



**Omondi v Kenya Power & Lighting Co. Ltd & 6 others (Constitutional Petition E324 of 2020)  
[2022] KEHC 13215 (KLR) (Constitutional and Human Rights) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13215 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E324 OF 2020**

**AC MRIMA, J**

**SEPTEMBER 30, 2022**

**BETWEEN**

**RONNIE OTENE OMONDI ..... PETITIONER**

**AND**

**KENYA POWER & LIGHTING CO. LTD ..... 1<sup>ST</sup> RESPONDENT**

**CPL NICHOLAS MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

**BARRACK OUMA ..... 3<sup>RD</sup> RESPONDENT**

**STELLAH MUTHEU ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 6<sup>TH</sup> RESPONDENT**

**THE CHIEF MAGISTRATE COURT, KIBERA LAW COURTS .... 7<sup>TH</sup>  
RESPONDENT**

**RULING**

**Introduction:**

1. This is a consolidated ruling in respect of three applications.
2. The applications are as follows: -
  - (a) The Notice of Preliminary Objection dated October 14, 2020 filed by the 1<sup>st</sup> Respondent, Kenya Power & Lighting Co Ltd, which challenged the jurisdiction of this Court.



- (b) The Notice of Motion dated November 20, 2020 by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein, Kenya Power & Lighting Co Ltd, Barrack Ouma and Stella Mutheu respectively seeking to review, set aside and vary orders of the Court issued on November 10, 2020
  - (c) The Notice of Motion dated December 17, 2020 filed by the Petitioner in respect to the disobedience the orders issued on November 10, 2020.
3. All the applications were variously opposed.
  4. By an order of this Court, all the three applications were heard together by way of written submissions whereupon parties highlighted thereon, hence, this ruling.
  5. This Court shall deal with the applications in seriatim.

**The Notice of Preliminary Objection:**

6. The objection impugned the jurisdiction of this Court.
7. It was tailored as follows: -
 

Take Noticethat the 1st respondent shall at the earliest opportune time raise a preliminary objection that this Honourable Court lacks jurisdiction to hear and determine this dispute and suit 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 Administration Act, 2015.
8. The objection was further supported by the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents and was opposed by the Petitioner.
9. The 1<sup>st</sup> Respondent filed written submissions dated October 27, 2020 in support of the objection. The submissions also applied to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as well.
10. The 5<sup>th</sup> and 7<sup>th</sup> Respondents, in support of the objection, filed joint Grounds of Opposition dated October 19, 2020 and written submissions dated on February 10, 2021 on both the objection and the Notice of Motion dated October 6, 2020. For clarity, the Notice of Motion dated October 6, 2020 is pending hearing.
11. In its written submissions, the 1<sup>st</sup> Respondent opened its arguments by urging the doctrine of jurisdiction. The decisions in Joseph Njuguna Mwaura & 2 Others vs Republic (2013) eKLR, Kenya Ports Authority vs Modern Holdings (EA) Limited (2017) eKLR, Owners of the Motor Vessel 'Lilian S' vs Caltex Oil (Kenya) Ltd (1989) KLR 1 and John Musakali vs Speaker County of Bungoma & 4 Others (2015) eKLR were cited in buttressing the essence of a Court's jurisdiction in a matter.
12. The 1<sup>st</sup> Respondent further submitted on the legal position in respect of preliminary objections. Reference was made to Mukisa Biscuits vs West End Distributors Ltd (1969) EALR 696.
13. Having referred to various constitutional provisions, the 1<sup>st</sup> Respondent submitted that this Court lacks jurisdiction over this matter courtesy of the Energy Act 2019,
14. According to the 1<sup>st</sup> Respondent, 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.



