneously allocated to this court.”



The subsequent proceedings show the matter was on 14th March 2024 mentioned before the Deputy Registrar High Court who then fixed it before Deputy Registrar of this court on 9th April 2024, who in turn set it for mention on 26th April 2024 before this court. On that date, the learned counsel for the respondent informed the court that she would ensure a copy of their submissions dated the 19th September 2023 is placed on the record. That as I prepare this judgement today the 13th July 2024, the respondent's submissions are yet to be placed on the file. The learned counsel for the Appellant filed their submissions dated the 21st September 2023 that the court has considered.

3. The issues for the court's determinations in this appeal are as follows:
 - a. Whether the trial court had jurisdiction to hear and determine the suit filed before it.
 - b. Whether the learned trial magistrate erred in law and in fact in upholding the respondent's preliminary objection and striking out the appellant's suit.
 - c. Who pays the costs?
4. The court has carefully considered the grounds on the appeal, record of appeal, submissions by the learned counsel, the applicable law and come to the following findings:
 - a. This being a first appeal, the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions on whether or not it would have come to different conclusions, bearing in mind it did not see or hear the witnesses testify. In the case of *Mursal & another versus Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) (Judgment), the court held as follows:

“A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd. & others* {1968} EA 123 and in *Peters v Sunday Post Limited* {1958} E.A. page 424.”

The court further stated as follows:

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*, Cap 21 Laws of Kenya, a court of first appeal can appreciate the entire evidence and come to a different conclusion.”

- b. The ruling subject matter of this appeal was on the respondent's preliminary objection dated the 13th April 2021 that is at page 88 of the record of appeal. The objection raised is that the trial court lacks jurisdiction as the suit offends sections 3(1), 10, 11(e), (f), (k), & (l), 23, 24 36, 40 to 42 and 224 (2)(e) of the *Energy Act*, 2019, Regulations 2, 4, 7, & 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012, as read with Article 159(2)(c) & 169(1)(d) and (2) of *the Constitution* of Kenya and section 9(2) and (3) of the Fair Administration Act, 2015.



The court has also noted that the respondent had at paragraphs 3, 11 and 13 of its defence dated the 15th February 2021, that is at pages 91 to 93 of the record of appeal, raised a similar objection to the appellant's suit.

- c. The copy of the trial court's proceedings that runs from page 7 to 9 of the record of appeal shows that on the 19th October 2021, the learned counsel for the parties agreed to canvass the respondent's preliminary objection through written submissions. The counsel for the respondent and appellant consequently filed the submissions dated the 5th November 2021 and 15th November 2021 respectively, that are at pages 12 to 21 of the record of appeal. The learned trial magistrate then delivered his ruling on the 25th February 2022 that is at pages 4 to 6 of the record of appeal, finding inter alia that:

“The main thrust of the defendants objection is that the dispute between the plaintiff and the defendant term is that between an owner and a license and relates to wayleaves where granted by the plaintiff to the defendant. According to the defendant therefore the dispute falls squarely under the [Energy Act](#), 2019 and out to be referred to the Energy and Petroleum Tribunal.

The plaintiff on the own land contend that this is purely a matter relating to acquisition of land and the same is governed by [Land Act](#), No. 6, 2012 Laws of Kenya and not the [Energy Act](#).

Part V11 of the [Energy Act](#) 2009 relates to Rights of Way. Way leaves and use of land for Energy Resources and Infrastructure. Section 170 to section 186 make provisions with respect to the relationship between the owner of land and a license for purposes of the Act.

Section 25 of the same Act establishes the Energy and Petroleum Tribunal which was outlined with jurisdiction under section 36 to hear and determine all matters referred to it relating to energy and petroleum sections arising under this Act or any other Act.

Section 36(3) is specifying about the jurisdiction of the tribunal to hear disputes between licenses and parties or licenses inter-se.

Under section 37(3) an appeal from the tribunal lies in High Court. The upshot of the typing is that the jurisdiction to hear and determine the present suit lies with the Energy and Petroleum tribunal and not with this court. The preliminary objection dated 13/04/2021 succeeds and consequently, the suit herein is struck out with costs to the defendant.”

- d. Upon realising the typed copy of the ruling is not making sense in some parts, I perused the handwritten ruling that is at pages 5 to 10 of the original trial court file, that is also attached herein and to me it reads as herein under.

“The main thrust of the defendant's objection is that the dispute between the plaintiff and the defendant herein is that between an owner and a licensee and relates to wayleaves which were granted by the plaintiff to the defendant. According to the defendant therefore, the dispute falls squarely under the [Energy Act](#), 2019 and ought to be referred to the Energy and Petroleum Tribunal.



The plaintiff on the other hand contend that this is purely a matter relating to acquisition of land and the same is governed by Land Act, No. 6, 2012 Laws of Kenya, and not the Energy Act.

