



Elfezouaty & another v Kenya Electricity Transmission (Tribunal Case E023 of 2022) [2022] KEET 792 (KLR) (Civ) (12 October 2022) (Ruling)

Neutral citation: [2022] KEET 792 (KLR)

**REPUBLIC OF KENYA
IN THE ENERGY & PETROLEUM TRIBUNAL
CIVIL**

TRIBUNAL CASE E023 OF 2022

**D.K MWIRIGI, VICE CHAIR, B.H WASIOYA, F. M KAVITA, SAMUEL
MAINA KARANJA, D JEMATOR & F.S IBRAHIM, MEMBERS**

OCTOBER 12, 2022

BETWEEN

IGAL RONI ELFEZOATY 1ST CLAIMANT

MAKAO NAFUU LIMITED 2ND CLAIMANT

AND

KENYA ELECTRICITY TRANSMISSION RESPONDENT

RULING

Background

1. The 1st and 2nd Claimants are the registered proprietors of the Land Nos 425/73 and 425/80 (herein referred to as the suit properties) respectively. The Respondent sought wayleaves for the construction of 400/220/132kV Olkaria-Lessos-Kisumu transmission line through the suit properties.
2. Despite the fact that the Respondent took possession of the suit properties, commenced and completed its project through the land in January/February 2021, the compensation in respect to the wayleaves remains unpaid.
3. The Claimants through their Statement of Claim dated the 2nd of September 2022, claim against the Respondent; breach of contract and failure to pay wayleaves compensation and accrued interest on delayed payments.
4. The Respondent, on the other hand, denies the claim by the Claimants stating that the Claimants have failed to furnish the Respondent with the Certificate of title to the suit properties to inform the registration of easement and compensation.



5. On September 14, 2022, the Tribunal requested the parties to file submissions in respect as to whether the tribunal was clothed with the necessary jurisdiction to hear and determine this matter.
6. Both parties filed their respective submissions on jurisdiction which we wish to summarize them as follows:-

Claimant's Submission

7. The Claimants counsel filed written submissions dated September 20, 2022. They submit that Section 36 of the Act (The Energy Act, 2019) confers exclusive jurisdiction to the Tribunal to hear all matters relating to energy and gives the Tribunal original civil jurisdiction on any dispute between a licensee and a third party or between licensees and has power to grant equitable reliefs including but not limited to injunctions, penalties, damages and specific performance. It is their submission that the dispute before the Tribunal falls within the Energy sector and thus the Tribunal has the requisite jurisdiction to hear the matter pursuant to Section 36 and Section 175 of the Energy Act, 2019.
8. On the jurisdiction of the Energy & Petroleum Tribunal, counsel submitted that Section 175 of the Energy Act provides the forum that has the appropriate jurisdiction to handle matters arising from wayleaves and rights of way whereby the same are for use for energy resources and infrastructure.
9. Relying on the case of Elijah Mutabi and 10 Others v Kenya Power & Lighting Company Limited [2020] eKLR counsel submitted that the Energy and Petroleum Tribunal has original jurisdiction in civil matters.

Respondent's Submission

10. In rebuttal, counsel for the Respondent submitted that the Claimant's case is a claim for breach of contract and failure to pay wayleaves compensation and accrued interest on delayed payments. Counsel further stated that they dispute the Claimant's ownership of the suit property since the Claimant has failed to prove the same.
11. Counsel further averred that contrary to the provisions of Section 26(1) of the Land Registration Act which provides that the Certificate of Title shall be taken as *prima facie* evidence that the person named as the proprietor of land is the absolute and indefeasible owner, the Claimant has failed to make good its ownership over the suit property.
12. Counsel similarly relied on the provisions of Section 175 of the Energy and Petroleum Act which highlights payment of wayleaves compensation.
13. Counsel further submitted that pursuant to the above mentioned Section and the Environment and Land Court Act No 9 of 2011, Section 13(1) vests original jurisdiction in hearing and determination of this case under the Environment and Land Court.
14. Counsel cited the case of AKM v NNN (2019) eKLR where the Honourable Judge in determining the jurisdiction of the Environment and Land Court stated as follow;

“On the other hand, the jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the Constitution of Kenya and Section 13(2) of the ELC Act No 19 of 2011. Article 162(20) (b) states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land. The provisions of Section 13(2) of the ELC Act clearly gives power to ELC to hear and determine disputes relating to inter alia, environment, land use



planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues...”

15. Counsel also cited the case of *Samuel Kamau Macharia and Another v Kenya Commercial Bank and 2 Others*, Application No 2 of 2011, where the Supreme Court pronounced itself thus;

“(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... 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.....”

position to determine issues at stake considering the nature of the claim.

Issues for Determination

17. Whether the Tribunal has the jurisdiction to hear the matter before it.

Analysis and Determination

18. It is an elementary principle in law that a Court cannot adjudicate on matters in which it lacks jurisdiction. The Jurisdiction of the Courts is derived from the Constitution or Statute. If a Court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by law. Mativo J while explaining the importance of jurisdiction in the case of *Chama cha Uzalendo & 4 Others vs Registrar of Political Parties & 2 Others* held that;

“Jurisdiction is to a Court, what a gate or a door is to a house. That is why the question of a Court’s jurisdiction is called a threshold issue. It is at the threshold (that is, at the gate) of the temple of justice (the Court). To be able to gain access to the temple (that is, the Court), a prospective litigant must satisfy the gate keeper that it has a genuine cause to be allowed ingress. Where he fails to convince the gate keeper, he will be denied access to the inns of the temple. The gate keeper, as vigilant as he is always, will readily intercept and query all persons who intrude into his domain. To be able to ventilate a grievance, a prospective litigant has to ensure that he addresses his complaint to the competent Court. That is so for an incompetent court will have no jurisdiction to his entreaty.”

