Gona & 56 others v Kenya Power & Lighting Company (Civil Suit E064 of 2022) [2023] KEELC 20214 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20214 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT E064 OF 2022

LL NAIKUNI, J

SEPTEMBER 21, 2023

BETWEEN

CHARO GONA ..... 1ST PLAINTIFF

NICODEMUS MUIA ..... 2ND PLAINTIFF

SISILIA MARIA OPONDO & 54 OTHERS ..... 3RD PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY ..... DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for its determination is a Chamber Summons application dated 9th May, 2023 filed by the Plaintiffs/Applicants herein - Charo Gona, Nicodemus Muia, Sisilia Maria Opondo and 54 others. As a way of brief background, this application was made following a ruling delivered by this Court on 28th March, 2023 uphoding a Preliminary Objection that had been raised by the Defendant/Respondent herein. Being aggrieved by the said ruling, the Plaintiffs/Applicants formally moved this Court seeking to have the said decision set, varied and/or reviewed based on set out grounds. This is the main gist of this ruling hereof.

II. The Plaintiff's Claim

2. From this application, the Plaintiffs/Applicants sought for the following orders:-

    i. Spent

    ii. That there be a temporary stay of ruling issues on 28th March, 2023 and subsequent orders issued thereof pending the hearing and determination of this application.

    iii. That the Applicants be given unconditional leave to review the Ruling and Order.

iv. That the orders issued on the 28th March, 2023 be set aside and the submissions by the Applicant be taken into consideration before a final determination is made.

3. The application was grounded on testimonial facts and averments made out under the eight (8) Paragraphed Supporting Kipkurui Ng'eno Birir an Advocate of the High Court of Kenya, sworn and dated on 9th May, 2023 and two (2) annextures marked as "KNB – 1 & 2" annexed thereto. He averred as follows:-

a. This Honourable Court delivered its Ruling on 28th March, 2023. Before then, we filed our written Submissions on 30th November, 2022 marked as "KNB – 1" and which was placed before Court file.

b. They were taken aback during the delivery of the ruling when the Court intimated that our submission were not in the Court file.

c. They felt that if their submissions were considered, the Court would have come to a different finding having raised weighty issue that the Act the Respondent was relying on was inapplicable in the Applicants' case.

d. The Deponent was surprised when he heard about the issue because they had diligently filed their submissions.

e. It was in respect of that they applied for the said Ruling and Order to be set aside and the matter to be adjudged a fresh on merit.

III. The Plaintiff's response & Claim.

4. Despite of being served with this application the Plaintiff never filed any response. In sense, the application was unopposed. On 22nd June, 2023 the Court allowed the application dated 9th May, 2023 with Costs. It is based on this that the Court agreed to set aside, vary and review its orders of 28th March, 2023 awaiting the re – considering the submissions filed by the Defendants on 30th November, 2022 and marked as "KNB – 1" respectively.

5. The Preliminary Objection by the Defendant, the Kenya Power & Lighting Company, dated 29th September, 2022 challenging the jurisdiction of this court to entertain the matter in view of the provisions of the *Energy Act*, 2019.

6. The Honourable Court on the 28th March, 2023 delivered a ruling upholding the Preliminary objection dated 29th September, 2022 and consequently striking out the suit.

7. The Application was allowed Ex - Parte by the Honourable Court on 22nd June, 2023 where this Honourable Court directed that:

a. That the Chamber summons application dated 9th May, 2023 be and is hereby allowed in its entirety with costs.

b. That the Honourable Court to deliver its final Ruling on the matter on 18th September, 2023.

8. The Plaintiffs through their amended Plaint dated 28th June, 2022 prays for;

a. A declaration that Plaintiffs quiet possession of the houses, schools and churches should not be interfered with as they rightfully built away from the wayleave.

b. A permanent injunction to issue restraining the Defendant, by himself, agents, servants and/or anybody claiming through him from interfering with the ownership and/or usage of the

Plaintiffs' houses, premises, schools and churches and any other structure in regard to the wayleave the Defendant is alleging.

c. That an order for a report from Government Surveyor made to establish the true position of the Defendant's claim.

d. Costs and interests.

e. Such further and/or relief as the Honourable Court may deem fit and expedient so as to grant.

9. The Plaintiffs' case is that the Defendant herein sent his workers and/or agents to put 'X' marks on all houses at Jomvu Brightstar area, Jomvu alleging that the same were in the wayleave area. The Defendant's action unless restrained by way of injunction, will demolish the said structures without giving the Plaintiffs a hearing ad ascertaining the true position of the houses affected.

10. The Plaintiffs are alarmed and distressed for fear of demolition of their houses, which they have owned and occupied together with their houses, which they have owned and occupied together with their families for a long time now and that they have nowhere to go.

