



Feneast Nominees Limited v Transmission Company Limited (Environment & Land Case 15 of 2023) [2024] KEELC 3601 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3601 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 15 OF 2023**

LA OMOLLO, J

MAY 2, 2024

BETWEEN

FENEAST NOMINEES LIMITED PLAINTIFF

AND

TRANSMISSION COMPANY LIMITED DEFENDANT

RULING

Introduction

1. This ruling is in respect to the Defendant’s Preliminary Objection dated 11th September, 2023. The Preliminary Objection is on the ground that this court lacks the jurisdiction to handle this case as the same lies with the Energy and Petroleum Regulatory Authority.

Factual Background.

2. The Plaintiff commenced this suit *vide* a plaint dated 18th August, 2023. In the plaint, it prays for judgment against the Defendant for:
 - a. Kshs. 15,149,206.80 payable to the Plaintiff as compensation for the wayleave through the said property Land Reference Number: 425/63, Naivasha.
 - b. Interest on (i) above at prevailing commercial or court rates of @14% p.a from 24th December, 2020 until payment in full.
 - c. Costs of the suit.
3. Subsequently, the Defendant filed a Preliminary Objection dated 11th September, 2023. It argues that that this court lacks the jurisdiction to handle this case as the same lies with the Energy and Petroleum Regulatory Authority.



4. On 28th November, 2023, the court gave directions that the Preliminary Objection shall be canvassed by way of written submissions.

Issues for determination.

5. The Defendant filed its submissions on 11th December, 2023. It gives a background of this suit and identifies one issue for determination:
 - a. Whether this Honourable Court has jurisdiction to hear and determine the Plaintiff's case.
6. It relies on the Supreme Court decision in *Samuel Kamau Macharia & Another V Kenya Commercial Bank and 2 Others* and Section 13 (1) of the *Environment and Land Act* No. 9 of 2011.
7. It further relies on Regulations 4 (a) and 7 of the *Energy (Complaints and Disputes Resolution) Regulations* 2012. It submits that original jurisdiction over disputes on wayleave and transmission vests with the Energy and Petroleum Regulatory Authority.
8. The Defendant also relies on Section 224(2)(e) of the *Energy Act* No. 1 of 2019 and submits that the same provides for application of any subsidiary legislation prior to the commencement of the Act.
9. It further relies on Section 3(1) of the *Energy Act* and submits that on disputes relating to transmission, the said Act supersedes any other Act. The Defendant adds that the Energy and Petroleum Regulatory Authority therefore has the original jurisdiction on matters wayleave and transmission of electricity lines.
10. The Defendant argues that pursuant to Section 24 (1) of the *Energy Act*, any person not satisfied with the decision of the Authority can appeal to the Energy Tribunal under Sections 36(4) and 40. He adds that if further aggrieved by the Tribunal's decision, one can then appeal to the High Court pursuant to Section 37(3) of the said Act. The defendant relies on the Court of Appeal decision in *Abidha Nicholas V Kenya Power & Lighting Company Limited & 13 Others*.
11. The Defendant further relies on the judicial authorities in Kwale ELC Case No. E021 of 2021 *Sombo K Sombo and 2 Others V Ketraco and 3 Others* and Malindi ELC Petition No. e008 of 2022 *Osman Gutu Wachu and Another V Kenya Electricity Transmission Company Limited*.
12. In conclusion, the Defendant submits that this court only has appellate jurisdiction over the dispute thus the suit should be dismissed with cost.
13. The Plaintiff filed its submissions on 18th January, 2024. In her submissions, she gives a background of the case and identifies one issue for determination;
 - Whether this Honourable court has jurisdiction to hear and determine this suit.
14. It relies on the judicial authority in *Tabitha K. Rutere V Kenyatta University* [2018] eKLR where the court relied on the decision in *Owners of Motor Vessel*
"Lilian S" V Caltex Oil (Kenya) Limited [1989] KLR 1.
15. It also relies on Article 162 (2) (b) and 3 of the *Constitution* as read with Section 13 (1) of the *Environment and Land Act*.
16. The Plaintiff cites the judicial decision in *AKM V NNN* [2019] eKLR and Section 11 of the *Energy Act* which provides an exhaustive list of the Energy and Petroleum Regulatory Authority's power.



