



REPUBLIC OF KENYA



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Gona & 56 others v Kenya Power & Lighting Company (Environment and Land Case Civil Suit E064 of 2022) [2023] KEELC 16799 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16799 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT E064 OF 2022
LL NAIKUNI, J
MARCH 28, 2023

BETWEEN

CHARO GONA 1ST PLAINTIFF

NICODEMUS MUIA 2ND PLAINTIFF

SISILIA MARIA OPONDO & 54 OTHERS 3RD PLAINTIFF

AND

THE KENYA POWER & LIGHTING COMPANY DEFENDANT

RULING

I. Introduction

1. This ruling is in respect of the Preliminary Objection dated September 29, 2022 raised by 'the Kenya Power & Lightening Company' – the Defendant herein, challenging the jurisdiction of this Court to entertain the matter in view of the provisions of the [Energy Act, 2019](#).

II. The Plaintiff's Case

2. The Plaintiffs' were residents of Miritini area within the County of Mombasa and dwellers of Jomvu Brightstar area, Jomvu – Sub _ County and owned houses there. Their case was that the Defendant herein sent its workers and/or agents to put 'X' marks on all houses at Jomvu Brightstar area, Jomvu alleging that the same were in the wayleave area. Many members were affected. These being schools, churches, mosques and other business premises.
3. The Plaintiffs averred that unless the Defendant's action were restrained by way of injunction, they would demolish the said structures without giving the Plaintiffs a hearing and ascertaining the true position of the houses affected.



4. The Plaintiffs were alarmed and distressed for fear of demolition of their houses, which they had owned and occupied together with their families for a long time now and that they had nowhere to go. They felt they would be prejudiced and subjected to irreparable harm and loss if the Defendant was not restrained from the intended eviction and/or demolition of the Plaintiffs' houses as they had no alternative places to go to.
5. The Plaintiffs through their amended Plaint dated June 28, 2022 prayed for:-
 - a. A declaration that Plaintiffs quiet possession of the houses, schools and churches should not be interfered with as they rightfully built away from the wayleave.
 - b. A permanent injunction to issue restraining the Defendant, by himself, agents, servants and/or anybody claiming through him from interfering with the ownership and/or usage of the Plaintiffs' houses, premises, schools and churches and any other structure in regard to the wayleave the Defendant is alleging.
 - c. That an order for a report from Government Surveyor made to establish the true position of the Defendant's claim.
 - d. Costs and interests.
 - e. Such further and/or relief as the Honourable Court may deem fit and expedient so as to grant.
6. On November 30, 2022, while opposing the objection raised by the Defendant, the Plaintiffs filed a three (3) points grounds of opposition. These were:-
 - a. That the Energy, Act 2019 did not apply to the Plaintiffs' case.
 - b. That the Defendant had no jurisdiction (Sic) to put 'X' on the houses near the wayleave as the same was done by the Kenya Electricity Transmission Company Limited (KETRACO Limited).
 - c. That the preliminary Objection was incompetent, misconceived, misplaced and was an abuse of the process of this Honourable Court and the same ought to be dismissed with Costs.For these reasons the Plaintiffs urged the Court to dismiss the said preliminary objection.

III. The Defendant's case

7. The Defendant filed its Statement of Defence dated the October 5, 2022 in which it entirely denied the Plaintiffs' claim. Further, the Defendant strongly contested this Court having any jurisdiction to hear and determine the instant suit. The Defendant's Notice of Preliminary Objection dated September 29, 2022 read as follows:-

' That this Honourable Court lacks jurisdiction to hear and determine this dispute and suit as against the Defendant and together with all consequential orders should be struck out with costs as the same offends the provisions of Sections 3 (1), 10; 11 (e), (f), (i), (k) & (1); 23; 24; 36; 40; 42 and 224 (2) (e) of the *Energy Act*, 2019 together with Regulations 2, 4,7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with



Article 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 Action Act,2015.'

IV. Submissions

8. On October 12, 2022, when the matter came up for directions, the parties agreed to dispense with the Preliminary Objection first and by way of written submissions. All the parties complied and filed their written submissions and Court reserved a date for the delivery of its ruling accordingly.

A. The Written Submission by the Defendant

9. On October 26, 2022, the Learned Counsel for the Defendant the Law firm of Joseph Atwoli Advocates filed their written Submissions. Mr Atwoli Advocates commenced his submissions by stating that he was relying on the preliminary objection dated September 29, 2022. He further provided the background whereby the Plaintiffs instituted this suit through an Amended Plaintiff dated June 28, 2022 and an amended Notice of Motion dated June 28, 2022 together with a supporting affidavit of Nicodemus Muia sworn on the same date. From the filed Amended Plaintiff dated June 28, 2022, the Plaintiff sought the following orders:-

- a. .
 - b. A permanent injunction restraining the defendant, by himself, agents, servants, and/or anybody claiming through him from interfering with the ownership and/or usage of the Plaintiffs' houses, premises, schools, and churches and any other structure in regard to the wayleave the defendant is alleging.
 - c. That a temporary injunction to issue restraining the Respondent, by himself, agents, servants and/or anybody claiming through him from interfering with the ownership and/or usage of the Applicant's houses, premises, schools and churches and any other structure in regard to the wayleave the respondent is alleging pending the hearing and determination of this application.
 - d. That the Officer Commanding Station (OCS), Jomvu Police Station do ensure compliance.
 - e. That costs of the Application be provided be provided for.
10. On the Notice of Preliminary objection, the Learned Counsel submitted that the Defendant urged the Honourable Court to dismiss the suit with costs and strike out all consequential orders. The Counsel asserted that the issues raised by the Plaintiffs against the Defendant were those that should be dealt with under the provision of the Energy Act, 2019 in the first instance. The Counsel held that essentially this Honourable Court lacked jurisdiction to handle this suit, as the suit offended the provisions of:
- a. Section 3(1),10;1 1 (e), (f), (1), (k) & (D) ; 23; 24; 36; 40; 42; and 224(2)(e) of the Energy Act, 2019;
 - b. Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations,2012;
 - c. Article 159 (2)(c) and 169(1) (d) and (2) of the Constitution of Kenya, 2010; and
 - d. Sections 9 (2) and (3) of the Fair Administration Act, 2015.
11. The learned Counsel's argument was that this case was purely about wayleaves as illustrated by the contents of Paragraphs a, c, and d of the grounds on the Amended Notice of Motion application dated June 28, 2022 and contents of Paragraphs 4, 5, 6, 7, 8 and 9 of the Amended Plaintiff dated June 28, 2022 and as such the Honourable Court had no jurisdiction to hear and determine this matter.