11. On 30th November, 2022 while opposing the objection raised by the Defendant, the Plaintiffs filed a three (3) Points grounds of opposition. These were: -

a. That the *Energy Act* 2019 did not apply to the Plaintiffs' case.

b. That the Defendant had no jurisdiction (sic) to put (X) on the houses near the wayleave as the same was done by the Kenya Electricity Transmission Company Limited (KENTRACO) Limited.

c. That the Preliminary objection was incompetent, misconceived, misplaced and was an abuse of the process of this Honourable Court and the same ought to be dismissed with costs.

12. For the reasons the Plaintiffs urged the Court to dismiss the said preliminary objection.

IV. The Defendant's case

13. The Defendant filed its Statement of Defence dated the 5th October, 2022 in which it entirely denied the Plaintiffs' claim. The Defendant further contested this court's jurisdiction to hear and determine the instant suit.

14. The Defendant's Notice of Preliminary Objection dated 29th September, 2022 reads as follows;

> " That this Honourable Court lacks jurisdiction to hear and determine this dispute and suit as against the defendant and together with all consequential orders should be struck out with costs as the same offends the provisions of sections 3(1), 10; 11(e),(f), (i),(k)&(1);23; 24; 36; 40; 42 and 224(2)(e) of the *Energy Act*,2019 together with Regulations 2, 4,7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations,2012 as read together with Article 159(2)(c) and 169(1)(d) and (2) of *the Constitution* of Kenya, 2010 and sections 9(2) and(3) of the *Fair Administrative Action Act*,2015."

15. When the matter came up for directions, the parties agreed to dispense with the Preliminary Objection first and by way of written submissions.

V. Submissions

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

17. However, as indicated and as pointed out by the Plaintiffs/Applicants although they filed their written submission on 30th November, 2022 and placed in the Court file, but inadvertently the Court never got an opportunity to see and consider it. Be that as it may, on 22nd, June, 2023 the Honourable Court agreed to set aside and vary the previous orders so that it may consider the filed submissions and now draw this Final Ruling herein.

A. The Written Submission by the Defendant

18. On 26th October, 2022 the Defendant through the firm of Messrs. Joseph Atwoli Advocates filed their written submissions dated 25th October, 2022. The Learned Counsel submitted that the instituted this suit through an amended plaint dated 28th June 2022 and an amended Notice of Motion dated 28th June,2022 together with a supporting affidavit of Nicodemus Muia sworn on the same date. In the Amended plaint dated 28th June 2022, the Plaintiff sought the following orders;

    a. .....

    b. A permanent injunction restraining the defendant, by himself, agents, servants, and/or anybody claiming through him from interfering with the ownership and/or usage of the plaintiffs' houses, premises, schools, and churches and any other structure in regard to the wayleave the defendant is alleging.

    c. That a temporary injunction to issue restraining the Respondent, by himself, agents, servants and/or anybody claiming through him from interfering with the ownership and/or usage of the Applicant's houses, premises, schools and churches and any other structure in regard to the wayleave the respondent is alleging pending the hearing and determination of this application.

    d. That the Officer Commanding Station (OCS), Jomvu Police Station do ensure compliance.

    e. That costs of the Application be provided be provided for.

19. On the Notice of Preliminary objection, the Learned Counsel submitted that the Defendant filed a Notice of Preliminary Objection. In the Notice of Preliminary Objection, the defendant urges the Honourable court to dismiss the suit with costs and strike out all consequential orders. The Defendant asserts that the issues raised by the Plaintiffs against the Defendant are those that should be dealt with under the *Energy Act*,2019 in the first instance. The Notice of Preliminary Objection is essentially raised on the grounds that this Honourable Court lacks jurisdiction to handle this suit, as it offends the provisions of:

    a. Section 3(1),10;11(e), (f), (1), (k) &(D) ; 23; 24; 36; 40; 42; and 224(2)(e) of the *Energy Act*,2019;

    b. Regulations 2,4,7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations,2012;

    c. Article 159(2)(c) and 169(1)(d) and (2) of *the Constitution* of Kenya, 2010; and

d. Sections 9(2) and (3) of the Fair Administration Act, 2015.

20. The Defendant submitted that this court case is purely about wayleaves as illustrated by paragraphs a, c, and d of the grounds on the Amended Notice of Motion dated 28.06.2022 and paragraphs 4,5,6,7,8, and 9 of the Amended Plaint dated 28.06.2022 and as such the Honourable Court has no jurisdiction to hear and determine this matter.