15. The 1<sup>st</sup> 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 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.
16. 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.
17. 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.
18. The 1<sup>st</sup> 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.
19. As regards the Petitioner's contestations on criminal allegations and matters, the 1<sup>st</sup> Respondent submitted that the issues had already been formally raised in an application before the Kibera Chief Magistrates Criminal Case No E873 of 2020 and shall be dealt with thereat.
20. The 1<sup>st</sup> Respondent, therefore, prayed for the dismissal of the Petition with costs.
21. The 5<sup>th</sup> and 7<sup>th</sup> Respondents supported the objection. The said Respondents mainly reiterated the position taken by the 1<sup>st</sup> Respondent.
22. The Petitioner opposed the objection.
23. In dismissing the objection, the Petitioner submitted that the same was based on disputed facts and as such it could not stand. The decision in [Emily N Mulanya vs Kenya Power and Lighting Company \(2008\) eKLR](#) was referred to in support.
24. The Petitioner further submitted that the facts in the matter were not settled and called for interrogation and ascertainment thereby making it impossible to raise the objection in the manner it was raised.
25. The Petitioner also drew the Court's attention to the fact that the issues raised in the objection were also part of the Notice of Motion dated November 20, 2020.
26. It was the Petitioner's call that the objection be dismissed with costs.
27. The Court will now consider the objection.
28. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.
29. To that end, the locus classicus decision in Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd (1969) EA 696. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -  
  
So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation,



or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

30. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 Others [2015] eKLR* and stated thus: -

Thus, a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

31. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors* case (supra) in *Civil Suit No 85 of 1992, Oraro -vs- Mbaja [2005] 1 KLR 141* when he observed as follows: -

I think the principle is abundantly clear. A 'preliminary objection', correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

32. In *John Musakali -vs- Speaker County of Bungoma & 4 others (2015) eKLR* the validity of a preliminary objection was considered in the following manner: -

The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.

33. Finally, in *Omondi -vs- National Bank of Kenya Ltd & Others {2001} KLR 579; [2001] 1 EA 177*, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -

In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters. What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done *ex debito justitiae* (as of right) but as a matter of judicial discretion.

34. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in *Petition No 7 of 2013 Mary Wambui Munene v Peter Gichuki Kingara and Six Others, [2014] eKLR*, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.

35. Focusing back to the case at hand, this Court has carefully considered the objection and the submissions. Whereas there are some facts which are not entirely agreed upon by all the parties on one hand, there are also pure questions of law raised on the other hand surrounded by agreed and settled facts. For instance, whether it is this Court or the Authority or the Tribunal with jurisdiction over this matter is a matter of law which must be determined in the first instance, since all parties agree that the



Petitioner's premises were initially connected and supplied by the 1<sup>st</sup> Respondent's power and that the supply was later disconnected. To that extent, there is concurrence on the factual issue.

36. Having said so, this Court finds that the jurisdictional issue in this matter was properly raised and the Court will deal with it.
37. It is the 1<sup>st</sup> Respondent's contention that the Petition violates some provisions of the Energy Act and the Regulations thereby the jurisdiction of this Court was improperly invoked.
38. Due to the centrality of the issue of jurisdiction in this matter, I will briefly deal with the same.
39. The Court of Appeal in Nakuru Civil Appeal No 119 of 2017 Public Service Commission & 2 Others vs Eric Cheruiyot & 16 Others consolidated with Civil Appeal No 139 of 2017 County Government of Embu & Another vs Eric Cheruiyot & 15 Others (2022) KECA 15 (KLR) in a decision rendered on February 8, 2022 had the following to say on the aspect of jurisdiction: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in 'Words and Phrases Legally Defined', Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1 Nyarangi, JA relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

A Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.



40. In *Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No 2 of 2011*, the Supreme Court reiterated its holding on a court's jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:
- (68). A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.
40. Returning to the matter at hand, there is no doubt that the basis of the Petition was the 1<sup>st</sup> Respondent's action of disconnecting the power supply to the Petitioner's premises and the subsequent arrest and arraignment of the Petitioner before a Court of law on some criminal allegations.
41. As a result of the said actions, the Petitioner instituted the instant 52-page Petition. The Petitioner dealt with the legal foundation of the Petition, the facts, the alleged violations of the *Constitution* in respect to Articles 28, 30, 46, 47, 49, 50 and 55, the unconstitutionality of Sections 87(a) and 82(1) of the *Criminal Procedure Code*, Cap 75 of the Laws of Kenya and the unconstitutionality of Sections 168(1)(a), (b), (c), (d), (e) and (f) and Section 168(2) of the *Energy Act*, 2019.
42. The Petitioner also sought a total of 33 prayers in the Petition ranging from orders of judicial review, injunctions, declarations, special damages of Kshs 25,000,000/=, general, exemplary and punitive damages, loss of future earnings among others.
43. It is the said Petition that the Respondents hold the view that this Court is not possessed of jurisdiction over.
44. 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*.
45. 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
46. 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.
47. 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.