12. The Learned Counsel reiterated that the foundational basis of the Defendant's Preliminary Objection was on the question of jurisdiction, which had been settled by the superior courts and as such binding on this Honourable Court. In the case of:- '*Adero Adero and Another – Versus - Ulinzi Sacco Society Limited [2002] eKLR*' it was held that:

' Having taken the view that this court had no jurisdiction to entertain the matter, it follows that it could not transfer the same to another court. In that regard it is trite law that where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a Court of competent jurisdiction.'

13. The Counsel also referred to the decision by the Supreme Court in the case of '*Albert Chaurembo Mumbo & 7 others – Versus - Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR*' which held that:-

' (118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.'

14. Again, the Supreme Court in the case of '*United Millers Ltd – Versus - Kenya Bureau of Standards Directorate of Criminal Investigations & 5 Others [2021] eKLR*', while addressing similar circumstances was emphatic that:

' (26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in *Albert Chaurembo Mumbo & 7 others – Versus - Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR*, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by the *Constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.[27] In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine *Petition No 4 of 2021* or the instant application for conservatory or stay orders.'

15. The Learned Counsel submitted that the jurisdiction in this present matter was with the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal, who had been expressly set out in the *Energy Act, 2019* and they therefore urged the Honourable Court to find that it lacked jurisdiction and proceed to strike out this matter with costs.



16. The Learned Counsel submitted that the only issue for determination was whether the Honourable Court had jurisdiction to hear and determine this suit where he stated that the Court of Appeal in the case of *Joseph Njuguna Mwaura & 2 others – Versus - Republic [2013] eKLR* held that:

' It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction. The authority of court is determined by the existence or the lack of jurisdiction to hear and determine dispute. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision-making function.'

'In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act.'

17. Further, in the Court of Appeal case of:- '*Equity Bank Limited – Versus - Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR*, said as follows:

' In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled law that parties cannot, even by their consent, confer jurisdiction on a court where no such jurisdiction exists.- It is so fundamental that where it lacks, parties cannot even seek refuge under the '02' principle or the overriding objective under the *Civil Procedure Act*, the Appellate Jurisdiction Act or even Article 159 of the *Constitution* to remedy the same. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.'

18. The Learned Counsel averred that in a more recent decision of: '*Phoenix of EA Assurance Company Limited – Versus - SM Thiga t/a Newspaper Service [2019] eKLR*, the Court of Appeal held that:-

' Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself.'

19. The Learned Counsel submitted that the Court of Appeal in the case of '*Kenya Ports Authority – Versus - Modern Holdings [EA] Limited [2017] eKLR* held that:-

' We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises.'

20. He argued that the issue of jurisdiction had been raised at the earliest available opportunity by the Defendant and he urged the Honourable Court to decide the issue right away, before delving into the merits of the matter before it. According to him, it was trite law that the Court derived its jurisdiction from the *Constitution* or statute and as such it must be slow to arrogate itself jurisdiction.



21. Additionally, in the case of: '[John Musakali – Versus - Speaker County of Bungoma & 4 others \[2015\] eKLR](#) the Court held that:-

' It is true the [Constitution](#) protects the petitioner's political rights under the Bill of Rights. It is also true that those rights are enforceable under Article 22 of the [Constitution](#) and the petitioner has a right to access the court under Article 22, while Article 258 allows the petitioner to approach the court when he thinks there is a threat to the [Constitution](#). However, the court is also alive to the fact that the same Constitution has created institutions which must be allowed to function and carry out their mandate, including the Political Parties Tribunal.'

22. Further, the provision of Section 5 of the [Civil Procedure Act](#), 2010 limits courts in exercise of their jurisdiction. The limitations of jurisdiction can either be express or implied. Section 5 states:

5. Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

23. He submitted that the Court in the case of '[Amy Kagendo Mate – Versus - Prime Bank Credit Reference Bureau Africa Ltd \[2013\] eKLR](#) emphasized the need to stick to the dispute resolution avenues available in law when (Ngugi J) struck out a Petition that sought injunctive reliefs against the Respondents therein on account of by-passing a statutory adjudication remedy in favour of the high court. Pursuant to the provisions of the law set out in Paragraph 6 above as read with Section 5 of the [Civil Procedure Act](#), 2010, the dispute at hand ought to be referred to the Energy & Petroleum Regulatory Authority (formerly Energy Regulatory Commission [ERC]) or in the alternative to the Energy & Petroleum Tribunal; as the limitation of jurisdiction of this Honourable Court was expressly barred by those provisions of the [Energy Act](#), 2019.

24. The Learned Counsel on Constitutional provisions on jurisdiction submitted that Article 159(2)(c) of the [Constitution](#) expressly recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism. Further Article 169(1)(d) of the [Constitution](#) made provision for the establishment of any other court or local tribunal by an Act of Parliament, other than the Courts established pursuant to Article 162 (2). This Article of the [Constitution](#) recognizes the role of Parliament to create Tribunals to hear and determine certain disputes.

