



REPUBLIC OF KENYA



KENYA LAW
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**Muchuku v Kenya Electricity Transmission Co Ltd (Land Case Petition
E003 of 2022) [2023] KEELC 101 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE PETITION E003 OF 2022
FM NJOROGE, J
JANUARY 19, 2023**

BETWEEN

PATRICK MWANGI MUCHUKU PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO LTD RESPONDENT

RULING

1. The petitioner filed a petition dated 16/5/2022 together with a notice of motion dated 17/5/2022. The notice of motion seeks the following orders:
 - a.Spent.
 - b. Pending the hearing and determination of the application *inter partes* an order do issue to compel the respondent to promptly deposit into court or an interest earning account of any reputable bank in Kenya the sum of Kshs 14,495,270.96 being wayleave compensation payable to the petitioner for wayleave through the petitioner's properties known as titles No Naivasha/Maraigushu block 32/80, 81 82 and 83 and LR No 425/65 situated in Naivasha sub county in Nakuru County;
 - c. Spent.
 - a. Pending the hearing and determination of this petition an order do issue to compel the respondent to promptly deposit into court or an interest earning account of any reputable bank in Kenya the sum of Kshs 14,495,270.96 being wayleave compensation payable to the petitioner for wayleave through the petitioner's properties known as titles No Naivasha/Maraigushu block 32/80, 81 82 and 83 and LR No 425/65 situated in Naivasha sub-county in Nakuru County;
 - b. The costs of the application herein be paid by Respondent.



2. The motion is supported by the applicant's sworn affidavit. The grounds of the application on the face of the motion and the affidavit are as follows: that the petitioner accepted an offer by the respondent for the payment by the latter of wayleave compensation totaling to Kshs 14,495,270.96; the respondent thereafter constructed an electric transmission line over the suit properties which line is now in use but it has failed to pay the wayleave compensation; that the applicant is entitled to both compensation and interest thereon; that the petitioner will be occasioned irreparable loss which would render the petition nugatory. It has been stated that upon following up with the respondent the applicant has been informed in the past that payment would be made upon budgetary allocation by the central government at the commencement of the financial year but the delay has now spanned three financial years; that the default in payment violates Section 173 (3) of the [Energy Act](#) and articles 40(3) and (4) of the [Constitution](#).
3. The respondent filed a notice of preliminary objection dated 19/6/2022 stating that:
 - a. The Motion and the petition violate the provisions of sections 25, 36 and 37 of the [Energy Act](#) as read with Part VII of the [Energy Act, 2019](#) as the jurisdiction to hear and determine disputes under the [Energy Act](#) falls under the energy and petroleum Tribunal;
 - b. This court lacks jurisdiction to hear the motion and the petition as:
 - c. The prayers sought have no constitutional underpinnings and discloses no constitutional cause of action against the respondent as it falls under section 148 of the [Land Act](#) as read with sections 7(d) and 150 of the [Environment And Land Court Act](#);
 - d. It offends articles 22(1) 23(1) and 23(3) of the [Constitution](#) and rule 4(2) (ii) of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#).
 - e. There is no written agreement between the parties herein as so no orders can be granted under the [Law of Contract Act](#);
4. The respondent filed grounds of opposition dated 19/6/2022 with the same allegations as in the notice of preliminary objection above, and adding that the petitioner has filed the petition in bad faith and with unclean hands and that the respondent acted according to law.
5. The preliminary objection was canvassed by way of written submissions. The respondent filed his submissions on 5/10/2022 and the petitioner on October 25, 2022 and on 25/10/2022 the matter was reserved for a ruling.
6. I have considered the application and the petition and the preliminary objection and the response thereto. The issue that arises are simply whether the court is possessed of jurisdiction to hear and determine the motion and the petition and whether that jurisdiction has been properly invoked.
7. Regarding the first issue, the jurisdiction of the court is objected to on the grounds of:
 - a. The doctrine of exhaustion, in that there exists the Energy and Petroleum Tribunal established under Section 25 of the [Energy Act](#) vested with original jurisdiction to adjudicate on any dispute under the act;
 - b. There are sufficient statutory remedies available to the petitioner under the [Energy Act](#) and section 148 and 150 of the [Land Act](#) as read with section 7(d) of the [ELC Act 2011](#) thus obviating the need for a constitutional petition; that the petitioner has failed to file a civil suit to seek the statutory remedies provided for nor sought nullification of the said statutory provisions and so the matter fails to attain the constitutional threshold.



