



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wekesa v Kenya Power & Lighting Company Limited & another (Constitutional  
Petition 12 of 2021) [2022] KEHC 12769 (KLR) (30 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12769 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CONSTITUTIONAL PETITION 12 OF 2021  
PJO OTIENO, J  
AUGUST 30, 2022**

**BETWEEN**

**MONI WEKESA ..... PETITIONER**

**AND**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ENERGY & PETROLEUM REGULATORY AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. In his Petition dated December 21, 2021 but filed in Court on the same day, the Petitioner prayed for orders that:-
  - “(i) A declaration be and is hereby issued that failure by first and second Respondents to restore electricity supply at the subject account has led to violation and continuing infringement of Petitioner’s right to dignity, freedom of expression, freedom of association, consumer rights, and right to fair administrative action.
  - (ii) A declaration that Regulation 16 of the *Energy (complaints and disputes resolution) Regulations 2012* is unconstitutional, null and void.
  - (iii) An Order of Mandamus be and is hereby issued compelling the first Respondent to restore electricity supply to account No. 36444685 immediately or within 24 hours of this Order pending resolution of the main dispute.
  - (iv) An Order of Mandamus be and is hereby issued compelling the second Respondent to complete investigations and issue a decision in the dispute



relating to electricity supply to account No 36444685 within two (2) weeks of this Order.

- (v) The first and second Respondents jointly and severally pay damages to Petitioner to the tune of Kenya Shillings Five Million (Kshs 5,000,000/=) for violation of Petitioner's various rights.
- (vi) The costs of this Petition be provided for."

2. The factual grounding of the position given by the Petitioner is to the effect that being a customer of the 1<sup>st</sup> Respondent, he maintains an electricity supply account No 36444685 upon his home situate upon Plot No 883, Muhuni Area in Navakholo Sub County, Kakamega County and uses the facility during holidays especially the months of December. With the advent of Covid 19 and its attendant restriction, the Petitioner and family spent less than 3 days between January and November 2021 but continued to pay his regular bills till the month of June 2021 when he was served with an elevated bill in the sum of Kshs 14,365 and 3,606 within a span of 24 days. On receipts of the said bills the Petitioner promptly registered a complaint with the 1<sup>st</sup> Respondent on July 1, 2022 which Complaint was never addressed till the Respondent November 2, 2021 when he received yet another bill in the sum of Kshs 22,151 and did the second complaint and pleaded for non-disconnection of the power supply pending resolution of the dispute but the 1<sup>st</sup> Respondent speedily disconnected supply on the November 12, 2021.
3. Aggrieved with the decision of the 1<sup>st</sup> Respondent, the Petitioner then lodged a complaint with the 2<sup>nd</sup> Respondent and sought interim relief in the nature of restoration of power supply to the premises pending resolution of the complaint but neither of the Respondents took any steps to restore the supply save that the 2<sup>nd</sup> Respondent acknowledge receipt of the complaint and reported forwarding same to the 1<sup>st</sup> Respondent. The Petitioner contends that disconnection of the power to the premises exposes the said property and premises to the risk of burglary, theft and robbery.
4. The Petitioner relate and view the conduct of the Respondents to deny him the right to live in dignity and exposed and cast him in the eyes of his relatives and neighbours as one unable to afford payment of the electricity bills, has been treated to psychological anguish and exposed to fear of attack by wild animals as well as mischievous human being and denied the use of the basic amenities of modernity like fridge, freezer and microwave. He equally considered himself to have been denied the freedom of expression and association in that without electric power supply he was curtailed in his receive and import ideas on the digital platform, to exercise artistic creativity and academic activities including scientific research and in his research as a lecturer on the basis that he was unable to charge his phone and compute batters. In effect his communication on the digital platforms and social media was curtailed and he was made unable to communicate such in over 10,000 in that media.
5. The Petitioner equally alleged violation to his economic interests by levy of exorbitant sporadic and unfortunate bills leading to denial of electric power supply.
6. The forth right alleged to have been violated in the right to fair administrative actions in that his complaint to the 1<sup>st</sup> Respondent remain unresolved after a long wait and that while the Respondents are required by the *Energy Act* and the *Energy (Complaints and Dispute Resolution) Regulation*, to publicise the complaint handling procedures, none can be found on its website.
7. On the Regulations, *Energy (Complaints and Dispute Resolution) Regulation 2012*, the Petitioner contend the same to be in contradiction to the *Constitution* Article 47 (1), and the Petroleum Regulation 16 which have no time lines for the resolution of disputes. It is silent or rather not explicit



