



REPUBLIC OF KENYA



**KENYA LAW**  
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**Makoffu v Kenya Power & Lighting Co. Ltd (Constitutional Petition E377 of 2021)  
[2023] KEHC 17974 (KLR) (Constitutional and Human Rights) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17974 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E377 OF 2021**

**AC MRIMA, J**

**MAY 30, 2023**

**BETWEEN**

**MARY NYATHARE MAKOFFU ..... PETITIONER**

**AND**

**KENYA POWER & LIGHTING CO. LTD ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling relates to the notice of preliminary objection dated September 27, 2021 taken out by the respondent in response to the petition herein.
2. The objection impugned the jurisdiction of this Court on the principle of exhaustion.
3. Parties filed written submissions which were quite elaborate and referred to several decisions. This Court is indeed grateful to all the parties.

**Analysis:**

4. Given the length and nature of the submissions, I will not reproduce the same *verbatim* in this ruling. However, I will consider the parties' positions, arguments and decisions referred to in the discussion herein.
5. The objection was tailored as follows: -

Take Notice that the Respondent shall at the earliest opportune time raise a preliminary objection that this Honourable Court lacks jurisdiction to hear and determine this dispute and petition together with all consequential orders should be struck out with costs as the same offends the provisions of sections 3, 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](#) 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) [Fair Administrative Action Act, 2015](#).

6. Since the issue at hand is on the jurisdiction of this Court, such can be raised at any time of the proceedings and even on appeal (See Court of Appeal in [Jamal Salim v Yusuf Abdullahi Abdi & another](#) Civil Appeal No 103 of 2016 [2018] eKLR). The Court can also raise such issue on its own motion.
7. The Supreme Court in Petition No 7 of 2013, [Mary Wambui Munene v Peter Gichuki Kingara and Six others](#), [2014] eKLR, while affirming its earlier position in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited Kenya & 2 others (2013) eKLR on jurisdiction, observed as follows: -

"... jurisdiction is a 'pure question of law' and should be resolved on priority basis."
8. In a nutshell, the Respondent strongly argued that the dispute before Court was premature since the Petitioner ought to have fully complied with the dispute resolution mechanism laid out in the [Energy Act](#). It was further argued that Parliament through the [Energy Act](#) established the Energy & Petroleum Authority (hereinafter referred to as 'the Authority') as well as the Energy & Petroleum Tribunal (hereinafter referred to as 'the Tribunal') and vested the entities with powers and duties to deal with all disputes within the energy sector which include such like the Petitioner's herein.
9. The Respondent referred this Court to Sections 3, 9, 10, 11(e), (f), (i), (k) and (l), 23, 24, 36, 40, 42, 159(3), 160(3), 167, 168 and 224(2) of the [Energy Act](#) and Regulations 2, 4, 7 and 7 of the [Energy \(Complaints and Disputes Resolution\) Regulations, 2012](#) on its position that the Court lacks jurisdiction.
10. It was further submitted in the alternative that pursuant to Section 36 of the [Energy Act](#) it was the Tribunal which has the jurisdiction over the dispute herein in the event the Authority is not seized of any jurisdiction.
11. On the basis of Section 9 of the Fair Administrative Actions Act and several decisions, the 1<sup>st</sup> Respondent submitted that the Petitioner ought to have exhausted the internal mechanisms for dispute resolution before approaching the Court. The mechanisms are the Authority and the Tribunal.
12. The Respondent further submitted that the issues raised in the Petition as purely commercial in nature and cannot be dealt with by the Courts, but by the Tribunal and Authority. Several decisions were referred to in support of the position.
13. On her part, the Petitioner argued that the Petition raised several constitutional issues and as such it is only the High Court which has the jurisdiction to determine a question of violation of constitutional rights. Several decisions were referred to in support of the position.
14. Going forward, since the objection is centered on the doctrine of exhaustion, I will now deal with the legal position of the doctrine of exhaustion and its applicability in this matter.
15. The doctrine of exhaustion in Kenya traces its origin from Article 159(2)(c) of the [Constitution](#) which recognizes and entrenches the use of alternative mechanisms of dispute resolution in the following terms: -

159(2) In exercising judicial authority, the Courts and tribunals shall be guided by the following principles-



- (a) ...
  - (b) ...
  - (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3.
16. Clause 3 is on traditional dispute resolution mechanisms.
17. The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No 159 of 2018 consolidated with Constitutional Petition No 201 of 2019 *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR. The Court stated as follows:
52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine 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 the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the *Constitution* and was aptly elucidated by the High Court in *R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:
42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:
- Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
42. While this case was decided before the *Constitution of Kenya* 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine. This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:
- 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 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 the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.



18. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the *Shikara Limited Case* (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

19. The above decision was appealed against by the Respondents. The Court of Appeal in upholding the decision and in dismissing the appeal in *Mombasa Civil Appeal No 166 of 2018 Kenya Ports Authority v William Odhiambo Ramogi & 8 others* [2019] eKLR held as follows: -

The jurisdiction of the High Court is derived from Article 165 (3) and (6) of the Constitution. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, including determination of a question of enforcement of the bill of rights and interpretation of the Constitution encompassing determination of any matter relating to the Constitutional relationship between the different levels of government.

At the High Court, we note that the learned Judges dealt with this matter under the question framed as follows: Is the court barred from considering the suit at present by virtue of



Article 189 of the Constitution and sections 33 and 34 of Inter-Governmental Relations Act of 2012 (IGRA)? The parties have advanced similar arguments as before the learned Judges of the High Court. The High Court went further than just looking at the ruling by Ogola J. They also took into account the doctrine of exhaustion as enunciated in Republic vs. Independent Election and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR. They applied a dual pronged approach before concluding that the dispute was not an inter-governmental dispute under IGRA. First, they considered that the test for determining the matter as an inter-governmental dispute for purposes of application of IGRA was not simply to look at who the parties to the dispute were, but the nature of the claim in question and; secondly, they considered that the claimed Constitutional violations seeking to be enforced are not mere “bootstraps.” We have keenly addressed our minds to the learned Judges’ decision and are satisfied that they stayed within the expected contours and properly directed themselves. Once they determined that the dispute was not inter-governmental in nature, we do not think it is necessary to consider whether the petitioners had exhausted their legal avenue. Jurisdiction by the High Court under Article 165 (5) of the Constitution became automatic. And in our view, it could not be ousted or substituted.

20. Further, in Civil Appeal 158 of 2017, Fleur Investments Limited v Commissioner of Domestic Taxes & another [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in Speaker of National Assembly vs Njenga Karume (1990-1994) EA 546 to assume jurisdiction by bypassing the mechanism under Income Tax Tribunal. They observed as follows: -

23. For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas Courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

21. Courts have in many occasions reiterated the position that where there are alternative avenues legally provided for in dispute resolutions, there should be postponement of judicial consideration of such disputes until after the available avenues are fully adhered to or unless it is adequately demonstrated that the matter under consideration falls within the exception to the doctrine of exhaustion.
22. Returning to the matter at hand, there is no doubt that the basis of the Petition was the Respondent’s action of interfering with the power supply to the Petitioner’s premises and subsequently levying some unexplained charges and compelling the Petitioner to make payments at the risk of disconnection of the power supply to her house.
23. As a result of the said actions, the Petitioner instituted the instant 56-paragraph Petition. The Petitioner dealt with the description of the parties, the legal foundation of the Petition, the facts, the alleged violations of the Constitution in respect to Articles 19,20, 21, 22, 23, 24, 25, 27, 28, 35, 46 and 47 of the Constitution and the reliefs sought.
24. The Petitioner sought the following reliefs: -