8. The petitioner's main concern regarding the first limb of objection with regard to jurisdiction is the alleged prevarication by the respondent, both approbating and reprobating regarding whether the Energy and Petroleum Tribunal is possessed of jurisdiction to hear and determine a dispute such as the current. The petitioner states that in two cases lodged before the tribunal the respondent's position was that the tribunal lacked jurisdiction and the Tribunal upheld the respondent's argument in both cases. Copies of the respondents' submissions to that effect in the two cases have even been "exhibited" by the petitioner in their submissions. Therefore, states the petitioner, the respondent has approached the court with unclean hands, and allowing the objection of lack of jurisdiction may leave the petitioner devoid of a remedy. I have examined the Tribunal's decisions cited by the petitioner and I agree with him that therein the respondent took a diametrically opposed view of its position herein.

9. Section 25 of the *Energy Act* has the following provisions:

"25. Establishment of the Energy and Petroleum Tribunal

There is established the Energy and Petroleum Tribunal, hereinafter referred to as the Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law."

10. Section 36 of the *Energy Act* has the following provisions:

36. Jurisdiction of the Tribunal

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.

11. Section 37 of the *Energy Act* provides as follows:

"37. Power of review and appeals from Tribunal

- (1) The Tribunal may, on its own motion or upon application by an aggrieved party, review its judgments and orders.
- (2) Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of a court of law.
- (3) Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.
- (4) The law applicable to applications for review to the High Court in civil matters shall, with the necessary modifications or other adjustments as the



Chief Justice may direct, apply to applications for review from the Tribunal to the High Court.”

12. It is clear that the original jurisdiction of the Tribunal under section 36 of the *Energy Act* is with respect to all matters referred to it (s.36(1)) between a licensee and a third party or between licensees (section 36(3).)

13. Section 13 (1) of the ELC Act on the other hand provides as follows:

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the *Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No 12 of 2012, Sch.
- (6) Deleted by Act No 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;”
 - (c) award of damages;
 - (d) compensation;



- (e) specific performance;
- (f) restitution;
- (g) declaration; or
- (h) costs.”

14. I agree with the argument based on the material supplied by the petitioner that neither the petitioner nor the respondent is a third party as envisaged under Section 36(3) of the *Energy Act* and therefore the provisions of Section 36 of the *Act* do not apply to the instant dispute. This court therefore finds that the dispute at hand falls squarely within the jurisdiction of the Environment and Land Court under Section 13 of the *ELC Act*.
15. Regarding the second limb of the preliminary objection, it is clear that this court would have to delve into much evidence and weigh it against the law pertaining to wayleave acquisition and compensation. The classical case of *Mukisa Biscuits Manufacturers v West End Distributors* envisages no such far reaching scouring of the terrain of any litigation in the event a preliminary objection is raised. A preliminary objection is that which requires no great argument to establish it. It does not require evidence to support it. It is to be raised where all facts are not contested. In the current case it is apparent that the respondent has questioned if there was an agreement between it and the petitioner. The question therefore arises as to whether there was an offer and an acceptance. In the current circumstances, this court hardly thinks that the second limb of the so called objection above fits into the description of a preliminary objection. Consequently, the preliminary objection dated June 19, 2022 is hereby dismissed with costs to the petitioner.
16. The petitioner shall file submissions on the motion dated 17/5/2022 within 14 days from the date of this ruling and the respondent shall file submissions within 14 days of service of the petitioner’s submissions upon it. Ruling on the application shall be delivered on February 28, 2023.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