21. The Learned Counsel submitted that the foundational basis of the defendant's Preliminary Objection is on the question of jurisdiction, which has been settled by the superior courts and as such binding on thisHonourable Court. In "Adero Adero and Another – Versus - Ulinzi Sacco Society Limited [2002] eKLR" it was held that:

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

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

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

23. Again, the Supreme Court in "United Millers Ltd vs. Kenya Bureau of Standards Directorate of Criminal Investigations &;5 Others [2021] eKLR", while addressing similar circumstances was emphatic that:

> "(26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao&148 others; SC Petition No 3 of 2016, [2019]eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.[27] In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine Petition No. 4 of2021 or the instant application for conservatory or stay orders."

24. The Learned Counsel submitted that the jurisdiction in this present matter is with the Energy and Petroleum Regulatory Authority and Energy and Petroleum Tribunal, who have been expressly set out in the *Energy Act*, 2019 and we therefore urge the Honourable Court to find that it lacks jurisdiction and proceed to strike out this matter with costs.

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

> " It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice and that is jurisdiction. The authority of court is determined by the existence or the lack of jurisdiction to hear and determine dispute. In essence, jurisdiction is the first hurdle that a Court will cross before it embarks on its decision-making function."
>
> "In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act."

26. Further, the Court of Appeal in "Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR", said as follows:

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

27. The Learned Counsel submitted that in a more recent decision, "Phoenix of EA Assurance Company Limited vs SM Thiga t/a Newspaper Service [2019] eKLR", the Court of Appeal held that:

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

28. The Counsel submitted that the Court of Appeal in the case of "Kenya Ports Authority – Versus - Modern Holdings [E.A] Limited [2017] eKLR" held that:

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

29. The Learned counsel submitted that the issue of jurisdiction has been raised at the earliest available opportunity by the defendant and we urge the Honourable Court to decide the issue right away, before delving into the merits of the matter before it.It is trite law that the Court derives its jurisdiction from *the Constitution* or statute and as such it must be slow to arrogate itself jurisdiction. In the locus classicus case of "Owners of the Motor Vessel "Lillian S" – Versus - Caltex Oil (Kenya) Ltd [1989] KLR 1" Justice Nyarangi held as follows:

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

30. To add in the case of "John Musakali – Versus - Speaker County of Bungoma & 4 others [2015] eKLR" the court held that:

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

31. Further, under the provision of Section 5 of the *Civil Procedure Act*, 2010 limits courts in exercise of their jurisdiction. The limitations of jurisdiction can either be express or implied. Section 5 states:

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

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

33. The Learned Counsel on Constitutional provisions on jurisdiction submitted that the provision of Article 159(2)(c) of *the Constitution* expressly recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism.Further Article 169(1)(d) of *the Constitution* makes provision for the establishment of any other court or local tribunal by an Act of Parliament, other than the courts established pursuant to Article 162(2). This

Article of *the Constitution* recognizes the role of Parliament to create Tribunals to hear and determine certain disputes.

34. The Learned Counsel submitted that the Energy &Petroleum Regulatory Authority (the Authority) and the Energy & Petroleum Tribunal (the Tribunal) are such creatures of Parliament through the *Energy Act*, 2019 (the Act) and by the powers donated by Article 169(1)(d). It is worth to note that the *Energy Act*, 2019 repealed the *Energy Act*, 2006. A five-Judge bench of the High Court in the case of "Law Society of Kenya – Versus - Centre for Human Rights and Democracy & 13 others [2013] eKLR" stated of jurisdiction thus:

> " The scope of the exercise of any court's jurisdiction in Kenya is dictated by Section 3 of the *Judicature Act* which provides that:
>
> "The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-
>
> a. Constitution

35. The Court of Appeal in "Joshua Sembei Mutua – Versus - Attorney General &2 others [2019] eKLR" in determining the issue of jurisdiction held;

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

36. On the statutory provisions on the Jurisdiction of the Energy & Petroleum Regulatory Authority the Learned Counsel submitted that the key legal framework giving rise to the Preliminary Objection herein is the *Energy Act*, 2019 (the Act). The Act, at section 3(1) deals with the issue of conflict of law and the said section states that:

> 3(1) If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters-
>
> (a) The importation, exportation, generation, transmission, distribution, supply or use of electrical energy; (Emphasis ours)
>
> (b) .....
>
> (c) all works and apparatus for any or all of these purposes.

37. The Learned counsel referred to a recent case of "Abidha Nicholus – Versus - Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) [2021] eKLR", the court in analysing section 3 of the *Energy Act*, 2010 stated as follows:

> " The import of the above (section 3) is that the *Energy Act* 2019 prevails over any other Act of Parliament or law or law but definitely not over *the constitution* of Kenya 2010. However, there is no indication that the Act is in conflict with *the Constitution* of Kenya 2010.Ifthere was any such conflict, then *the Constitution* would prevail."