25. He held the Energy & Petroleum Regulatory Authority (the Authority) and the Energy & Petroleum Tribunal (the Tribunal) were such creatures of Parliament through the [Energy Act](#), 2019 (the Act) and by the powers donated by Article 169 (1) (d) of the [Constitution](#) of Kenya, 2010. It was worth to note that the [Energy Act](#), 2019 repealed the [Energy Act](#), 2006. A five-Judge bench of the High Court in the case of '[The Law Society of Kenya – Versus - Centre for Human Rights and Democracy & 13 others \[2013\] eKLR](#) stated of jurisdiction thus:-

' The scope of the exercise of any court's jurisdiction in Kenya is dictated by Section 3 of the [Judicature Act](#) which provides that:

'The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

a. Constitution



26. He further cited the Court of Appeal in the case of: '[Joshua Sembei Mutua – Versus - Attorney General & 2 others \[2019\] eKLR](#) in determining the issue of jurisdiction held:-

' We find and hold that the construction adopted by the trial court that RBAT had the power to hear the appeal and decide on it, but had no power to grant any final or consequential orders would result in an absurdity, anomaly or illogical result, which courts have always avoided. It follows from that finding that the decision made by the trial court that RBAT had no jurisdiction or power to make the orders it did on August 29, 2013 is for setting aside.'

27. On the statutory provisions on the Jurisdiction of the Energy & Petroleum Regulatory Authority the Learned Counsel submitted that the key legal framework giving rise to the Preliminary Objection herein was the [Energy Act, 2019](#) (the Act). Under the provision of Section 3 (1) of the Act dealt with the issue of conflict of law and the said section states that:

3 (1) If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters-

(a) The importation, exportation, generation, transmission, distribution, supply or use of electrical energy; (Emphasis ours)

(b).

(c) All works and apparatus for any or all of these purposes.

28. On this point, the Learned Counsel referred to a recent case of '[Abidha Nicholus – Versus - Attorney General & 7 others; National Environmental Complaints Committee \(NECC\) & 5 others \(Interested Parties\) \[2021\] eKLR](#), the Court in analysing Section 3 of the [Energy Act, 2010](#) stated as follows:-

' The import of the above (Section 3) is that the [Energy Act 2019](#) prevails over any other Act of Parliament or law or law but definitely not over the [Constitution](#) of Kenya 2010. However, there is no indication that the Act is in conflict with the [Constitution](#) of Kenya 2010. If there was any such conflict, then the [Constitution](#) would prevail.'

29. Further, under Section 2 the [Energy Act, 2019](#) defines the following key terms:

' Works' means-

(a) electric supply lines, machinery, lands, buildings, structures, earth works and water works, and includes any apparatus or things of whatsoever description, required for the importation, exportation, generation, transmission, distribution supply and use of electrical energy, or

(b) Machinery, land, buildings, structures, earth works and water works, and includes any apparatus required for the production, importation, exportation, storage, transportation, distribution and supply of any other form of energy. distribution; means the ownership, operation, management or control of facilities for the movement or delivery of energy to enable supply to consumers;

'Distribution' means the ownership, operation, management or control of facilities for the movement or delivery of energy to enable supply to consumers;

30. The Learned Counsel opined that under Section 9 of the Act established the Energy & Petroleum Regulatory Authority (Authority) while Section 11 sets out the powers of the Authority as follows:-



- a) Under Sections 11 (i) the Authority has the power to:
 - i. Investigates and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act.
- b) To add under Sections 11 (e), (f), (k) & (l) the Authority has the powers to:
 - (e) Make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under this Act;
 - (f) Issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled;
 - (k) Issue orders or directions to ensure compliance with this Act;
 - l) impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;
31. These powers of the Authority were buttressed by the provision of Section 167 of the Act which granted the Cabinet Secretary power to make regulations for several purposes. One such purpose for which the regulations are made is as set out in Section 167 (1)(m) that was:
 - (m) prescribing the procedures for hearings, settlement of disputes and any proceedings before the Authority.
32. He further submitted that Part X of the Act dealt with repeals, savings and transitional clauses. Specifically, Section 224 (2) (e) of the Act provides as follows:
 - (e) Any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act.
33. He averred that on May 25, 2012, the then Minister for Energy gazetted the Energy (Complaints and Dispute Resolution) Regulations, 2012 (the Regulations) under Sections 63 and 110 of the [Energy Act, 2006](#) (repealed) as the Legislative Supplement No15 vide Kenya Gazette Supplement No 49 of 2012. Under the provisions of Sections 3, 9, 10, 11(e), (f), (i), (k) & (1); 23; 24; 36; 40; 42; 159(3); 160(3); and 224(2)(e) of the [Energy Act, 2019](#) as read with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 gives the Authority jurisdiction to handle disputes similar to the one that the plaintiff has filed herein.
34. Regulation 2 of the Energy (Complaints & Disputes Resolution) Regulations 2012 states as follows:
 - 4) These regulations shall apply to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct, practice or operation of any party or any matter regulated under the Act.
35. Further, the provision of the Regulation 4 of the Regulations provides for the nature of the disputes that ought to be heard by the Authority. It provides thus:
 - 4) These regulations shall apply to complaints and disputes in the following areas-
 - a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensees practices and procedures, metering, new connections and extensions, reconnections,



quality of services, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.

b) Any other activity and/or matter regulated under the Act.

36. The Learned Counsel's contention was that Regulations 7 and 9 of the Regulations sets out the procedures for the reference to the Authority of the disputes and the manner the proceedings would be conducted. Whereas the provision of Section 23 of the Act provided for the timelines within which a decision must be rendered by the Authority, the provision of Section 24 provided for the procedure for appeal in the event a party was dissatisfied by the Authority's decisions. From the foregoing, it was certain, there was a clear dispute resolution mechanism available under the *Energy Act*, 2019 which ought be followed. In the case of *Speaker of National Assembly – Versus - Njenga Karume (1992) 1KLR 425* the Court of Appeal held that:-

' There was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of parliament that procedure should have been strictly followed.'

37. He submitted that under the provision of Sections of the *Energy Act*, 2019 and the provisions of the Energy (Complaints and Disputes Resolution) Regulations, 2012, the Authority had powers to investigate and determine complaints or disputes between parties and grant equitable reliefs mentioned therein. He submitted that, pursuant to the foregoing provisions, this Honourable Court had no jurisdiction to hear and determine the suit or even grant the reliefs sought by the Plaintiff as against the Defendant. The appropriate forum with jurisdiction was the Energy and Petroleum Regulatory Authority and not this Court at all.