- a. A declaration that the respondent has violated the Petitioner's right under Article 46 that guarantees a right to goods and services of reasonable quality and to have information necessary for them to gain full benefit of the said good and services.
  - b. A declaration that the Respondent's violation of the Petitioner's right to goods and services of reasonable quality and enjoyment of their full benefit has occasioned her loss of money considering the time spent following up on the issues with the Respondent and there is a further likelihood of loss of money as a resource, if the demand of Kshs 1, 108,189.53 is enforced upon the Petitioner.
  - c. A declaration that the demand by the Respondent to the Petitioner in its letter dated September 11, 2021 requiring her to pay the backdated electricity bill dated May 13, 2015 in the amount of Kshs 1,086,890.53 and addressed to Dave Van Lanfdeghem is illegal, cruel, unfair, unreasonable and oppressive.
  - d. A declaration that the Petitioner's right to fair administrative actions under Article 47 of the Constitution of Kenya has been denied, violated or infringed by the Respondent. An order directing the Respondent to restore all the meter details in the names of the Petitioner or to install a new meter in her names.
  - e. A permanent injunction directed at the Respondent, its employees, agents, servants or any of its representative from billing and recovering from the Petitioner backdated electricity bill for the period from 1<sup>st</sup> January 2017 to 30<sup>th</sup> January 2019 amounting to Kshs 1,108,189.53/-
  - f. A permanent injunction directed at the Respondent, its employees agents, servants or any of its representatives from disconnecting the Petitioner's electricity supply on grounds of the contested bill of Kshs 1, 108,189.53 provided payment being paid for the power justly consumed.
  - g. Such further and other consequential orders, writs, declarations and directions as this Honourable Court may Consider appropriate for the purpose of enforcing and securing the enforcement of the rights and fundamental freedoms of the Petitioners under the Constitution.
  - h. Costs of the Petition.
25. It is the said Petition that the Respondent hold the view that this Court is not possessed of jurisdiction over.
  26. To be able to resolve the issue, this Court will, firstly, outline the functions and powers of both the Authority and the Tribunal, but first the Preamble of the Energy Act.
  27. The Preamble states as follows: -
 

An Act of Parliament to consolidate the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities; promotion of renewable energy; exploration, recovery and commercial utilization of geothermal energy; regulation of midstream and downstream petroleum and coal activities; regulation, production, supply and use of electricity and other energy forms; and for connected purposes
  28. The Authority is established under Section 9 of the Energy Act as a body corporate, with perpetual succession, a common seal and with capacity to deal in its corporate name.
  29. Its functions are provided for in Section 10 as follows: -



- (a) regulate—
  - (i) generation, importation, exportation, transmission, distribution, supply and use of electrical energy with the exception of licensing of nuclear facilities;
  - (ii) importation, refining, exportation, transportation, storage and sale of petroleum and petroleum products with the exception of crude oil;
  - (iii) production, conversion, distribution, supply, marketing and use of renewable energy;
  - (iv) exploration, extraction, production, processing, transportation, storage exportation, importation and sale of coal bed methane gas and other energy forms;
- (b) regulate, monitor and supervise upstream petroleum operations in Kenya in accordance with the law relating to petroleum, the regulations made thereunder and the relevant petroleum agreement;
- (c) provide such information and statistics in relation to upstream petroleum operations in Kenya to the Cabinet Secretary responsible for matters relating to petroleum as may be required from time to time;
- (d) collect, maintain and manage upstream petroleum data;
- (e) receive, review and grant an application for a non-exclusive exploration;
- (f) co-ordinate the development of upstream petroleum infrastructure and promote capacity building in upstream petroleum operations;
- (g) inspect and test any machinery or equipment that has been used, is used or shall be used in upstream petroleum operations;
- (h) assess field development plans and make recommendations to the Cabinet Secretary responsible for matters relating to petroleum for approval, amendment or rejection of the plans;
- (i) assess tail-end production and cessation of upstream petroleum operations and oversee decommissioning by a contractor;
- (j) verify the measurements of petroleum production to allow for estimation and assessment of royalties and profits of oil and gas due to the National Government;
- (k) verify the recoverable cost of oil and gas due to the parties to a petroleum agreement;
- (l) audit contractors for cost recovery;
- (m) monitor in consultation with the Competition Authority conditions of contractors' operations and their trade practices;
- (n) provide information to the relevant authority for the collection of taxes and fees from upstream petroleum operations;
- (o) set, review and approve contracts, tariffs and charges for common user upstream petroleum facilities;
- (p) make proposals to the Cabinet Secretary responsible for matters relating to petroleum in relation to regulations which may be necessary or expedient for the regulation of the upstream petroleum sector or for carrying out the objects and purposes of this Act;