48. 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.
49. A party aggrieved by the decision of the Authority may appeal to the Tribunal established under Section 25 of the *Energy Act*.
50. 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.
51. 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.
52. It is on the foregoing background that the 1<sup>st</sup>, 5<sup>th</sup> and 7<sup>th</sup> Respondents contended that Petitioner ought to have lodged his complaints before the Authority and the Tribunal.
53. 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 1<sup>st</sup> 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.
54. This Court, hence, finds that the Authority has no jurisdiction over the issues raised in the Petition.
55. 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.
56. 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 address the doctrine of exhaustion and its exceptions.
57. 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.



58. 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.
59. Drawing from the above, a look at the doctrine of exhaustion is of essence.
60. 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 (IEBC) 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.
43. 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 - vs- 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.
61. 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 \(IEBC\) & 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.
62. 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.

63. Further, in [Civil Appeal 158 of 2017, Fleur Investments Limited -vs- 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.
64. The High Court has variously reiterated the position that it is only the High Court and Courts of equal status which can interpret the [Constitution](#). (See [Royal Media Services Ltd -vs- Attorney General & 6 others \(2015\) eKLR](#) among others).
65. Turning back to the case at hand, it comes to the fore that most of the matters 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.
66. The Tribunal further has jurisdiction to apply and ascertain whether the [Constitution](#) was upheld. The duty is expressly provided for in Article 3 of the [Constitution](#). In other words, 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 [Constitution](#) is applied appropriately or otherwise.
67. This Court addressed itself to a like scenario in Nairobi (Milimani) [Constitutional Petition No E488 of 2021 \(consolidated with Petition No E465 of 2021\) Stephen Moseito Mirambo and Another vs Independent Electoral and Boundaries Commission & Others \(unreported\)](#). In that case, the High Court refuted the argument that the Public Procurement Administrative Review Board, an entity created under the Public Procurement & Asset Disposal Act, No 33 of 2015, did not have the power to determine whether the procuring entities complied with the [Constitution](#), but only the High Court.



68. In doing so, the Court expressed itself as follows: -

111. It is, therefore, apparent that the Procurement Act fuses the relevant aspects of the Constitution such that whenever the Procurement Act is applied, that can only be within the confines of the Constitution. It also means that the Review Board, being a creature of the Procurement Act must, in discharging its mandate, uphold and defend the Constitution and the law. Of course, that calling is expressly so provided for in Article 3 of the Constitution to the extent that every person, as defined in Article 260 of the Constitution, has an obligation to respect, uphold and defend the Constitution.
112. Putting it more succinctly, the Review Board has the jurisdiction to determine whether the Constitution and the law were violated by a procuring public entity in respect to public procurement and assets disposal proceedings.
113. This Court, therefore, takes great exception to the position that Tribunals, quasi-judicial bodies, State organs or any person, except Courts of law, cannot determine whether the Constitution and the law is infringed. That cannot, by any shred of imagination, be correct. The reason is simple. Article 3 of the Constitution and in mandatory terms, obligates every person, as defined in Article 260 of the Constitution, to respect, uphold and defend the Constitution.
114. Further, the people of Kenya expressly demanded that the Constitution applies to and be applied by the current and future generations. In its Preamble the Constitution states as follows:  
-

We, the people of Kenya-

Acknowledging

Honouring

Proud

Respectful

Committed

Recognising

Exercising

Adopt, Enact and give this Constitution to ourselves and to our future generations.

115. In discharging the said constitutional-calling, the persons, which include Tribunals and quasi-judicial bodies, must apply the Constitution and the law. A body which applies the Constitution and the law definitely has the capacity to understand and ascertain whether the very Constitution and law it is supposed to uphold is infringed. That can be the only reasonable rationale since the converse is to suggest that the persons do not understand and cannot therefore respect, uphold and defend the Constitution and the law. Such a finding will be in itself unconstitutional.
116. It is, hence, the finding and holding of this Court, that the Review Board has unfettered jurisdiction to determine whether the Constitution and the law is infringed in procurement and disposal proceedings by public entities.