38. On the statutory provisions on the Jurisdiction of the Energy & Petroleum Tribunal, the Learned Counsel submitted that the provision of Section 25 of the Act had established the Energy & Petroleum Tribunal (the Tribunal) for the purposes of hearing and determining disputes and appeals. Subsequently, the provision of Section 36 provides for the jurisdiction of the Tribunal as follows:

36.(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) .

(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. (Emphasis ours).

43. Section 36 (3) of the *Energy Act*, 2019 grants the Energy & Petroleum Tribunal original civil jurisdiction on any dispute between the licensee and a third party. By way of elaboration, section 2 of the Act defines licensee and licence as follows:

licensee; means a holder of any licence issued under this Act;



licence; means any document or instrument in writing granted under this Act, to any person or authorizing the importation, exportation, generation, transmission, distribution and supply of electrical energy or the exploration and production of geothermal energy, in the manner described in such document or instrument;

39. He argued that it was public knowledge that the Defendant was a public utility company engaged in the bulk purchase, transmission, distribution and retail supply of electricity and therefore licensed within the meaning of Section 2 of the [Energy Act, 2019](#) and as listed in the Third Schedule of the [Energy Act, 2019](#). The Third Schedule of the [Energy Act, 2019](#) on its part listed all Energy Sector Entities within the country including the Defendant herein. The third party contemplated under this Section was anyone else who was affected by the acts or omissions of any licensee under the Act.
40. Under the provision of Sub - Section (5) the Tribunal, had powers to grant equitable reliefs mentioned therein as the ones sought by the Plaintiffs on the face of their Application. On the other hand, Section 37 of the Act provided for the procedure for review and appeal of the decisions of the Tribunal, where it stated that an appeal lies in the High Court. The Section provides as follows:
- 37.(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.
41. According to the Learned Counsel on September 26, 2008, the then Chairman of the Energy Tribunal gazetted the Energy Tribunal Rules, 2008 (the Rules) under paragraph 12(4) of the [Energy Act, 2006](#) (repealed) as the Gazette Notice No 9163 vide Kenya Gazette Vol CX - No 78 dated 2September 6, 2008. The Rules clearly sets out the procedures before the Energy and Petroleum Tribunal (formerly the Energy Tribunal). It was certain from the [Energy Act, 2019](#) that a dispute resolution procedure had been established and therefore, the same ought to be followed. This proposition was supported by the findings of the Court in the case of: '[Cyrus Komo Njoroge - Versus - Kiringa Njoroge Gachoka & 2 Others \[2015\] eKLR](#), where the court held that:-
- ' The principle that where the [Constitution](#) and or statute has provided a dispute resolution procedure, then that procedure must be strictly followed is well established.' Court further held: 'The Plaintiff must therefore exhaust the remedy stipulated by the Land Registration Act. The upshot of the foregoing is that the suit herein is dismissed.'
42. His submission was that going by the provisions of Section 36 of the [Energy Act, 2019](#), this Honourable Court had no jurisdiction to hear and determine the suit or even grant the reliefs sought by the Plaintiff as against the Defendant. The alternative judicial forum with jurisdiction was the Energy and Petroleum Tribunal and not this Court.
43. On the issue of fair administration of justice, the Learned Counsel argued that the issue of the jurisdiction of the Courts had further been extensively addressed by the Fair Administration Act, 2015.



The provisions of Section 9 (2) and (3) of the Fair Administration Act, 2015 further illustrated the appropriate forum for resolution of disputes. The provisions of Section states as follows:

9(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

44. The Learned Counsel averred that it was the Plaintiffs' case and assertion was that the Defendant in exercising its powers and undertaking its duties provided for under the *Energy Act*, 2019, had purportedly disconnected her electricity supply. It was noteworthy that whereas the Plaintiffs case was guised as a claim against the Defendant, on keen perusal it was revealing that it was purely a complaint to be pursued pursuant to the *Energy Act*, 2019. The provision of Section 9 of the Fair Administration Act, 2015 was couched in mandatory terms where the superior Courts or Sub - ordinate Courts were stripped off jurisdiction to hear matters where alternative dispute resolution mechanism have not been exhausted. In the case of: *Night Rose Cosmetics (1972) Ltd – Versus - Nairobi County Government & 2 Others [2018] eKLR* the Honourable Court in upholding a Preliminary Objection on this ground held:

' I should emphasize that the use of the word shall in Section 9 of the Act cited above is worth noting. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of what effect should be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.

The word 'shall' when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.'

45. The Learned Counsel submitted that the Plaintiffs in filing this matter in this Honourable Court, it knowingly and deliberately by-passed the Energy & Petroleum Regulatory Authority and also the Energy & Petroleum Tribunal in total disregard to the clearly laid down statutory provisions. They relied on the case of *Republic – Versus - Energy Regulatory Commission & 2 Others/2018] eKLR*. In this case the court held that:

' Article 159 of the *Constitution* which provides for principles governing Courts and tribunals 'imposes on the Judiciary the obligation to promote alternative dispute resolution hence the utilization of Tribunals such as the Energy Tribunal falls within this objective.'

The court further held: 'It has been held that where a statute provides for a mode'

46. He asserted that it was now settled on matters of energy there were alternative forums where such disputes were to be handled. There are plausible reasons as to why the Authority or the Tribunal were vested with jurisdiction in energy matters and the above captioned powers and the same should be strictly adhered to. In the case of:- '*Mutanga Tea & Company Ltd – Versus - Shikara Limited &*



Another [2015] eKLR, the Court of Appeal in addressing the importance of adhering to alternative dispute resolution mechanism noted:

' Such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; the dispute is resolved much expeditiously and in a more cost-effective manner.'

47. The Learned Counsel relied in the recent case of 'Republic – Versus - Public Procurement Administrative Review Board & Energy Sectors Contractors Association, Zoec-Zhapedc-Nginu Ex parte Kenya Power & Lighting Company Limited [2020] eKLR where the Court noted that:-

' An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognize its own limitations and intervene only when an applicant has demonstrated grounds for review.'