- (q) work with the relevant statutory authorities to formulate, enforce and review environmental, health, safety and quality standards for the upstream petroleum sector;
- (r) develop guidelines, in consultation with other statutory authorities, in relation to the implementation of treaties, conventions or protocols affecting the upstream petroleum sector that have been ratified by Kenya;
- (s) regulate contracts on upstream petroleum operations not specifically provided for under the law relating to petroleum;
- (t) advise the Cabinet Secretary responsible for matters relating to petroleum in the evaluation of the bids and applications made for upstream petroleum blocks;
- (u) ensure that contractors uphold the relevant laws, regulations and petroleum agreement terms;
- (v) ensure optimal levels of recovery of petroleum resources;
- (w) promote well planned, executed and cost-efficient operations;
- (x) ensure optimal utilization of existing and planned facilities;
- (y) ensure the establishment of a central database of persons involved in upstream petroleum operations;
- (z) manage upstream petroleum data and provide periodic updates and publication of the status of upstream petroleum operations;
  - (aa) take such action as is necessary to enforce the requirements in a petroleum agreement or any regulations and to protect the environment, the health and safety of workers and the public;
  - (bb) ensure and facilitate competition, access and utilization of facilities by third parties;
  - (cc) prescribe the form and manner in which any application for any authority, consent or approval under the law relating to petroleum shall be made;
  - (dd) investigate complaints or disputes arising from petroleum operations;
  - (ee) enforce local content requirements;
  - (ff) issue operational permits and non-exclusive exploration permits in accordance with the law relating to petroleum;
  - (gg) ensure enforcement and compliance with the national values and principles;
  - (hh) protect consumer, investor and other stakeholder interests;
  - (ii) provide such information and statistics to the Cabinet Secretary as the Cabinet Secretary may from time to time require;
  - (jj) collect and maintain energy data;
  - (kk) develop guidelines on applicable treaties, conventions and protocols affecting the energy sector in consultation with other statutory authorities except those relating to nuclear energy;



- (ll) co-ordinate the development and implementation of a national energy efficiency and conservation action plan, in consultation with relevant statutory authorities and other stakeholders;
- (mm) develop testing and certification procedures, in conjunction with relevant statutory agencies, for certification and testing for energy consumption of equipment and appliances;
- (nn) ensure, in collaboration the Kenya Bureau of Standards, that only energy efficient and cost effective appliances and equipment are imported into the country;
- (oo) certify energy managers and license energy auditors;
- (pp) promote, in consultation with the Kenya National Accreditation Service, the establishment of accredited laboratories for energy efficiency; and
- (qq) perform any other function that is incidental or consequential to its functions under this Act or any other written law.

30. Section 11 of the [Energy Act](#) sets out the powers of the Authority as follows: -

The Authority shall have all powers necessary for the performance of its functions under this Act and in particular, the Authority shall have the power to—

- (a) issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector;
- (b) set, review and approve contracts, tariffs and charges for common user petroleum logistics facilities and petroleum products;
- (c) set, review and adjust electric power tariffs and tariff structures and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment;
- (d) prescribe the form and manner in which any application for any authority, licence, consent or approval under this Act shall be made and the fees payable in respect of such application;
- (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;
- (g) formulate, set, enforce and review environmental, health, safety and quality standards for the energy sector in coordination with other statutory authorities;
- (h) approve electric power purchase and network service contracts for all persons engaging in electric power undertakings;



- (i) investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;
- (j) enter, inspect and search any premises where an offence is being committed or is suspected to have been committed;
- (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;
- (m) enter, inspect and search any premises at which any undertaking relating to petroleum operations is carried out or an offence is being committed or is suspected to have been committed;
- (n) issue orders either 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 in furtherance of its powers under the law relating to petroleum;
- (o) impose such sanctions and civil fines not exceeding five hundred thousand shillings per violation per day to secure compliance with orders issued under the law relating to petroleum;
- (p) take or remove, for analysis, testing or for use in evidence in connection with the commission of an offence under the law relating to petroleum, samples of petroleum or other substances from any area where any upstream petroleum operations are being carried on; and
- (q) inspect, take extracts from, or make copies of any document relating to any upstream petroleum operations.

31. A party aggrieved by the decision of the Authority may appeal to the Tribunal established under Section 25 of the *Energy Act*.

