



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Power & Lighting Company PLC v Wamwere (Environment and Land
Appeal E038 of 2022) [2025] KEELC 559 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E038 OF 2022
A OMBWAYO, J
FEBRUARY 13, 2025**

BETWEEN

KENYA POWER & LIGHTING COMPANY PLC APPELLANT

AND

HON KOIGI WAMWERE RESPONDENT

*(Being an appeal from the Ruling of Hon. E. A Nyaloti Chief Magistrate
delivered on 22nd November, 2022 in Nakuru C.M ELC 146 of 2020)*

JUDGMENT

1. This is an appeal arising from the ruling of Honourable E. A Nyaloti Chief Magistrate, Nakuru delivered on November 22, 2022 in Nakuru CMC ELC 146 of 2020.
2. The Appellant filed a Memorandum of Appeal dated December 2, 2022 appealing against the said judgment on the following grounds: -
 1. That the Learned Trial Magistrate erred in law by not considering that the subject matter is purely under the purview of the *Energy Act, 2019*.
 2. That the Learned Trial Magistrate erred in law in completely misapprehending the principles governing and/or what constitutes a preliminary objection thereby arriving at an erroneous decision with regard to the preliminary objection raised by the Appellant.
 3. That the Learned Trial Magistrate erred in law in entertaining and/or delving into issues of facts while ignoring the preliminary objection raised by the Appellant.
 4. That the Learned Trial Magistrate erred in law in failing to appreciate the facts and overwhelming laws and statutory provisions tendered to prove that the Trial Court had no jurisdiction.



5. That the Learned Trial Magistrate erred both in law and in facts when she ignored the fact that the crux of the matter against the Appellant in the suit and the application is about wayleaves as set out in the *Energy Act*, 2019.
 6. That the Learned Trial Magistrate erred both in law and in facts when she ignored the Appellant's Notice of Preliminary Objection dated 18.12.2020 and delved into the merits of the suit together with the Plaintiff's application dated 18.02.2022.
 7. That the Learned Trial Magistrate erred in law in failing to appreciate the statutory provisions on the jurisdiction of the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal.
 8. That the Learned Trial Magistrate erred in law by ignoring the submissions tendered by the appellant but irregularly relied on the Court's own misdirection that it had jurisdiction.
 9. That the Learned Trial Magistrate erred in law and facts by assuming jurisdiction and allowing the Plaintiffs application to amend their plaint while ignoring the Defendant's Notice of Preliminary Objection dated 18.12.2020 and the Submissions dated 10.11.2022.
 10. That the Learned Trial Magistrate erred in law and facts by ignoring the binding authorities of the superior Courts adduced in the Appellant's submissions.
 11. That the Learned Trial Magistrate erred in law and in facts by taking into account irrelevant considerations.
3. The Appellant seeks orders setting aside the trial court's ruling and an order allowing the preliminary objection dated 18th December, 2020.

Brief Facts

4. The Respondent filed a suit against the Appellant vide an amended plaint dated 22nd September, 2023 seeking orders for removal of the electricity poles on title no. IR 237754 and L.R No. 12903/1, a permanent injunction against the Respondent from the Appellant's land, general damages, mesne profits and loss of user for the said parcel together with costs of the suit and interest. The Appellant filed its statement of defence dated 15th September, 2020 where it denied the allegations in the amended plaint.
5. The Respondent's case was that he is the lawful owner of title no. IR 237754 and L.R No. 12903/1 (formerly known as Kabazi Trading Centre Unsurveyed Residential Plot) the suit property herein. That the Respondent has trespassed onto the suit property and erected three electricity poles and laid an electric supply line over the suit land.
6. The trial magistrate in her ruling granted leave to the Respondent to file his amended plaint.
7. The Appellant being dissatisfied with the ruling lodged the instant appeal.
8. This court on 16th December, 2024 directed that the appeal be canvassed by way of written submissions.