48. It was the humble submissions of the Learned Counsel that the Energy & Petroleum Regulatory Authority and the Energy & Petroleum Tribunal was comprised of experts in matters of energy as set out under the provisions of Sections 26, 10,11, 12 and 13 of the Energy Act, 2019. A party could not move a Court in glaring contradiction of the judicial hierarchical system as provided for by the law. The Energy Act, 2019 had provided very clear dispute settlement mechanisms while the provision of Section 9 of the Fair Administrative Act, 2015 deprived this Honourable Court the jurisdiction to entertain this suit at first instance. In the case of 'Geoffrey Muthinja & Another – Versus - Samuel Muguna Henry & 1756 Others [2015] eKLR the Court of Appeal in dismissing an appeal for failing to adhere to the doctrine of exhaustion held:-

' It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.'

49. In another case of 'Josiah Tatiya Kipelian – Versus - Dr. David Ole Nkadienye & 2 Others [2014] eKLR, Justice Mabeya had occasion to pronounce himself thus:-

' My view is that, the law did not provide the detailed procedure for pre-election dispute resolution mechanism for no reason. It was intended that the procedure be strictly followed. There is ample authority, including to the effect that once a procedure on dispute resolution has been provided, the Court has no business extending its tentacles thereto.'

50. The Learned Counsel averred that the question that the Honourable court should ask was if the Plaintiffs had exhausted the mechanism provided for under the Energy Act, 2019 dealing with the dispute. The answer was in the negative. However, the Plaintiff had elected to ignore the mechanism laid down for resolution of the instant dispute and now invited the Court to invoke, craft and innovate and assume jurisdiction which it did not have. On account of the foregoing, it was beyond doubt



that the Plaintiffs' action of filing this suit before this Honourable Court as against the Defendant amounted to an abuse of the Court process.

51. He argued that having established that there existed competent alternative dispute resolution mechanisms available to the Plaintiffs and the same were bestowed with the requisite capacity to grant the orders sought, the Honourable Court should find that it lacked jurisdiction to entertain this matter at first instance. From the reading of the aforementioned provisions of Sections of the [Energy Act, 2019](#), it was evident that the Energy and Petroleum Regulatory Authority was bestowed with jurisdiction to handle the complaint as against the Defendants. On the other hand, the Energy and Petroleum Tribunal was clothed with jurisdiction to grant equitable reliefs, including injunctions, penalties, damages and orders of specific performance as sought by the Plaintiffs. In view of the foregoing, the orders that the Plaintiffs sought against the Defendant could be issued by the Tribunal by dint of Section 36 (5) of the [Energy Act, 2019](#). The section states as follows:

(5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.

52. By doing so, the Counsel held that the Plaintiff would not be prejudiced, as her rights would be protected by either the Authority or the Tribunal, as the case may be. They relied on the case of [Thomas Schering – Versus - Nereah Michael Said & Others \(2019\) eKLR](#) whereby in upholding a preliminary objection of the same nature, the Court held that:

' From the provisions of the [Energy Act](#), it is apparent that Parliament in its wisdom wanted such disputes to be taken away from the mainstream courts to be handled by a specialized body known as the Energy Regulatory Commission.'

53. In giving a similar finding and upholding a preliminary objection, the court in the case of' [Alice Mweru Ngai – Versus - Kenya Power & Lighting Co Ltd \[2015\] eKLR](#) held as follows:

' Disputes of this nature are the preserve of the Energy Regulatory Commission and appeal therefrom lie with the Energy Tribunal as established under section 108 of the [Energy Act](#).'

'It is clear from the above that the Plaintiff's first port of call should be the Energy Regulatory Commission and not this Court. Where the law has granted jurisdiction to other organs of Government to handle specific grievances, the Courts must respect and uphold the law.'

'In our understanding, court have no jurisdiction in matters over which other arms of Government have been vested with jurisdiction to act.'

'The Plaintiff has not approached as a first point of call. it would be an un-warranted intrusion into the Jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of the proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their Statutory responsibilities. That is why those procedures were formulated and such organs established.'



54. The Learned Counsel also place reliance on the case of '[James Kibugi Githinji – Versus - Kenya Power & Lighting Company Limited \[2016\] eKLR](#)' wherein in determining that the Court did not have jurisdiction, the Judge held that:

' Without saying more, the Notice of Preliminary Objection must be upheld. I hold I have no jurisdiction to deal with this matter and must down my tools. The end result is that the suit is incompetent and must be struck out with costs.'

55. Similarly, in the case of '[James Mwaura Ndung'u – Versus - Kenya Power and Lighting Co Ltd \[2016\] eKLR](#)', the Judge while dismissing the appeal filed by the customer made a finding that:

' After a careful consideration of the rival submissions, I have concluded that the decision of the Learned Senior Resident Magistrate cannot be faulted. She came to the correct conclusion. The provisions cited i.e to say Section 61 of the [Energy Act, 2006](#) and the Energy (Complaints and Dispute Resolutions) Regulations, 2012 clearly shows that matters relating to energy should be heard before the Energy Regulatory Commission previously the Energy Regulatory Board. For this reason, I find no merit in the appeal. The same is dismissed with costs to the Respondent.'

56. Additionally, he cited the recent decision in '[Kenya Power and Lighting Co. Ltd – Versus - Geofrey Orina Oganga \[2020\] eKLR](#)' where the Judge held that:-

' The issue raised by the Appellant has been the subject of various decisions in disputes between it and its customers. The position taken in those cases is standard that since there is a set procedure for handling disputes over electricity bills and power disconnections and a tribunal or some institution set up to handle such matters, court should not entertain such matters before the parties have exhausted the procedures set out under that law. It is beaten track. Clearly the first port of call should have been the Energy Regulatory Commission or its equivalent. In Joseph Njuguna Mwaura & Others – Versus - Republic [2013] eKLR, the Court of Appeal Stated that no court should exercise jurisdiction in matters over which other arms of government have been vested with jurisdiction to act.'