32. Section 36 of the *Energy Act* provides for the jurisdiction of the Tribunal as follows: -

- (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act.
- (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence.
- (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
- (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
- (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
- (6) The Tribunal shall hear and determine matters referred to it expeditiously.



33. 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.
34. It is on the foregoing background that the Respondent contended that Petitioner ought to have lodged his complaints before the Authority and the Tribunal.
35. This Court has carefully considered the functions and powers of the Authority vis-à-vis the matters in the Petition. The issues in the Petition in this matter mainly revolves around a licensee (that is the Respondent) and a third party (the Petitioner) who is allegedly affected by the actions of the licensee. As such, it appears that the Authority's jurisdiction does not extend to such issues.
36. This Court, hence, finds that the Authority has no jurisdiction over the issues raised in the Petition.
37. But, what about the Tribunal? Indeed, the Tribunal has original civil jurisdiction over any dispute between a licensee and a third party or between licensees.
38. Given the foregoing legal position, it then behooves this Court to ascertain if the disputes can be wholly dealt with by the Tribunal. In doing so, the Court will focus on the doctrine of exhaustion and its exceptions.
39. In the event this Court finds that all the issues raised can be dealt with by the Tribunal, then the Court will be barred from dealing with the matter further. The Court will down its tools.
40. There is also the possibility that the Court may find that the exceptions to the doctrine of exhaustion apply to the case. In that instance, the Court will assume jurisdiction over the dispute and deal further.
41. In this matter, it comes to the fore that most of the issues raised by the Petitioner fall within the jurisdiction of the Tribunal. I say so since the Tribunal has original civil jurisdiction on any dispute between a licensee and a third party or between licensees. The Tribunal also has powers to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
42. There is, however, the contention by the Petitioner that the Tribunal cannot deal with the constitutional issues raised in the Petition. In dealing this the matter, this Court will briefly address what a constitutional issue is.
43. The South African Court in *Fredricks & Other vs. MEC for Education and Training, Eastern Cape & Others* (2002) 23 ILJ 81 (CC) delimited what a constitutional issue entails and the jurisdiction of a Constitutional Court as follows: -

The Constitution provides no definition of 'constitutional matter'. What is a constitutional matter must be gleaned from a reading of the Constitution itself: if regard is had to the provisions of... Constitution, constitutional matters must include disputes as to whether any law or conduct is inconsistent with the Constitution, as well as issues concerning the status, powers and functions of an organ of State.... the interpretation, application and upholding of the Constitution are also constitutional issues. So too .... is the question of the interpretation of any legislation or the development of the common law promotes the spirit, purport and object of the Bill of Rights. If regard is had to this and to the wide scope and application of the Bill of Rights, and to the other detailed provisions of the Constitution, such as the allocation of powers to various legislatures and structures of government, the jurisdiction vested in the Constitutional Court to determine constitutional matters and issues connected with decisions on constitutional matters is clearly on extensive jurisdiction...



44. In the United States of America, a constitutional issue refers to any political, legal, or social issue that in some way confronts the protections laid out in the US Constitution.
45. Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or the Constitution itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of the Constitution alleged to have been contravened or threatened and the manifestation of contravention or infringement. In the words of Langa, J in Minister of Safety & Security vs. Luiters, (2007) 28 ILJ 133 (CC): -
- ... When determining whether an argument raises a constitutional issue, the Court is not strictly concerned with whether the argument will be successful. The question is whether the argument forces the Court to consider constitutional rights and values...
46. Whereas it is largely agreed that the Constitution of Kenya, 2010 is transformative and that the Bill of Rights has been hailed as one of the best in any Constitution in the world, as Lenaola, J (as he then was) firmly stated in PKA v MSA case (*supra*) ‘... Courts must interpret it with all liberation they can marshal...’
47. Resulting from the above discussion and the definition of a constitutional issue, this Court agrees with the position in Turkana County Government & 20 others vs. Attorney General & others (2016) eKLR where a Multi-Judge bench affirmed the profound legal standing that claims of statutory violations cannot give rise to constitutional violations.
48. Having defined what a constitutional issue is, there is no doubt that the Petition alleges contravention of the Bill of Rights. As such, the Petition raises some constitutional issues.
49. On that background, this Court remains alive to the calling in Article 3(1) of the Constitution that ‘every person has an obligation to respect, uphold and defend this Constitution’.
50. Further, Article 10 of the Constitution lays down the national values and principles of governance. Such bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution, enacts, applies or interprets any law; or makes or implements public policy decisions.
51. One of the national values and principles of governance is the rule of law; the need to adhere to set down laws and regulations.
52. It is, therefore, the position that since every person has a duty to respect, uphold and defend the Constitution, it then goes without say that all persons must be aware of the contents of the very Constitution otherwise it will be inimical to expect someone to respect, uphold or defend something one is unaware of.
53. Having so said, the question which now begs for an answer is whether the Tribunal ought to apply the Constitution in its processes.
54. In answering the question, it must, however, be understood that the duty to apply the Constitution is different from the duty to interpret the Constitution.
55. In the context of this case, the Tribunal, in applying the Constitution, is simply called upon to determine whether a given set of circumstances reveal denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights. It is just that simple. Conversely, interpretation of the Constitution is a serious judicial function. While interpreting the Constitution, the High Court is called