17. It submits that the Energy and Petroleum Regulatory Authority is vested with the power to investigate and determine complaints between parties over matters relating to licenses and license conditions.
18. It further submits that the suit is between two principal parties in a contract for wayleave and does not in any way involve a license.
19. The Plaintiff adds that it is therefore clear that the same does not fall within the confines of the Energy and Petroleum Regulatory Authority under Section 11 (i) of the Energy Act.
20. It submits that the Defendant's averment that the Plaintiff has not exhausted the available remedies before filing the instant case is an afterthought.
21. The Plaintiff relies on Section 25 and 36 of the Energy Act and submits that the same involves license disputes between a licensee and a third party.
22. It further submits that in the instant suit the relationship between it and the Defendant is grounded in an agreement. It adds that the agreement provides that Defendant will utilize the Plaintiff's property in construction of a power line and that the Plaintiff would subsequently be compensated. Plaintiff relies on the judicial decision Nakuru ELC Pet E3 of 2022 Patrick Mwangi Muchuku V Kenya Electricity Transmission Company Limited.
23. It also relies on Section 148 of the Land Act as well as Section 175 of the Energy Act and submits that this court has the jurisdiction to hear and determine the instant claim. The Plaintiff cites the decision by the Energy and Petroleum Tribunal in EPA/E023 between Igal Roni Elfezouaty and Makau Nafuu V Kenya Electricity Transmission Company Limited.
24. It submits that the Defendant has moved the court with unclean hands and allowing the Preliminary Objection would be tantamount to allowing it to violate the Plaintiff's rights without a remedy.
25. It further submits that the case as relied on by the Defendant in Court of Appeal in Kisumu Civil Appeal No. 42 of 2021 Abidha Nicholus V Attorney General & 7 Others was recently set aside by the Supreme court.
26. It also submits that Regulation 4 (a) and 7 of the Energy (Complaints and Dispute Resolution) Regulations 2012 are not applicable as they are inconsistent with the Energy Act No. 1 of 2019.
27. It argues that it is trite that provisions of an Act of Parliament take precedence in case there is an inconsistency with a subsidiary legislation.
28. In conclusion, the Plaintiff relies on Article 162 (2) of the Constitution as read with Section 175 of the Energy Act, Section 148 of the Land Act and Section 13 of the Environment and Land Act. It submits that the same gives this court the jurisdiction to hear and determine the instant suit.

Analysis and Determination.

29. Upon perusal of the Preliminary Objection and Submissions filed in respect of this Application, it is my considered view that one issue is for determination;

Whether or not this court has the requisite jurisdiction to hear and determine the suit.



30. The law on preliminary objections is well settled. In *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696. The court held as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

31. It is evident, therefore that the preliminary objection as raised by the Defendant is valid and therefore warrants determination.

32. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. In the Matter of *Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 at paragraph 68 of its ruling, and held as follows:

(68). A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

33. *In the Matter of Interim Independent Electoral Commission (Supra)*, the Supreme court held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent.

34. Apart from principles set out in judicial principles, the jurisdiction of the Environment and Land Court is set out in Article 162(2)(b) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act.

35. Article 162(2)(b) of the Constitution of Kenya, 2010 provides as follows;

(2) 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.

36. Section 13 of the Environment and Land Court Act provides 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 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; [Emphasis is mine]and
- (e) any other dispute relating to environment and land.

37. The plaintiff's claim is on compensation for use of his parcel of land by the Defendant as a corridor route for construction of Olkaria-Lessos-Kisumu electricity transmission line. Paragraph 12 of the plaint sets out the prayers sought by the plaintiff. They are as follows:

- i. KES.15,149,206.80 payable to the Plaintiff as compensation for the way leave through the said property Land Reference Number: 425/63, Naivasha.
- ii. Interest on (i) above at the prevailing commercial or court rates of @ 14% p.a from 24/12/2020.
- iii. Costs of the suit.

38. Section 175 of the Energy Act on payment of compensation provides as follows:

“If any difficulty or question arises as to the amount, entitlement to compensation or person entitled to compensation payable under this Act, the determination shall be made in accordance with the relevant written law”

39. Section 148(5) of the Land Act makes provision for compensation in respect of wayleave. It provides as follows:

“If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may, make any additional costs and inconvenience incurred by the person entitled to compensation.” [Emphasis mine]

40. In the Supreme Court in Nicholus V Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR), held as follows:

“...that the provisions of the Energy Act do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction...”

41. In effect, the Constitution of Kenya, 2010 [Article 162(2)(b)], the Environment and Land Court Act [Section 13 (d)] and the Land Act [Section 148(5)] confer this court with requisite jurisdiction to determine this dispute which, as stated in preceding paragraphs, is hinged on compensation for wayleave.

Disposition.

42. The upshot of the foregoing is that the Defendant's Preliminary Objection dated 11th September, 2023 lacks merit and is hereby dismissed with costs to the Plaintiff.

43. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 2ND DAY OF MAY, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Olala for the Plaintiff/Respondent

No appearance for the Defendants.

Court Assistant; Mr. Joseph Makori.