Submissions

9. Counsel for the Appellant filed his submissions dated 2nd December, 2024 where he gave a background of the case and identified five issues for determination. The first issue was whether the Learned Trial Magistrate ignored the Appellant's Notice of Preliminary Objection. He submits that the trial court



ignored its Notice of Preliminary Objection and delved into the facts of the main suit and Notice of Motion Application for Amendment by the Respondent. He argues that the trial court's failure to determine the question of jurisdiction raised, she denied the Appellant access to justice and thus condemned it unheard. He relied on Articles 48 and 50(1) of the Constitution of Kenya and the case in *Muruatetu & another V Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated))* [2017] KESC 2 (KLR) (14 December 2017) (Judgment). He further submits that the trial court violated the principle that a court has a duty to determine whether it has jurisdiction before it delved into the main issues in a matter. He relied on the Court of Appeal decision in *Joseph Njuguna Mwaura & 2 Others v. Republic* [2013] eKLR

10. The second issue whether the Respondent's suit is with respect to matters under the *Energy Act*. He submits that the Respondent's claim in the Plaintiff is one that relates to, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy as envisaged under Regulation 4(a) of the Energy (Complaints and Dispute Resolution) Regulations 2012. Counsel relied on Section 170 of the *Energy Act* No. 1 of 2019. He argues that the trial Court failed to take notice of part VII of the *Energy Act* and in particular section 170 of the said Act. 26. He added that the trial court also failed to take notice of section 3 of the *Energy Act* which provides that whenever there is conflict between the *Energy Act* No. 1 of 2019 and any other Act, the *Energy Act* No. 1 of 2019 shall prevail. He submits that the Respondent's suit fell squarely on matters regulated under the *Energy Act* No. 1 of 2019 and the Regulations flowing there- under by virtue of section 224(2)(c) of the said Act.
11. The third issue was whether the jurisdiction to try the matter is vested upon the Energy and Petroleum Regulation Authority (EPRA) and/or the Energy and Petroleum Tribunal (EPT). He submits that the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal (Tribunal) are creatures of Parliament through the *Energy Act*, No. 1 of 2019 by the powers donated by Article 169(1) (d). He submits that it is a constitutional imperative that tribunals and other quasi-judicial bodies are vested with judicial authority in their respective specialized areas, and such tribunals and bodies include the Energy & Petroleum Regulatory Authority and Energy & Petroleum Tribunal. Counsel cited Sections 3 and 9 of the *Energy Act*, 2019. He cited the case of *Cyrus Komo Njoroge V Kiringa Njoroge Gachoka & 2 Others* [2015] eKLR and submits that going by the provisions of section 36 of the *Energy Act*, 2019, the original jurisdiction to hear and determine the Respondent's suit is vested upon the Energy and Petroleum Tribunal.
12. The fourth issue was whether the Respondent's Suit violates the Doctrine of exhaustion of local remedies. He submits that the trial court departed from the precedence set in the Supreme Court decision in *Albert Chaurembo Mumbo & 7 others V Maurice Munyao & 148 others; SC Petition No 3 of 2016*, [2019] eKLR. He argues that Section 9 of the Fair Administrative Act, 2015 is couched in mandatory terms where the High Court or Subordinate Courts are stripped off jurisdiction to hear matters where alternative dispute resolution mechanism have not been exhausted. He relied on the cases of *Night Rose Cosmetics (1972) Ltd V Nairobi County Government & 2 Others* [2018] eKLR and *Republic V Energy Regulatory Commission & 2 Others* [2018] eKLR. It was counsel's submission that that the Respondent in filing this matter, knowingly and deliberately by-passed the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal in total disregard to the clearly laid down statutory provisions. He argued that the court lacked the jurisdiction to determine a matter where the *Energy Act* provided the mechanism for dispute resolution. He relied on a number of cases including *Kenya Power & Lighting Company PLC v Gichure* [2024] KEELC 3333 (KLR). He submits that the trial court violated the well settled judicial precedent and departed from the doctrine of exhaustion in determining the Preliminary Objection dated 27th March 2023.