69. Being satisfied that the Tribunal has powers to determine whether the Constitution was properly applied or otherwise, and further that the Tribunal has powers to issue appropriate equitable remedies, including damages, most of the reliefs sought by the Petitioner are within the confines of the Tribunal.
70. There are, however, some remedies sought which the Tribunal cannot issue. The remedies include the determination of the unconstitutionality of various provisions of the Criminal Procedure Code and the Energy Act. The provisions are Sections 87(a) and 82(1) of the Criminal Procedure Code, Cap 75 of the Laws of Kenya and Sections 168(1)(a), (b), (c), (d), (e) and (f) and Section 168(2) of the Energy Act, 2019. Others are the prayers seeking prerogative orders of Certiorari and Prohibition.
71. The above position is affirmed by Section 36(5) of the Energy Act which gives the Tribunal the power to grant equitable remedies, but not constitutional remedies.
72. The Petitioner in this case will, hence, have no appropriate and adequate audience before the Tribunal which is proportionate to the interests which the Petitioner wishes to advance in the Petition.
73. It would, therefore, amount to a travesty of justice for this Court to compel the Petitioner to seek remedies before the Tribunal, being an entity, which has no powers to grant such remedies. In such an instance, the High Court must stand up to its calling and deal with the matters at hand. Needless to say, the Petition raises serious constitutional allegations of violation of rights and fundamental freedoms and calls for the interpretation of the Constitution, which matters can only be dealt with by the High Court by dint of Article 165(3) of the Constitution.
74. The upshot of this discussion is that, given the nature of the grievances and the remedies sought in this matter, the jurisdiction of the Tribunal is ousted. The matters raised in the Petition can only be perfectly and comprehensively addressed by the High Court.
75. Consequently, this Court arrives at the finding that the objection is not merited. It fails on both fronts; that is the Authority and the Tribunal have no jurisdiction over the matters herein.
76. With such a finding, the Court will now deal with the Notice of Motion dated November 20, 2020 filed by the Petitioner herein.

**The Notice of Motion dated November 20, 2020:**

77. This Court will refer to the Notice of Motion dated November 20, 2020 to as ‘the first application’.
78. The first application sought the following orders: -
  1. Spent
  2. Spent
  3. That this Honorable Court be pleased to review and set aside its orders issued on November 11, 2020 compelling the 1<sup>st</sup> Respondent to install a valid electricity meter and restore supply of electricity power to the Petitioner’s business premises at stall E6 at Kenyatta Market in Kibra Sub-County pending the hearing and determination of the application dated October 6, 2020; and
  4. That cost of this Application be provided for.
79. It was supported by an affidavit sworn by one Ariel Mutegi Mbae, the 1<sup>st</sup> Respondent’s County Business Manager, Nairobi West. The 1<sup>st</sup> Respondent also stated that it had filed written submissions in support of the first application. However, as at the time of writing this ruling, this Court was yet