Part V11 of the Energy Act 2009 relates to Rights of Way, Way leaves and Use of land for Energy Resources and Infrastructure. Section 170 to section 186 make provisions with respect to the relationship between the owner of land and a licensee for purposes of the Act.

Section 25 of the same Act establishes the Energy and Petroleum Tribunal which was clothed with jurisdiction under section 36 to hear and determine all matters referred to it relating to energy and petroleum sectors arising under this Act or any other Act.

Section 36(3) is specially about the jurisdiction of the tribunal to hear disputes between licensees and parties or licensees inter-se.

Under section 37(3) an appeal from the tribunal lies in High Court.

The upshot of the foregoing is that the jurisdiction to hear and determine the present suit lies with the Energy and Petroleum tribunal and not with this court. The preliminary objection dated 13.04.2021 succeeds and consequently, the suit herein is struck out with costs to the defendant.”

- e. I have perused the ground on the preliminary objection challenging the court’s jurisdiction, submissions by the learned counsel before the trial court and this court, and there is no dispute that it meets the definition set out in the case of Mukisa Biscuits Manufacturing Ltd versus West End Distributors Ltd (1969) EA 696, that a preliminary objection should be a pure point of law that can be canvassed without calling evidence, and if upheld, it can determine the suit before the trial court. I have also perused the pleadings filed by the appellant and respondent before the trial court, and specifically paragraphs 4 of the plaint in which the plaintiff averred inter alia that:

“4.The defendant acquired statutory wayleaves over a portion of the plaintiff’s property known as Title Number; Mgumopatsa/Maseras/540 measuring 0.0894 hectares or thereabouts over and upon which it constructed high voltage power transmission lines and pylons thus rendering the said portion permanently unavailable for the plaintiff’s use and to date the defendant has neglected and or failed to compensate the plaintiff for the acquisition and loss of property and value.”

That having considered the pleadings as framed or phrased, I have not seen any particulars, allegation or averments therein that would disclose a claim based on compulsory acquisition as alleged in this appeal by the appellant. What I gather from the pleadings of the appellant is that he is seeking payment from the respondent for erecting high voltage power transmission lines, and pylons over, and on a portion totalling 0.0894 hectares of his land parcel Mgumopatsa/Maseras/540, that is approximately 0.32 hectares, without paying him adequate compensation. There is no suggestion that the respondent took over or intends to take over or assume title to the 0.0894 hectares of the appellant’s said land. The title for the whole parcel remains with the appellant as can be confirmed from the copy of the title deed issued to the appellant on 20th January 2010, that is at page 103 of the record of appeal. I do not find any basis or grounds to fault the learned trial magistrate for agreeing with the respondent’s submissions, that the appellant’s claim, being a compensation dispute between him, as the land owner, and the respondent, as the licensee, then the dispute resolution forum with the original civil jurisdiction to deal with the matter is the Energy & Petroleum Tribunal established under section 25 of the Energy Act, 2019.



- f. Part V111 of the *Land Act* No. 3 of 2012, is indeed the one carrying the provisions guiding compulsory acquisition. The superior courts have variously addressed the provisions therein, especially section 112 thereof. The averments in the plaint filed by the appellant before the trial court has not pleaded to any notice of intention to acquire, inquiry and award thereof, having been made by the National Land Commission, which is charged with among others the responsibility to acquire land for public use. The National Land Commission is not even a party in the suit before the trial court or this appeal. I am therefore in agreement with the respondent's position that the appellant's suit was over a compensation dispute over use of a portion of his land to erect energy infrastructure by the respondent. Under section 36 (3) of the *Energy Act*, 2019, the Energy & Petroleum Tribunal has jurisdiction in the first instance and any party not satisfied may thereafter approach this court on appeal under section 35(4) of the said Act.
- g. In the famous case of Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd. (1989) eKLR, 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."
- The learned trial magistrate did not therefore, misdirect himself or err in law or in fact when he upheld the respondent's preliminary objection on jurisdiction and then proceeded to strike out the suit with costs, as that is what the law obligated him to do.
- h. The appellant needed to first submit his claim through the alternative disputes resolutions mechanisms under the relevant legislation, in his case the *Energy Act*, 2019, before invoking the jurisdiction of the trial court. The appeal therefore fails.
- i. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless where for good cause the court orders otherwise. In this instance, I find no good reasons have been presented, to make the court depart from that norm. The appellant will meet the respondent's costs.
1. That from the foregoing determinations, the court finds and orders as follows:
- a. That the appeal is without merit and is dismissed.
 - b. The Hon. Trial magistrate ruling and or decree of 25th February 2022, upholding the respondent's preliminary objection on jurisdiction, is hereby upheld.
 - c. The appellant to pay the respondent's costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF JULY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.



In The Presence Of:

Appellant: M/s Nduku

Respondent: M/s Kabole

Leakey– Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