- on how long the Commission must appoint the expert or panel to resolve the dispute. On account of paucity of timelines the Petitioner contends that the dispute resolution mechanism is not efficient and has occasioned to him a violation of the right to expeditious fair administrative action and do not provide for remedies envisaged under the Act.
8. On account of the inefficient mechanism waiting in remedies the Petitioner considers himself to be entitled, under Section 9 of the *Fair Administrative Actions Act* to approach the Court without compliance with the doctrine of exhaustion. In total the Petitioner deems and considers the conduct of the Respondents to demonstration of unfair, unreasonable oppressive conduct and therefore abuse of statutory power and process. When served, the 1<sup>st</sup> Respondent resisted the application and the application for conservatory orders on the basis that the Court lacks the requisite jurisdiction to handle and determine the matter on account of Sections 3, 10, 23, 24, 36, 40, 42, 159 (3), 160 (3) and 224 (2) of the *Energy Act 2019* together with Regulations 2, 4, 7 and 9 of the *Energy (Complaints and Dispute Resolution) Regulations 2012* as read with Article 159 (2) c and 169 (1) d & 2 of the *Constitution of Kenya*.
  9. When parties attend Court on May 12, 2022 to report on progress made towards settlement, both report having not made any progress and agreed that the Preliminary Objection be dealt with first for the Court to be satisfied on whether or not it has jurisdiction to entertain the matter. To execute those direction parties did file written submissions. The 1<sup>st</sup> Respondent's submissions are dated May 27, 2022 while those by the Petitioner are dated May 27, 2022 while those by the Petitioner are dated July 12, 2022.
  10. Contrary to the Notice of Preliminary Objection, the 1<sup>st</sup> Respondent additionally relied on Sections 58 (6) of the *Civil Procedure Act* and contended that it having been pleaded by the Petitioner that he filed a complaint, with the second Respondent, this Court ought not entertain the dispute as the doctrine of subjudice dictates otherwise. It is submitted that by dint of Sections 39, 11, 23, 24, 36, 40, 42, 159 (3), 160, 167, 168 and 222 (4) of the *Energy Act* as read with the Regulations the dispute pleaded by the Petitioner in the exclusive domain for the Authority. That submission expands the tenure of the Preliminary Objection to include an assertion that the Petition is bad for being subjudice the complaint filed before the 2<sup>nd</sup> Respondent.
  11. On the objection challenging the jurisdiction of the Court reliance is upon the provisions of the *Energy Act* and the Regulations made thereunder it being contended that the doctrine of exhaustion or ripeness dictates that this suit lies not before the Court prior to the statutory forum which is operational and efficient. It is contended that the Court must let the Authority and the Tribunal set under Section 25 to execute their mandates. Several decisions were cited in support of the Preliminary Objection including *Speaker of National Assembly –vs- Njenga Karume* [1992] KLR 415, *Abidha Nicholus –vs- AG* [2012] eKLR, *Cyrus Komo Njoroge –vs- Kiringa Njoroge Gachoka* [2015] eKLR and *Adro Adro –vs- Uwazi Sacco Society Ltd* [2002] eKLR all for the proposition that where the *Constitution* of the statute provides a dispute resolution mechanism, the same must be complied with strictly. The decision in *Night Rose Cosmetics (Supra)* was additionally cited to underscore the use of the word shall in Section 9 of the *Administrative Actions Act* to make it mandatory and were merely directory.
  12. For the Petitioner a document called Grounds of Opposition to the Preliminary Objection and submissions it is intended that what the 1<sup>st</sup> Respondent has raised does not meet the test laid by the Court in *Mukisa Biscuits Manufacturing Co Ltd –vs- West End Distributors Ltd* [1969] ER 696 for reasons that not all the facts as pleaded are correct. To the Petitioner that he challenges the suitability and efficiency of the dispute puts the dispute outside the mandate of the Authority and the Tribunal.



- The Petitioner contends that the Tribunals are ill suited and not vested with jurisdiction to entertain the question whether his rights allegedly violated and freedom allegedly denied.
13. On the merits, the Petitioner submits that the law, Regulation 5 of the Regulations, commend a Licencee like the first Respondent to establish a complaint handling procedures to be approved by the said Respondent but there is no evidence that such has been one hence no dispute can be declared between the Petitioner and the 1<sup>st</sup> Respondent . For that reason the Petitioner submits that the Respondents have not set the dispute resolution mechanism rolling and are thus not entitled to fault him for failing to pursue that route.
  14. In the alternative and further submissions, the Petitioner contends in opposing the Preliminary Objection that the Alternative Dispute Resolution mechanism under the statute is not available, adequate nor efficient/expeditious and thus offends the dictates of Article 47 of the [Constitution](#).
  15. On adequacy of the remedies by the alternative forum the Petitioner contends that there is no clarity by the 2<sup>nd</sup> Respondent that it can grant interim orders just as the time given of 75 days to conclude dispute resolution is too long for one to remain deprived of use of electric power and that the time taken from the initiation of the dispute to the date of bringing this petition was a period of 150 days and no steps had been taken.
  16. It was additionally submitted that even though the complaint is about the single act of disconnection, this alone can trigger other cause of action sprouting from it and cited the decision in [AG -vs- Andrew Maina Gitthinji](#) [2016] eKLR in support of such position. He then urged the Court to find that a constitutional question has been isolated here by relying on the decision in [Alan E Sunovan -vs- Kenya Power and Lighting Co Ltd](#) [2021] eKLR.
  17. The forth ground in opposition to the Preliminary Objection was founded on Section 9 (4) [Fair Administrative Actions Act](#) as an exception to the exhaustion doctrine which the Petitioner contends is not enumerated in the Act thus leaving it to the discretion of the Court. He cited Night Rose (Supra) and again to assert that where interpretation of the [Constitution](#) is sought there emerges an exception to the general rules and buttressed the point by citing [Mith-Bell Welfare Society -vs- Kenya Airports Authority](#) [2021] eKLR.
  18. Lastly, on the subjudice rule, the Petitioner contends and submits that the same is not applicable here to defeat the Petitioner because, this Court and the Authority have no current jurisdiction and there is difference in that only the 1<sup>st</sup> Respondent with Petitioner are before the Authority while the 2<sup>nd</sup> Respondent is not. On those submissions the Petitioner urged the Court to dismiss the Preliminary Objection and to have the matter heard on the merits.
  19. I have had the benefit of reading the objection and submissions filed by both sides. I discern the issue for determinate to be whether, on account of the existence of the alternative dispute resolution established under the [Energy Act](#), this Court's jurisdiction has been postponed and remain postponed until and unless that process has been exhausted under the doctrine of exhaustion.
  20. The question thus is whether the doctrine of exhaustion is applicable in the circumstances and facts of this case as to enable the Court down its tools so as to allow the statutory forum execute its mandate.
  21. The exhaustion doctrine serves the purpose of ensuring that where the law establishes a forum for dispute resolution outside the Court, then a party is not allowed willingly, to disregard that forum and to approach the Court as the first port of call. It is a doctrine that underscores the necessity and appreciation that many a dispute are best suited to be dealt with by mechanism outside the mainstream Court system.