57. In the case of '[Kenya Power & Lighting Co Limited – Versus - Samuel Mandere Ogeto \[2018\] eKLR](#)', being an appeal against an order dismissing the appellant's preliminary objection based on provisions of Section 61(3) of the [Energy Act 2006](#) (repealed), where DS Majanja Judge while allowing the appeal held that:-

' Flowing from the provisions I have cited, I hold that any disconnection whether illegal or otherwise falls within the scope of disputes to be referred to the ERC. The Act and Regulations point to the fact that there is statutory scheme for resolving disputes between the appellant and its customers and the respondent was obliged to follow the procedure established. In Peter Muturi Njuguna – Versus - Kenya Wildlife Service NKU CA Civil Appeal No 260 of 2013 [2017] eKLR, the Court of Appeal reiterated this principle that, 'It is abundantly clear to us that where there is a specific procedure as to redress of grievances, the same ought to be strictly followed. I find that the Learned Magistrate erred in dismissing the preliminary objection. The sub - ordinate court had no jurisdiction to hear the matter. I allow the appeal and uphold the preliminary objection. Consequently, the suit is struck out.'



58. In the recent ruling in 'Abidha Nicholus – Versus - Attorney General & 7 others; National Environmental Complaints Committee (NEEC) & 5 others (Interested Parties (supra), the Court held that:

' Section 9 (2) and 3 of the Fair Administrative Act 2015 removes this kind of disputes from this court and places jurisdiction to the Energy Authority the Petition against the defendant is struck out as there is alternative mechanism for resolving the dispute'

59. Further, recently the High Court determined similar preliminary objections raised by the Defendant herein and the Honourable Judges made the finding that disputes with regard to the electricity should all be referred to the Energy and Petroleum Regulatory Authority or the Energy and Petroleum Tribunal. The High Court in Nairobi, in the case of [*Justin Karionji Nyaga – Versus - Attorney General & 2 others \[2021\] eKLR*](#) held as follows:

' 7. The tenor and import of the doctrine of exhaustion of remedies is that, where a dispute resolution mechanism has been established by a statute outside the mainstream Courts, that mechanism should be exhausted before the jurisdiction of the mainstream Courts is invoked. Put differently, where there exists a legitimate statutory primary dispute resolution mechanism, such as a tribunal, the mainstream courts should be the fora of last resort and not the first port of call.

13. There is no contestation about the fact that the 3rd Respondent was a licensee within the meaning of Section 2 of the Act. It therefore follows that the dispute resolution forum established by the Act for the resolution of the present dispute, as at the time of initiating the petition herein, was the Energy and Petroleum Tribunal established under Section 25 of the Act. The Petitioner, for unexplained reasons, did not utilize that primary dispute resolution mechanism. No explanation has been tendered to justify the petitioner's failure to exhaust the dispute resolution mechanism provided under the Act.

14. In the circumstances, the court finds that the Petition herein offends the doctrine of exhaustion of remedies. The net result is that the petition herein stands to be struck out. The Petitioner will have the right to seek redress in the Tribunal, as prescribed under the Act, subject to the relevant law on limitation.

16. In the end, the 2nd Respondent's preliminary objection dated June 29, 2020 is upheld to the extent that the petition herein is struck out on the ground that the petitioner has not exhausted the primary dispute resolution mechanism established under the [*Energy Act*](#), No 1 of 2019.'

60. Whereas the High Court in Kisumu made the same holding in the case of [*Vitalis Ouma Osano – Versus - Kenya Power and Lighting Company PLC \[2021\] eKLR*](#) and held that:-

' I do find that this dispute revolves on development of Energy infrastructure namely Electricity Supply lines on the alleged Plaintiff's land which is private land. The Plaintiff's aggrieved with the act of the Defendant.

Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector arising under the Act to the Tribunal. The



Plaintiff has no option but to refer the dispute to the Tribunal has the Jurisdiction to grant the orders being sought by the Plaintiff.

Indeed Article 159 (2) c of the [Constitution](#) of Kenya 2010 provides that in exercising Judicial Authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration.

In view of the above, this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act. The Preliminary Objection is upheld and the suit is struck out. Costs to the Defendant.'

61. The Learned Counsel submitted that this sound jurisprudence in the Court's consideration and determination of this present matter. On account of the above, it was imperative that this Honourable Court afforded opportunity to the statutory bodies mentioned, to exercise their jurisdiction with respect to the matter. Under the provision of Article 159 of the [Constitution](#) of Kenya, 2010 was instructive that in exercising judicial authority the Court shall 'inter alia' be guided by the principle of promoting alternative forms of dispute resolution. This Honourable Court ought also take judicial notice of the huge backlog of cases before the courts and therefore take cognizance of the fact that encouraging and promoting these statutory bodies would in essence substantially reduce the number of cases filed before this Court and enhance principle of expeditious disposition of cases.

62. The Learned Counsel urged the Honourable Court to make a finding that it had no jurisdiction and proceed to down its tools as was held by the Court of Appeal in the case of [Esther Gachambi Mwangi - Versus - Samuel Mwangi Mbiri \[2013\] eKLR](#):

' A Court of law or any tribunal must down tools in respect of the matter before it the moment it is without jurisdiction.' (Court of Appeal at Nyeri-Visram, Kiage & Otieno Odek, JJ.A)

63. The Learned Counsel concluded by urging the Honourable Court to find that this Court did not have jurisdiction to entertain this matter and dismisses the same with cost.

64. On the issue of who bears the costs, the Learned Counsel relied on the provision of Section 27 (1) of the [Civil Procedure Act](#), Cap 21 which stipulated that costs must follow the event unless the Court for good reason, orders otherwise. In the case of:- 'Kenya Sugar Board - Versus - Ndungu Gathini (2013) eKLR, the court in recognizing that costs do follow the event, maintained an award of costs to a party stating that the discretion was applied judiciously. In awarding costs to the defendant, the court in the case of [Joseph Nzyoki Mwanthi - Versus - Kenya Power & Lighting Co Ltd \[2017\] eKLR](#) had this to say:-

' I have on my part considered the sort of reliefs sought by the Appellant in the Plaintiff. It is apparent from the Plaintiff that the dispute is over the charges and or supply of electricity. In my view, the dispute is a matter which is reserved by statute to be heard and determined by the Energy Regulatory Commission under Section 61 (3) (a) of the [Energy Act](#). The [Energy Act](#) also provides for any person who is dissatisfied with the decision of the Energy Regulatory Commission to file an appeal with the Energy Tribunal under Section 108 of the aforesaid Act. I am therefore convinced that the learned Senior Resident Magistrate properly dismissed the suit for want of jurisdiction. In the end, I find no merit in this appeal. It is dismissed in its entirety with costs to the Respondent.'