upon to apply its legal mind to determine the applicability and extent thereof of a constitutional provision to a set of facts. In arriving at such an interpretation, the High Court is supposed to consider all the applicable principles in constitutional interpretation. (See the Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR). The High Court may also look at comparative jurisprudence from other jurisdictions on the subject. Such a determination yields to a binding legal principle unless overturned by a Court with superior jurisdiction.

56. There is, therefore, a defined distinction between determining the denial, violation, infringement or threat to a right or fundamental freedom in the Bill of Rights and interpreting the Constitution. Whereas the former is not exclusively a judicial function, the latter is.
57. From the Petition in this matter, the Petitioner contended that the Respondent did not adhere to several provisions of the Constitution in the Bill of Rights. Consequently, the Petitioner sought for declarations and injunctions.
58. At this point in time, one may pose and ask two questions: First, is the Tribunal capable of ascertaining whether several Articles of the Constitution were adhered to by the Respondent in the process of dealing with the Petitioner's issue. Second, in the event the Petitioner's case is holding, is the Tribunal capable of awarding all the reliefs sought?
59. The answer to the first question is unwaveringly in the affirmative. The Tribunal is capable of ascertaining whether the provisions of the Bill of Rights in the Constitution were infringed. The Tribunal, which is headed by a Chairperson who shall be appointed by the President from among persons qualified to be Judges of the High Court and who has at least five years' experience in energy and petroleum matters, must surely be capable of finding whether the Constitution is applied appropriately or otherwise in the circumstances of this case.
60. On the second question, the reliefs sought by the Petitioner are mainly declarations that the Constitution was infringed and injunctions. Such reliefs, without more, are within the purview of the Tribunal. Had the Petitioner raised issues like those bordering on constitutional interpretation, then the Tribunal would be devoid of jurisdiction.
61. Having so found, this Court is still under a legal duty to ascertain whether the exceptions to the doctrine of exhaustion applies in the matter. The Petitioner's perspective was that since the Petition raised constitutional issues, then none of the entities in the Energy Act had jurisdiction over the matter save only the High Court. The position has since been dissuaded.
62. In the end, it is the finding and holding of this Court that the Petitioner did not demonstrate any of the exceptions to the doctrine of exhaustion in this matter. As such, this Court's legal hands are tied for want of jurisdiction. In other words, the jurisdiction of this Court has been improperly invoked in these proceedings.

### **Disposition:**

63. Deriving from the foregoing discussion, the objection is determined as follows: -
  - a. This Court lacks the jurisdiction to hear and determine the Petition on the basis of the doctrine of exhaustion.
  - b. The Notice of Preliminary Objection dated September 27, 2021 is merited.
  - c. The Petition and the Notice of Motion both dated September 21, 2021 be and are hereby struck out.



d. Since the dispute between the parties herein still subsists, each party shall bear its own costs.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF MAY, 2023.**

**A. C. MRIMA**

**JUDGE**

**Ruling No 1 virtually delivered in the presence of:**

Miss. Makoffu, Learned Counsel for the Petitioner.

Miss Walala, Learned Counsel for the Respondent.

Regina/Chemutai – Court Assistants.