- to benefit from receipt of the same. The said submissions were not in the Court file; electronically or otherwise.
80. In precis, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents to the Petition contended that the Application was premised on important matters of evidence bereft of the court's knowledge. They lamented that the matter, originally poised for mention on November 11, 2020, proceeded on that day for hearing of the Application. This conversion, mischievously done so by Petitioner's Counsel, denied them an opportunity to present such new evidence. As a consequence, the Petitioner gained benefit from this absence.
  81. It was explained that the court ought to have known that there existed a power supply contract between the 1<sup>st</sup> Respondent and the landlord/owner/developer of stall E6 at Kenyatta Market Kibra Sub-County. Flowing from this, the Petitioner could not thus apply for and be granted an independent meter and power supply as he was not a stall owner. Thus, the court could not by law impose contrary terms as proposed by the Petitioner owing to the fact that no contract existed between the Petitioner and the 1<sup>st</sup> Respondent.
  82. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents further deplored that the Court ought to have firstly canvassed the Preliminary Objection before hearing the present Application. It was their conclusion that consequently, the issuance of orders in the present Application was inchoate.
  83. The Respondents further cited the Petitioner for misrepresentation. They maintained that contrary to the Petitioner's claims, the 1<sup>st</sup> Respondent had not communicated to the Petitioner that it was intent on withdrawing Kibera CMC Criminal Case No E873 of 2020 Republic vs Ronnie Otene Omondi.
  84. It was their conclusion that as a consequence thereof, the orders issued were unenforceable leaving the 1<sup>st</sup> Respondent in an artificially court-induced contempt. They added that had the court been made aware of the above facts, it would not have 'restored' the supply of electricity power to the Petitioner's business premises at stall E6 at Kenyatta Market in Kibra Sub-County in the interim.
  85. The 5<sup>th</sup> and 7<sup>th</sup> Respondents also supported the first application. They filed Grounds of Opposition and written submissions.
  86. They prayed that the first application be allowed as prayed.
  87. The Petitioner opposed the first application. He filed a Replying Affidavit sworn on April 19, 2021 as well as written submissions evenly dated.
  88. The Petitioner first laid a brief abridgment of the transpirations that occurred since filing his Application dated October 6, 2020. In particular, the Petitioner pointed out that the court judiciously exercised its discretion on November 10, 2020. This is after the court granted the 1<sup>st</sup> Respondent an opportunity to explain why the Petitioner's connection was not restored. In that regard, the said orders were only granted after the court interrogated the parties concerned. So that contrary to the Respondents' assertions, they were given ample opportunity before issuance of the orders.
  89. It was the Petitioner's contention that the 1<sup>st</sup> Respondent's assertions were baseless as no evidence was produced in support of their contention. Additionally, the Petitioner stated that in fact, the 1<sup>st</sup> Respondent accepted his application, as tenant of the suit premises, for the supply of power as well as the requisite charges. The 1<sup>st</sup> Respondent could not thus approbate and reprobate.
  90. In interpretation of the orders granted, the Petitioner elucidated that the purpose of those orders was to preserve the status quo of the subject matter. He added that the court had power to grant such orders regardless of the fact that it does not have jurisdiction to hear the matter on its merits. He



fortified this submission by relying on the case of *China Zhongxing Construction Company Ltd –vs- Eden Development Limited (K) [2020] eKLR.*

91. The Petitioner observed that the orders in force are temporary in nature. As such, the 1<sup>st</sup> Respondent will be given an opportunity to present its evidence during the substantive hearing of the case. This court, he added, is vested with jurisdiction to grant those orders even where the issues center on contractual relationships.
92. The Petitioner continued that the orders were granted having met the threshold set out in *Giella –vs- Cassman Brown & Co Ltd (1973) EA 358*, *Robai Kadili Agufa & another –vs- Kenya Power & Lighting Co Ltd [2015] eKLR*, *Kenya Power & Lighting Co Ltd –vs- Samwel Mandere Ogeto [2017] eKLR* and *Kenya Breweries Limited –vs- Washington Okeyo (2002) eKLR.*
93. Finally, the Petitioner urged this court to dismiss the Application as the Respondents had firstly not approached with clean hands and secondly, the Application failed to meet the threshold for grant of the orders sought.
94. The first application was mainly a review application. It was brought under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Orders 45 and 51 of the *Civil Procedure Rules.*
95. Review entails a Court making a departure from its earlier finding on an issue. A Court may do so on its own motion or upon application by a party. Review is discretionary.
96. In exercising such discretion, the Court must abide by the principles established for the exercise of such powers either by the law or settled judicial precedents.
97. The power of review in the High Court is anchored in the *Civil Procedure Act*, Cap 21 of the Laws of Kenya and the Civil Procedure Rules, 2010.
98. Section 80 of the *Civil Procedure Act* provides as follows: -  
Any person who considers himself aggrieved—
  - (a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - (b) By a decree or order from which no appeal is allowed by this Act,May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
99. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner: -  
Any person considering himself aggrieved—
  - (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
  - (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.



100. Courts have severally dealt with the issue of review. The Supreme Court in *Application No 8 of 2017, Parliamentary Service Commission -vs- Martin Nyaga Wambora & others [2018] eKLR*, quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and Another -vs- Shah [1968] EA*, upon establishing the following principles: -

[31] Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
  - a. As a result, a wrong decision was arrived at; or
  - b. It is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

101. The Court of Appeal in *Civil Appeal No 2111 of 1996, National Bank of Kenya vs Ndungu Njau* observed as follows in respect of reviews applications: -

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeds on an incorrect expansion of the law.

102. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules was considered by the High Court in *Miscellaneous Application 317 of 2018, Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR*. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression 'any other sufficient reason' appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.



- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
  - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
  - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
  - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
  - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
  - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
  - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
  - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
103. Returning to the case at hand, the first application was premised on the following two grounds:
- (i) That there were new and important matters of evidence;
  - (ii) There was an error apparent on the face of the record as matter was instead scheduled for a Mention on November 10, 2020 when the impugned orders were issued and further that there was a pending application that challenged the jurisdiction of the Court.
104. According to Order 45 of the Rules, for an Applicant to succeed on the ground of discovery of new evidence, the Applicant must demonstrate ‘the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made.’
105. The above requirement can be equated to the evidence referred to as ‘new and compelling evidence’ in Article 50(6) of the *Constitution*. Speaking of such evidence, the Supreme Court in *Col Tom Martins Kibisu vs Republic Petition No 3 of 2014 (2014) eKLR* presented itself thus: -
- [42] We are in agreement with the Court of Appeal that under Article 50(6), ‘new and compelling evidence’ means ‘evidence which was not available at the trial and which despite exercise of due diligence, could not have been availed at the trial’; and ‘compelling evidence’ implies ‘evidence that would have been admissible at the trial, of high probative value and capable of belief,



and which, if adduced at the trial would probably have led to a different verdict.' A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges; the criminal trial process, the conviction entered; or the sentence passed against the accused person.

106. In this case, the new and important evidence was that there existed a power supply contract between the 1<sup>st</sup> Respondent and the Landlord/owner /developer of the stall at the Kenyatta Market in Kibra Sub-County, which is the Petitioner's premises subject of this matter.
107. There is no doubt that the alleged contract was known to the 1<sup>st</sup> Respondent. However, on October 21, 2020 the matter came up before Court where the Petitioner pressed for prayer 2 of the Notice of Motion dated October 6, 2020.
108. In response to the prayer sought by the Petitioner, the 1<sup>st</sup> Respondent through Counsel Mr Ochieng, responded as follows: -
- No reconnection can be done without an application. The Petitioner ought to apply formally and we will consider the application. There is really no need of an order of the Court.
109. On hearing the parties, the Court then made the following orders: -
- (a) The PO dated October 14, 2020 shall first be heard and determined;
  - (b) The Respondent to file and serve written submissions within 7 days of this order;
  - (c) Upon service, the Petitioner and the other Respondent and the Interested Party do file and serve written submissions within 7 days;
  - (d) The highlighting of submissions on November 24, 2020;
  - (e) On the prayer for an order as sought in prayer 2 of the Notice of Motion, I hereby direct that the Petitioner shall first formally apply for power to the 1<sup>st</sup> Respondent. The matter may be raised later if the Petitioner is unsuccessful on application.
  - (f) The Petitioner shall serve a copy of this order upon the parties not before Court today and that will be in the next 3 days.
110. The Court, then made the following further order: -
- Mention on November 10, 2020 to confirm progress of the application and for further orders of the Court.
111. When the matter came up on November 10, 2020, the 1<sup>st</sup> Respondent was represented by Counsel, one Mr Macharia.
112. The Petitioner informed the Court that he had fully complied with the order of the Court and lodged the application and adhered to all requirements by the 1<sup>st</sup> Respondent, but unfortunately the 1<sup>st</sup> Respondent was not keen on the reconnection of the power supply.
113. On being asked by the Court about the progress of the power supply application made by the Petitioner, Counsel responded as follows: -
- We have no instructions on the application for reconnection as we have just taken over the conduct of the matter.