13. The final issue on the orders suitable to be granted, counsel relied on the Court of Appeal case of *Nguruman Limited V Shompole Group Ranch & Another* (2014) eKLR which held that an order made where a court has no jurisdiction becomes null and void. He relied on the case of *Party of Independent Candidate of Kenya vs. Mutula Kilonzo & 2 others*, while citing the case of *Nedbank Swaziland Ltd V Sandile Dlamini* No. (144/2010) 2012 SZHC 30 (2013) and urges the court to award the Appellant costs of the appeal.
14. Counsel for the Respondent filed his submissions dated 23rd January, 2025 where he gave a background of the case and identified two issues for determination. The first issue was whether the appeal was merited where he submits that the Respondent's claim against the Appellant was based on the action of trespass. He argues that the provisions of Sections 11 (e) (f) (i) (k) and (l) of the *Energy Act, 2019* relied upon by the Appellant speak to the Energy, Petroleum & Regulatory Authority's power where licenses have been issued. He further argues that the Respondent had not entered into any agreement with the Appellant where a license was issued and thus the said provisions was not applicable. Counsel relied on Section 171 and 173 of the *Energy Act* and submits that the Appellant was required to seek consent of the land owner prior to entering and laying electric supply lines. He added that a notice was also required accompanied by a statement giving particulars of entry.
15. It was counsel's submission that it was not in dispute that the Respondent was the legal owner of the suit land and that the Appellant never sought permission to have the electricity supply lines on the suit land. He added that the Respondent was never compensated as required thus there was trespass by virtue of the Appellant's actions. He relied on the case of *Cape Supplies Limited V Kenya Power & Lighting Company PLC* (Environment & Land Case E307 of 2021) (2024) KEELC 3462 (KLR). He further submits that the trial court was vested with the requisite jurisdiction to hear and determine the suit. He added that there was no relationship of a licensor and licensee between the Appellant and Respondent. Counsel relied on the case of *Amaka Development Limited V Kenya Electricity Transmission Company Limited (KENTRACO) & Another* (Environment & Land Case 84 of 2021) (2022) KEELC (KLR) and submits that the ELC has the jurisdiction to determine the suit and that the appeal should be dismissed.
16. On the second issue of costs, he relied on the case of *Orix Oil Limited V Paul Kabeu* (2014) eKLR and urged the court to grant the Respondent costs of the appeal.

Analysis and Determination

17. This court has considered the record of appeal and the issues proffered by the parties' submissions and the sole issue for determination is whether the appeal is merited.
18. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."
19. Further, in the case of *Mwangi V Wambugu* [1984] KLR 453 it was held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence



or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

20. It is not in contention that the basis of the present appeal is the ruling by the trial magistrate delivered on 22nd November, 2022. It is also not in dispute that the ruling was on the Respondent's application dated 18th February, 2022. I have keenly perused the prayers sought in the said application and the Respondent only sought for leave to amend the Plaint dated 10th August, 2020. It is noteworthy that the trial magistrate never addressed herself on the Appellant's preliminary objection dated 18th December, 2020. The learned magistrate based her finding on the prayers sought in the application and upon being satisfied, proceeded to grant leave to the Respondent to file the amended plaint as prayed. It is my view that the issue of jurisdiction of the trial court as raised by the Appellant is premature in nature. I am of the view that the Preliminary objection despite pending determination, the Appellant is at liberty to have the same raised before the trial court so as to get directions on how the same can be disposed off. In addition, the matter is still at its early stages and yet to be heard on merit. In view of the same, I find that the trial magistrate did not err in her finding. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.

21. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED ELECTROICALLY AT NAKURU THIS 13TH DAY OF FEBRUARY 2025.

A.O.OMBWAYO

JUDGE