19. In *RW v JMN* [2022] eKLR the learned judge stated that;

“Jurisdiction is everything and this court should first establish the same before it can proceed further in analyzing and making a determination of the Claimant’s clam.”

20. Further in the case of *Republic v Chief Land Registrar & another* [2019] eKLR the court stated that;

“In general a court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. 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 of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of



facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the fact exist. Perhaps I should add that where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.[6] A court’s jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent.[7]

A court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.”

21. The Claimant’s position is that the Energy and Petroleum Tribunal has jurisdiction over this matter. The Respondent’s contention on the other hand is that the matter before this tribunal falls within the jurisdiction of the Environment and Land Court.
22. The plaintiff avers that the Tribunal has the relevant jurisdiction to hear and determine this
23. The jurisdiction of this Tribunal is donated by Section 36 of the Act which states that;
 - a. 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 .
 - b. The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
 - c. The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
 - d. 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.
 - e. The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
24. We shall start by looking at the Section 36 (3) by defining the parties to a dispute brought under Section 36 (3). The two parties under Section 36(3) are a Licensee and a Third Party. Section 2 of the Energy and Petroleum Act defines a licensee to mean a holder of any licence issued under the Act. However, the Act fails to define who a third party is. The Black’s Law Dictionary defines a third party as a person not connected to a contract but may be affected by its outcome.
25. Considering the above definition, it is clear that a third party is a person, other than the principal party to an agreement or dispute. The relationship between the Claimant and the Respondent is based on an agreement that the Respondent will utilize the Claimant’s parcel of land in the construction of transmission lines while the Claimant on the other hand will receive compensation from the Respondent from the utilization of their parcels of land. Therefore, both the Claimant and the Respondent are primarily involved in the agreement and cannot be considered as third parties. This therefore means that the dispute between the parties herein does not fall under the scope of Section 36 (3). While the Respondent is a licensee, the Claimant is neither a licensee nor a third party.
26. Having established that the Claimant cannot be considered a third party and therefore the provisions of Section 36(3) do not apply in this matter, it is important to consider the provisions of Section 36(1) which gives the tribunal jurisdiction to hear and determine all matters relating to the energy and petroleum sector.



27. Section 175 of the Energy and [Petroleum Act](#) in addressing the issue of compensation where wayleaves has been sought and granted states that;
175. If any difficulty or questions 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 provisions of the relevant law.
28. Although the Energy and [Petroleum Act](#) makes provision for rights of way, wayleaves and use of land for energy resources and infrastructure and compensation, Section 175 refers the determination of any dispute that may arise touching on ownership, use of land, compensation to the relevant law other than the [Energy Act](#).
29. Section 148 of the [Land Act](#) provides for compensation in respect of public right of way. It states that;
148. Compensation in respect of public right of way
- (5) 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.
30. The Court referred to in the above cited provision is the Environment and Land Court pursuant to Section 150 of the [Land Act](#) which states that;
150. Jurisdiction of the Environment and Land Court
- The Environment and Land Court established in the [Environment and Land Court Act](#) and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.
31. The broad jurisdiction of the Environment and Land Court is donated by Article 162 of the [Constitution](#) which establishes the three tiers of Kenya’s Superior Courts. It provides thus:
- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
2. Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
- a. ; and
- b. the environment and the use and occupation of, and title to, land.
3. Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.
32. Further, Section 13 of the [Environment and Land Court Act](#) provides for the jurisdiction of the court that is envisaged under Article 162(2) (b) which reads:
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;

instruments granting any enforceable interests in land; and, in respect of matters falling within the jurisdiction of the Court.
33. From the provision under Section 13 above, the Environment and Land Court has original and appellate jurisdiction to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources. It also provides that the court shall have the jurisdiction to hear any other disputes relating to environment and land.
34. In the case of National Land Commission v Afrison Export Import Limited & 10 others [2019] eKLR the court stated that;
- “A plain reading of the above Constitutional and Statutory framework on the jurisdiction of the Environment and Land Court reveals that the Environment and Land Court which is the court contemplated under Article 162(2)(b) of the Constitution, has a broad constitutional jurisdiction to hear and determine disputes relating to the environment and the use, occupation, and title to land.”
35. Despite the vast jurisdiction vested into the Energy and Petroleum Tribunal by Section 36(1) of the Act, it is imperative to note that the claim before this tribunal extends outside the scope of the Energy and Petroleum Act as it involves enforceable interests in land.
36. This matter being one of compensation emanating from the use of land which clearly falls under the purview of the Land Act and therefore it can only be heard and determined by the Environment and Land Court.



37. Flowing from the foregoing analysis of the law, the facts and authorities, the conclusion becomes irresistible that this Tribunal lacks the Jurisdiction to hear and determine the claim before it.

Disposition

38. In light of the aforestated, this suit is struck out for want of jurisdiction.

39. Each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2022. In the Presence of:

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Ms. Doris Kinya Mwirigi Vice Chairperson

..... Eng. Buge Hatibu Wasioya Member

..... Eng. Fidelis Muli Kavita Member

.....

Mr. Samuel Maina Karanja Member

.....

Ms. Dorothy Jemator

.....

Mr. Feisal Shariff Ibrahim Member

SIGNED BY: DORIS KINYA MWIRIGI