65. He argued that the Plaintiffs being fully aware of the mechanisms put in place for parties to pursue reliefs in instances such as these and to ventilate the issues raised in the Plaintiff elected to prematurely



drag the Defendant to court. The Defendant had expended considerable resources in this matter and thus ought to be awarded costs as reprove. In the case of: '*Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & Another [2016] eKLR* while quoting with approval the case of Republic – Versus - Rosemary Wairimu Munene ex - parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Ltd.

66. In the case of 'Party of Independent Candidate of Kenya – Versus - Mutula Kilonzo & 2 others, while citing the case of Nedbank Swaziland Ltd – Versus - Sandile Dlamini No(144/2010)-2012 SZHC 30 (2013) where it was stated that the underlying principle in awarding costs are that the award of costs is a matter of discretion of the Judge to be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at and that the general rule is that costs are awarded to the successful party, unless there good ground for not doing so. The Learned Counsel asked the Court to be guided by these authorities.
67. In conclusion, the Learned Counsel stated that the suit herein as against the Defendant was one that exclusively fell under the jurisdiction of the Energy & Petroleum Regulatory Authority or in the alternative the Energy & Petroleum Tribunal as such the Plaintiffs ought to pursue its claims there. The Defendant prayed that the suit herein be hereby dismissed with costs.

B. The Written Submissions by the Plaintiffs

68. On November 30, 2022, the Learned Counsel for the Plaintiffs the Law firm of Messrs Birir & Company Advocates filed their written submissions dated November 23, 2022. Mr Birir Advocate submitted that the Defendant's Notice of Preliminary Objection is misconceived, incompetent, misplaced and is an abuse of the process of this Honourable Court and that the same ought to be dismissed with costs.
69. The Learned Counsel argued that the Sections relied upon by the Defendant did not apply to the issues raised in the suit. The *Energy Act*, 2019 as enacted and as per the preamble was to: -
- i. Provide National and County Governments functions in relation to energy;
 - ii. Provide for establishment, power and functions of energy sector entities;
 - iii. Promotion of renewable energy; exploration, recovery and commercial utilization of the geothermal energy;
 - iv. Regulation of midstream and downstream petroleum and coal activities;
 - v. Regulation, production, supply and use of electricity and other energy forms;
 - vi. For connected purposes
70. He submitted that a look at the preamble was evident that the same had nothing to do with the 3rd Parties but it had everything to do with regulating those in energy sector, in the circumstances. Therefore, without belabouring the point, the Learned Counsel submitted that the Preliminary Objection was misplaced, misguided, misapplied and should be dismissed with costs.

V. Issues for Determination

71. I have considered the gist of the preliminary objection dated September 29, 2022 by the Defendant herein, the written submissions, the cited authorities and the relevant constitutional and statutory frameworks together with the prevailing jurisprudence on the key question falling for determination in the preliminary objection.



72. In order to arrive at an informed, reasonable, Just and equitable decision, the Honourable Court has condensed the subject matter to the following three (3) issues for its determination. These are:
- a. Whether the Preliminary objection dated September 29, 2022 by the Defendant met the thresholds of an objection as stipulated under the law and precedents.
 - b. Whether this Honourable Court is clothed with the Jurisdiction to entertain this Suit filed by the Plaintiffs herein taking into account the doctrine of exhaustion of remedies.
 - c. Who will bear the costs of this Objection.

VI. Analysis & Determination

ISSUE No a). Whether the Preliminary objection dated September 29, 2022 by the Defendant met the thresholds of an objection as stipulated under the law and precedents.

73. According to the Black Law Dictionary a Preliminary Objection is defined as being:

' In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary'

The above legal proposition being the meaning, scope and nature of preliminary objection has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co Limited – Versus- West End Distributors Limited [1969] EA 696*. Where Lord Charles Newbold P held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

' The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop'

74. I further wish to cite the case of '*Attorney General & Another –Versus- Andrew Mwaura Gitinji & another [2016] eKLR*:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. 'A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.'

75. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the



subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Defendant are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Defendant was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co Limited (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

ISSUE No b). Whether this Honourable Court is clothed with the Jurisdiction to entertains this Suit filed by the Plaintiff herein taking into account the doctrine of exhaustion of remedies.

76. Under this sub heading, an objection to the court's jurisdiction may be raised as a preliminary objection as it was a pure point of law and may arise by clear implication out of pleadings. It was also an elementary principle in law that a Court could not adjudicate on matters in which it lacked jurisdiction. The jurisdiction of the court 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 the law. This position was stated In 'the locus classicus' case of: 'Owners of the Motor Vessel 'Lillian S' – Versus - Caltex Oil (Kenya) Ltd [1989] KLR 1 Justice Nyarangi held as follows:-

' I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Once a question of jurisdiction is raised, the court must down its tools and determine the issue of jurisdiction before delving into the merits of the suit and/or application before it.'

77. And by the Supreme Court in the case of Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank Limited & 2 Others (2012) eKLR.

78. The Defendant's contention is that the matter before this court fell within the jurisdiction of both the Energy and Petroleum Tribunal and the Energy and Petroleum Regulatory Authority. The doctrine of exhaustion of remedies provides that, where a dispute resolution mechanism has been established by a statute outside the mainstream courts, that mechanism should be exhausted before the jurisdiction of the mainstream courts is invoked. Put differently, where there exists a legitimate statutory primary dispute resolution mechanism, such as a tribunal, the mainstream courts should be the fora of last resort and not the first port of call.