114. The Court, in consideration of the matter at hand and in line with the orders made on October 21, 2020 granted prayer 2 of the Notice of Motion dated October 6, 2020 which application was filed by the Petitioner.
115. The issue of the existence of the contract between the 1<sup>st</sup> Respondent and the alleged Landlord/owner/developer of the stall was, therefore, not a new discovery. The issue was all along within the knowledge of the 1<sup>st</sup> Respondent and the Court could have been informed of the same at the time it enquired from the 1<sup>st</sup> Respondent why the reconnection was not undertaken.
116. Despite such knowledge and the probing by the Court, the 1<sup>st</sup> Respondent intentionally opted to keep it to itself until when the impugned order was made.
117. On the basis of the law and the facts, this Court finds that the 1<sup>st</sup> Respondent has failed to raise to the ground of existence of new and important matter or evidence. The 1<sup>st</sup> Respondent's contention, therefore, fails.
118. The second ground was that there existed an error apparent on the face of the record. The ground was two-pronged. First, that the impugned order was issued when the matter was listed for a Mention and, second, that there was a pending objection to the jurisdiction of the Court.
119. On the first limb of the ground, the events surrounding the issuance of the orders on November 10, 2020 have been well captured in the preceding ground.
120. In a nutshell, the orders were rightly issued.
121. On whether a Court cannot issue any interim orders when its jurisdiction is impugned, the 1<sup>st</sup> Respondent did not refer to any law or decision on the same.
122. To this Court, the raising of an objection on the jurisdiction of a Court does not ipso facto deny the Court the power to issue any interim orders when the circumstances of the Court call for such. In any event, the raising of the objection is different from whether the same will see the light of the day.
123. On a proper consideration of the second ground, this Court finds that the same, as well, lacks any legal to stand on. The ground also fails.
124. The upshot is that the Notice of Motion dated November 20, 2020 which sought the review and setting aside of the orders made on November 10, 2020 is unsuccessful.

**The Notice of Motion dated December 17, 2020:**

125. The Notice of Motion dated December 17, 2020 was filed by the Petitioner.
126. The application sought the following orders: -
  1. Spent;
  2. Spent;
  3. That the Honorable Court does find that the 1<sup>st</sup> Respondent's Chief Executive Officer, Bernard Ngugi, the Company Secretary Imelda Bore, the County Business Manager, Nairobi West Sub-County, Ariel Mutegi Mbae, the Legal Officer, Justus Ododa and the Senior Security Officer, Nairobi West Sub-County, Stella Mutheu are in contempt of court for disobedience of the order of this court issued on November 11, 2020;



4. That upon grant of prayers 1, 2 and 3 above, the Honorable Court do impose a fine and/or a penalty of Kshs 5,000,000.00 (Kenya Shillings Five Million) against each contemnor and in default of payment of such fine all movable and immovable assets of each contemnor including land, vehicles and buildings be attached and sold in execution of this order to satisfy the penalty for contempt;
  5. That interest be charged upon prayer 4 at court rates until the date the contempt is purged;
  6. That upon grant of prayers 1, 2, and 3 above, the court do issue an order that the above mentioned BERNARD NGUGI, Imelda Bore, Ariel Mutegi Mbae, Justus Ododa and Stella MutheU be committed to civil jail for a period of 6 months;
  7. That upon grant of prayers 1, 2 and 3 above, the contemnors and the 1<sup>st</sup> to 4<sup>th</sup> Respondent herein be denied audience before this court until the contempt is purged;
  8. That upon grant of prayers 1, 2 and 3 above, the court do issue a declaration that the contemnors are unfit to hold public office;
  9. That the Honorable Court be pleased and do hereby order that the Officer Commanding Station, Capitol Hill Police Station ensures compliance with the order of this court issued on November 11, 2020.
  10. That the costs of this application be provided for.
127. In essence, the application sought to enforce the compliance of the orders of the Court made on November 10, 2020. It is an application in the nature of contempt of Court proceedings.
  128. As said earlier, the orders in issue were issued by this Court on November 10, 2020.
  129. The 1<sup>st</sup> Respondent alongside the cited persons did not dispute that the orders in issue were issued and that they were known to them. They further stated that they fully complied with the order of the Court by reconnecting the power supply.
  130. As to why it took some time for the 1<sup>st</sup> Respondent to reconnect the power supply, the 1<sup>st</sup> Respondent alleged that the delay was occasioned in the 1<sup>st</sup> Respondent's internal administrative processes which had strict institutional policies.
  131. This Court has carefully considered the application, the responses and the submissions.
  132. It is apparent that it took the 1<sup>st</sup> Respondent a considerable time to comply with the order despite its full knowledge. The reason is readily gathered from the first application which was filed to challenge the orders issued.
  133. It is also apparent that the 1<sup>st</sup> Respondent only chose to comply with the order of the Court upon the filing of the contempt of Court application.
  134. The reason given that the 1<sup>st</sup> Respondent that it needed time to comply with the order cannot be truthful and is only an afterthought.
  135. The order of the Court was very simple and clear. It called upon the 1<sup>st</sup> Respondent through its servants and employees to restore power supply to the instant premises.
  136. However, in a disposition sworn on November 20, 2020, the 1<sup>st</sup> Respondent through one Ariel Mutegi Mbae blatantly refused to comply with the order of the Court by stating as follows in paragraph 9 thereof as follows: -