22. Succinctly put, the doctrine demands that ‘where there is 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. That was the edict by the apex Court at the same way before the dawn of the Constitution, 2010. It has stood the test of time and can only be left and nurtured to gain ground and respect and not be watered down.
23. Here the Court is told, in the Preliminary Objection, that there is or there are special mechanism under the Energy Act, best suit to deal with the Petitioner’s dispute in the Petition. That cannot be gainsaid or made debatable. The question however is whether the dispute filed before the Court fits for determination by the special mechanism. Hence the doctrine of exhaustion is not a complete bar for it has exceptions and it is not an ouster of jurisdiction which is merely postponed<sup>1</sup> pending exhaustion.
24. Back to whether this dispute can be conveniently handled by the mechanism under the Act, I note that there are at least three mechanisms provided. The first is the mandate of the Energy and Petroleum Regulatory Authority under Section 11 (i) of the Act which include investigation and determination of complaints or disputes between parties over any matter relating to licence and licence conditions under the Act. The second is the mandate of the Energy and Petroleum Tribunal whose jurisdiction under Section 36 of the Act is both original and appellate, excludes criminal jurisdiction but vests the power to grant equitable reliefs including but not limited to injunctions, penalties, damages and specific performance.
25. The third mechanism is that provided under Regulation 5, Energy (Complaints and Dispute Resolution) Regulations 2012, made pursuant to Section 167 of the Act. The statutes creates an obligation on every person carrying out any undertaking under the Act to establish a procedure for dispute resolution approved by the Commission.
26. Without specification, the 1<sup>st</sup> Respondent faults the Petitioner for having ignored or sidestepped the said special mechanism. For that objection to be merited, the law demands that the mechanisms be available, affordable, effective and efficient/expeditious.<sup>2</sup> The Court has set out the complaints by the Petitioner and the remedies he seeks. The Petitioner even high triggered and provoked by the single act of disconnection of electric supply to his premises, alleges violation of rights and denial of fundamental freedom under the Constitution. To this Court the question whether there has been a violation threat to violation of a right or denial of a fundamental freedom is the mandate of the High Court under Article 165. I consider that it is not within the mandate of any of the mechanisms to determine whether the rights of the Petitioner have been infringed or his freedoms denied. It is thus the finding of the Court that the Petitioner could not have approached the special procedures provided under the Act to remedy his grievances.
27. For that reason I find the objection not to be entirely merited in so far as the Petition seeks the determination of alleged violation of rights and denial of freedoms and the interpretation of the regulations if aligned to the Constitution.
28. I however refrain from commenting whether those mechanisms are effective and expeditious for I consider that those would be questions for determination in the Petition and to comment on the same would be preemptive.

<sup>1</sup> Mordern Holdings (EA) Ltd –vs- Kenya Ports Authority [2020] eKLR

<sup>2</sup> Night Rose Case (Supra)



29. The Preliminary Objection therefore fails and is dismissed. Let the Respondents now file Responses to the Petition within fourteen (14) days from the date of this Ruling.
30. Once filed, let the Petitioner file any Supplementary Affidavits; if need shall arise, together with written submissions within fifteen (15) days after service so that the Respondents also file and serve submissions within fifteen (15) days thereafter.
31. Mention on November 7, 2022 to confirm compliance and for further directions.

**DATED, SIGNED AND DELIVERED IN KAKAMEGA, ONLINE, THIS 30<sup>TH</sup> DAY OF AUGUST 2022.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of**

Prof. Moni Wekesa for the Petitioner

Mr. Ododa for the 1<sup>st</sup> Respondent

Mr. Chebon for the 2<sup>nd</sup> Respondent

Court Assistant: Kulubi