79. The Supreme Court of Kenya explained the importance of the doctrine of exhaustion of remedies in the case of Benard Murage – Versus - Fine Serve Africa Limited & 3 others [2015] eKLR in the following words:

' Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.'



80. The Court of Appeal in the case of: [*Geoffrey Muthinja & Another - Versus - Samuel Muguna Henry & 1756 others \(2015\) eKLR*](#) was also elaborate that;

‘The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts.’

81. See also the case of [*Speaker of the National Assembly – Versus - James Njenga Karume*](#) (Supra) where the Court of Appeal emphasized that where there is a clear procedure prescribed by the [*Constitution*](#) or by a statute for the redress of a particular grievance, that procedure should be strictly followed and exhausted before invoking the jurisdiction of the Court.

82. The dispute in this suit was triggered by the Defendant’s threat that they wanted to set up a way leave over the suit property without the Plaintiffs’ consent. The Plaintiffs allege that the Defendant is planning to lay a high voltage electric power supply line through their land and the Defendant herein sent his workers and/or agents to put ‘X’ marks on all houses at Jomvu Brightstar area, Jomvu alleging that the same were in the wayleave area. That this is a violation of their rights, title and interest in the suit property.

83. Continuing trespass is defined by *Clerk On Law of Torts, 16th Edition* Para 23-01 as;

‘ Every continuance of a trespass is a fresh trespass of which a new cause of action arise from day to day as long as the trespass continues.’

84. Granted the above definition and as long as a trespasser continues to occupy another’s land unlawfully, such occupation constitutes a continuing trespass which is actionable from day to day so long as the trespasser remains on the land. The Plaintiff alleges that the electric power lines are still on her land. The Plaintiffs’ cause of action arose sometime in 2021 after the enactment of the [*Energy Act, 2019*](#) in any event.

85. The Supreme Court of Kenya in the case of '[*Samuel Kamau Macharia & another – Versus - Kenya Commercial Bank Ltd & 2 others*](#) (2012) eKLR while addressing the issue of retrospective application of the law held that,

‘ As for non-criminal legislation, the general rule is that all the statutes other than those that are merely declaratory or which relate to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless by express words or necessary implication it appears that this was the intention of the Legislature.’

86. Therefore, this court’s finding is that the provisions of the [*Energy Act, No 1 of 2019*](#) are applicable to the Plaintiffs’ cause of action as suggested by the Defendant. Indeed, Article 159 (2) c of the [*Constitution*](#) of Kenya 2010 provides that in exercising Judicial Authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration.

87. The provision of Section 9 of the Fair Administration Act provides:

‘ 9.

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for



judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

- (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.'

88. I do fully agree with the Learned Counsel for the Defendant that the Defendant act of wanting to constructing the way leaves in the Plaintiffs' land is a decision that affects the rights of the Plaintiff and therefore is an administrative action.

89. He provision of Section 2 of the fair Administrative Act on its part defines administrative action to include:

- ' 2. In this Act, unless the context otherwise requires- 'administrative action' includes-(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates; means a person who takes an or who makes an administrative. 'decision' means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be; 'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken; 'failure', in relation to the taking of a decision, includes a refusal to take the decision; 'state organ' has the meaning assigned to it under Article 260 of the the Constitution; and 'tribunal' means a tribunal established under any written law.'

90. For these reasons adduced herein, therefore, I hold that this Court which is an appellate Court on all matters pertaining to Energy this Court lacks the legal mandate to entertain the same in the first instance. Thus, the objection raised by the Defendant must be upheld thereof.



ISSUE No c). Who will bear the Costs of the Objection

91. It is well established that the issue of Costs is at the discretion of Court. Costs means the award that is granted to a party upon the conclusion of the legal process and/or legal proceedings of any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that costs follow the events (See the Court of Appeal cases of '*Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & Another [2016] eKLR* while quoting with approval the case of *Republic – Versus - Rosemary Wairimu Munene ex - parte Applicant – Versus - Ihururu Dairy Farmers Co - operative Society Limited (2014) eKLR*; and *Supreme Court case of Jasbir Rai Singh – Versus – Tarchalan Singh (2014) eKLR*) held thus:-

' The basic rule on attribution of costs is that costs follow the event it is well recognized that the principle costs follow the event is not be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.'

92. In the instant case, the Plaintiffs being fully aware of the mechanisms put in place for parties to pursue reprieve in instances such as these and to ventilate the issues raised in the Complaint elected to prematurely drag the Defendant to this Honourable Court. I fully concur with the argument advanced by the learned Counsel for the Defendant that the Defendant had expended considerable resources in this matter and thus ought to be awarded costs as reprieve. The results of the case is that the objection by the Defendant is allowed taking that the right forum to have instituted this suit was exclusively fell under the jurisdiction of the Energy & Petroleum Regulatory Authority or in the alternative the Energy & Petroleum Tribunal as such the Plaintiffs ought to pursue its claims there. The Defendant prayed that the suit herein be hereby dismissed with costs. Hence, it is fair as a the general rule that costs be awarded to the successful party being the Defendant herein.

VI. Conclusion & Disposition

93. Consequently, having conducted such an elaborate and indepth analysis of the framed issues surrounding the objection raised by the Defendant herein, the Honourable Court finds on preponderance of probability that the objection has merit. Therefore, the Court finds as follows:-
- a. That this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act.
 - b. That the Preliminary Objection date September 29, 2022 be and is hereby upheld and the suit is struck out. The matter stands closed.
 - c. That the costs of the suit to awarded to the Defendant.

It Is So Ordered Accordingly

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATE AT MOMBASA THIS28THDAY OFMARCH.....2023.

HON. JUSTICE L. L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT AT

MOMBASA

In the presence of:



a. M/s. Yumna, the Court Assistant.

b. Mr. Birir Advocate for the Plaintiffs

c. No appearance for the Defendant

RULING: CIVIL SUIT NO. E064 OF 2022 Page **15** of **15** **HON. L.L. NNAIKUNI (JUDGE)**