That owing to the above apparent errors and new evidence, it would be impossible for the 1<sup>st</sup> Defendant not to default in complying with the orders issued by the Learned Judge. This has left the 1<sup>st</sup> Respondent in an artificially induced contempt situation where it cannot comply with the orders of the Court.

137. With such a brazen disobedience of the orders of the Court, perhaps it is important to look at the history of obedience of Court orders. As early as 1952, Courts have held that the duty to obey the law by all individuals and institutions is cardinal in the maintenance of the rule of law and due administration of justice. In *Hadkinson vs Hadkinson (1952) ALL ER 567*, the Court stated as follows:-

It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until it is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, LC said in *Chuck vs Cremer (1) (1 Coop temp Cott 342)*:

A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed.

138. Closer home, the Court of Appeal in *Refrigeration and Kitchen Utensils Ltd vs Gulabchand Popartal Shah & Another, Civil Application No 39 of 1990 (unreported)* stated that:

It is essential for the maintenance of the rule of law and good order that the authority and dignity of our Courts is upheld at all times.

139. In *TSC vs KNUIT & 2 others (2013) eKLR*, the Court observed as follows:-

38. The reason why Courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the Judiciary or the Court or even the personal ego of the Presiding Judge. Neither is it about placating the applicant who moves the Court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.

140. There is a long line of decisions upholding the above position including *Shah & Another t/a Lento Agencies vs. National Industrial Credit Bank Ltd (2005) 1 KLR 300*, *Mulika vs Baharini Farm Ltd. (1985) KLR 227* among others.

141. Further, the 26<sup>th</sup> President of the United States of America, one Theodore Roosevelt, once said: -

No man is above the law and no man is below it; nor do we ask any man's permission to obey it. Obedience to the law is demanded as a right; not as a favour.

142. The Court of Appeal in *Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR* capped it all in stating as follows: -

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by the *Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy. We think we have said enough to send this important message across.



143. Without much ado, there is ample evidence that at least the said Ariel Mutegi Mbae deliberately declined to promptly comply with the orders of the Court issued on November 10, 2020.
144. This Court, therefore, finds that the said Ariel Mutegi Mbae deliberately and without any lawful cause disobeyed the order of the Court issued on November 10, 2020.
145. This Court, hence, finds the said Ariel Mutegi Mbae in contempt of Court.

**Disposition:**

146. Drawing from the above, the three applications are hereby determined as follows: -
  - a. The Notice of Preliminary objection dated October 14, 2020 be and is hereby dismissed.
  - b. The Notice of Motion dated November 20, 2020 be and is hereby dismissed.
  - c. The Notice of Motion dated December 17, 2020 is hereby allowed to the extent of finding one Ariel Mutegi Mbae in contempt of Court for disobeying the orders of the Court issued on November 10, 2020.
  - d. The said Ariel Mutegi Mbae shall, on a date to issue, show cause why he/she should not be sentenced for contempt of Court.
  - e. In the interest of time, the Notice of Motion dated October 6, 2020 shall be subsumed into the main Petition and the interim orders issued on November 10, 2020 shall remain in force until the Petition is heard and determined or until further orders of the Court.
  - f. Further, with a view to maintain the substratum of the Petition, prayer 5 of the Notice of Motion dated October 6, 2020 is hereby issued pending the determination of the Petition.
  - g. The 1<sup>st</sup> Respondent shall bear the costs of the applications.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**A. C. MRIMA**

**JUDGE**

Ruling No. 1 virtually delivered in the presence of:

Mr. Arende, Learned Counsel for the Petitioner.

Mr. Ouma, Learned Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

Miss Chiringa, Learned Counsel for the 5<sup>th</sup> and 7<sup>th</sup> Respondents.

Miss Mwenda, Learned Counsel for the 6<sup>th</sup> Respondent.

Kirong/Benard – Court Assistants.

