



Ng'ang'a & 6 others v Kenya Power & Lighting Company (Environment & Land Case E077 of 2022) [2023] KEELC 773 (KLR) (13 February 2023) (Ruling)

Neutral citation: [2023] KEELC 773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E077 OF 2022
JG KEMEI, J
FEBRUARY 13, 2023**

BETWEEN

**GEORGE KIMANI NG'ANG'A 1ST PLAINTIFF
PETER MASAI 2ND PLAINTIFF
JECINTAH MUMBI 3RD PLAINTIFF
VERONICAH MUTUA 4TH PLAINTIFF
MARY WANGARI MUGWANJA 5TH PLAINTIFF
JANUARIES MUTUA 6TH PLAINTIFF
JOSEPH MBURU MAINA 7TH PLAINTIFF**

AND

KENYA POWER & LIGHTING COMPANY DEFENDANT

RULING

1. The defendant in this suit, Kenya power & lighting company limited has raised a preliminary objection on the grounds that this court lacks jurisdiction to hear and determine the suit as against it as the same offends the provisions of sections 3(1), 10, 11(e) (f), (i), (k) & (l); 23; 24;36;40; 42; and 224(2) (e) of the *Energy Act*, 2019 together with Regulations 2, 4, 7 & 9 of the *Energy Act (Complaints and Dispute Resolution) Regulations, 2012* as read together with art 159(2) (c) and 169 (1)(d) and (2) of the *Constitution of Kenya 2010* and sections 9 (2) and (3) of the *Fair Administrative Actions Act, 2015*.
2. The plaintiffs' case as set out in the plaint dated the July 14, 2022 against the defendant is that the defendant without their consent has encroached and trespassed on their properties namely plot no 144 Makongeni/Kisii Deacons; Thika/Mun/Block 38/104; Thika/Mun plot No 425A; Thika/Mun/Block38/206; Thika Mun Block 38/205; Thika/Mun plot no 396 and Thika/Mun 38/106



(hereinafter called the suit lands) and erected electricity posts and high voltage power lines without their consent, notice to acquire the necessary wayleaves and easement under the law and compensation. To add salt to a sore injury, the plaintiffs aver that the defendant has now issued them with infringement notices to remove their structures lying on the suit properties. That the activities of the defendant have limited the utility values of their land in terms of further developments. The plaintiffs aver that the erection of the power lines across their land was unnecessary as there is a designated way leaves trace nearby that would have served the purpose.

3. The plaintiffs have moved the court for prayers set out thus;
 - a. A declaration that the defendants actions amount to illegal trespass on the suit lands
 - b. An order directing the restoration of the plaintiffs suit land in its prior status as existing prior to erection of the electricity poles and high voltage power lines through the suit
 - c. Permanent injunction against the defendants restraining it either by itself its agent's offices employees servants or any body or authority from interfering in any way with the plaintiffs quiet user occupation and possession of the land.
 - d. General damages for trespass and psychological harm and mesne profits.
 - e. Costs of the suit.
4. The defendant in its statement of defence dated the November 1, 2022 denied the plaintiffs' claims and contend that the suit lacks merit, fatally defective and devoid of a prima facie case hence the preliminary objection.
5. Directions were taken before the court where parties elected to canvass the preliminary objection by way of written submissions. Parties have complied and the court has had the opportunity to peruse the said filed written submissions.
6. The issue for determination is whether the preliminary objection is merited. put it differently is whether the court has jurisdiction to hear and determine the plaintiffs suit against the defendant in view of the existence of the provisions in the Energy Act.
7. According to the decision in the celebrated case of Mukhisa Biscuits Manufacturing Company Limited v West End Distributors Limited [1969] a preliminary objection must raise a pure point of law which when presented with success should dispose the suit. In this case the objection is on jurisdiction which is a point of law.
8. In the case of Owners of Motor Vessel Lilian S v Caltex Oil Kenya Ltd [1989] KLR the court was clear that where there is a contention on jurisdiction of a court the court ought to halt its tracks and determine the objection and if it finds that it is bereft of jurisdiction, must take no further steps but down its tools.
9. Jurisdiction of a court is a creature of the law. In the matter of the interim independent electoral commission (applicant), constitutional application number 2 of 2011 the court stated that where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.



10. It is trite that the jurisdiction of a court flows from either the constitution or legislation or both and a court of law can only exercise jurisdiction as conferred by the constitution or written law. It cannot arrogate to itself jurisdiction in excess of that which is conferred upon it by law. See the case of *Samuel Kamau Macharia & Anor v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.
11. In the case of *R v Karisa Chengo* [2017] eKLR, the Court determined that;
- “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics ... where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
12. The jurisdiction of this court is set out in article 162 (2) of the *Constitution* as follows;
- “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
- (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.”
13. Further its mandate is laid out in section 13 of the Environment and Land Court Act as follows:-
- “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 land administration and management;
 - 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 court to 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. Even where a court has original and appellate jurisdiction like in the case of this court, the court ought to exercise judicial restraint where applicable. In the case of *Benson Ambuti Atega & 2 others v Kibos Distillers Limited & 5 others* [2020] eKLR the court held that judicial abstention, as with judicial restraint, is a doctrine not founded in Constitutional or statutory provisions, but one that has been established through common law practice. It provides that a court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.
15. The *Energy Act No 1 of 2019* is an act of parliament to consolidate the laws relating to energy, to provide for national and county government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes.
16. Section 25 of the said act establishes the energy and petroleum tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law. The jurisdiction of the tribunal is set out under section 36 of the said act 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.”
17. Flowing from the above it shows that the tribunal has both original and appellate jurisdiction to hear and determine any dispute between a licensee and a third party and over the decisions of the energy & petroleum regulatory authority and other licensing authorities respectively. Going by the preamble of the act the defendant falls within the definition of a licensee and for the case in dispute the relevant part is the distribution of electric power.
18. The plaintiff’s case is that the defendant has entered into the suit land and erected poles and high voltage electric wires over their parcels without their consent and that the said erection is limiting their utilization of the land including development. Is this the kind of dispute contemplated to be referred to the tribunal as set out in the act? my reading of section 36 of the act read together with regulation 4 of shows that any dispute relating to way leaves easements or rights of way in relation to transmission distribution supply and use of electrical energy is one of the disputes contemplated by the Act.
19. I find that the plaintiffs dispute is such dispute that falls for determination under the act and going with the principle of judicial restraint or abstention the court shall down its tools. This is to give effect to the principle of law that where parliament has decreed an agency of government to carry out an act, that agency must be allowed to do so without led or hinderance to allow exhaustion of dispute resolution mechanisms. See the case of *Speaker of the National Assembly v Njenga Karume* [1992] KLR which emphasized the point as thus;
- “In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or an act of parliament, that procedure should be strictly followed”
20. The court notes that the prayers of the plaintiffs fall within the remedies available under section 36(5) of the *act* such as damages injunctions and specific performance. In my view the plaintiffs do not stand to be prejudiced if the matter is referred to the tribunal for hearing and determination.
21. In the upshot I find the preliminary objection has merit. it is allowed with the consequence that the suit is struck out. The plaintiff retains the liberty to lodge his complaint against the defendant with the appropriate entity under the provisions of the *Energy Act* as desired.
22. Each party to meet their costs
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI



JUDGE

Delivered online in the presence of;

Ms. Tibira HB Mungai for 1st – 7th Plaintiffs

Ododa for Defendant

Court Assistant – Esther / Kevin

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