38. Further the *Energy Act*, 2019 under section 2 defines the following key terms:

> " Works" means-
>
> (a)electric supply lines, machinery, lands, buildings, structures, earth works and water works, and includes any apparatus or things of whatsoever description, required for the importation, exportation, generation, transmission, distribution supply and use of electrical energy, or
>
> (b) machinery, land, buildings, structures, earth works and water works, and includes any apparatus required for the production, importation, exportation, storage, transportation, distribution and supply of any other form of energy. distribution; means the ownership, operation, management or control of facilities for the movement or delivery of energy to enable supply to consumers;
>
> "Distribution" means the ownership, operation, management or control of facilities for the movement or delivery of energy to enable supply to consumers;

39. The Learned counsel submitted that under the provision of Section 9 of the Act establishes the Energy &Petroleum Regulatory Authority (Authority) and section 11 sets out the powers of the Authority.

a) Under Sections 11 (i) the Authority has the power to:

i. investigates and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act.

b) To add under sections 11(e), (f), (k)& (l) the Authority has the powers to:

(e) make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under this Act;

(f) issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled;

(k) issue orders or directions to ensure compliance with this Act;

l)impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;

40. These powers of the Authority are buttressed by the provision Section 167 of the Act which grants the Cabinet Secretary power to make regulations for several purposes. One such purpose for which the regulations are made is as set out in Section 167 (1) (m) that is:

> (m)prescribing the procedures for hearings, settlement of disputes and any proceedings before the Authority.

41. The Learned Counsel further submitted that Part X of the Act deals with repeals, savings and transitional clauses. Specifically, the provision of Section 224(2)(e) of the Act provides as follows:

(e) any subsidiary legislation issued before the commencement of this Act shall, as long it is not inconsistent with this Act, remain in force until repealed or revoked by subsidiary legislation under the provisions of this Act and shall, for all purposes, be deemed to have been made under this Act.

42. The Learned counsel submitted that on 25th May 2012, the then Minister for Energy gazetted the Energy (Complaints and Dispute Resolution) Regulations, 2012 (the Regulations) under the provision Section 63 and 110 of the *Energy Act*, 2006 (repealed) as the Legislative Supplement No.15 vide Kenya Gazette Supplement No. 49 of 2012. The provision Sections 3, 9, 10, 11 (e), (f), (i), (k) &; (1); 23; 24; 36; 40; 42; 159 (3); 160 (3); and 224 (2)(e) of the *Energy Act*, 2019 as read with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 gives the Authority jurisdiction to handle disputes similar to the one that the Plaintiff has filed herein.

43. Regulation 2 of the Energy (Complaints & Disputes Resolution) Regulations 2012 states as follows:

> 4) These regulations shall apply to any person who has a complaint or a dispute regarding any licence, permit, contract, code, conduct, practice or operation of any party or any matter regulated under the Act

44. Further, Regulation 4 of the Regulations provides for the nature of the disputes that ought to be heard by the Authority. It provides thus:

> 4)These regulations shall apply to complaints and disputes in the following areas-
>
> a) Billing, damages, disconnection, health and safety, electrical installations, interruptions, licensees practices and procedures, metering, new connections and extensions, reconnections, quality of services, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
>
> b) Any other activity and/or matter regulated under the Act.

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

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

46. The Learned Counsel submitted that under the sections of the *Energy Act*, 2019 and the provisions of the Energy (Complaints and Disputes Resolution) Regulations, 2012, the Authority has powers to investigate and determine complaints or disputes between parties and grant equitable reliefs mentioned therein. We submit that, pursuant to the foregoing provisions, this Honourable Court has no jurisdiction to hear and determine the suit or even grant the reliefs sought by the Plaintiff as against the Defendant. The appropriate forum with jurisdiction is the Energy and Petroleum Regulatory Authority.

47. On the statutory provisions on the Jurisdiction of the Energy & Petroleum Tribunal, the Learned Counsel submitted that section 25 of the Act has established the Energy & Petroleum Tribunal (the

Tribunal) for the purposes of hearing and determining disputes and appeals. Subsequently, section 36 provides for the jurisdiction of the Tribunal as follows:

> 36.
>
> (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Actor any other Act.
>
> (2) ....
>
> (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.
>
> (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration.
>
> (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance.
>
> (6) The Tribunal shall hear and determine matters referred to it expeditiously. (Emphasis ours)

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

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

48. The Learned Counsel submitted that it is public knowledge that the Defendant is a public utility company engaged in the bulk purchase, transmission, distribution and retail supply of electricity and therefore licensed within the meaning of section 2 of the *Energy Act*,2019 and as listed in the Third Schedule of the *Energy Act*, 2019. The Third Schedule of the *Energy Act*, 2019 on its part lists all Energy Sector Entities within the country including the defendant herein. The third party contemplated under this section is anyone else who is affected by the acts or omissions of any licensee under the Act.

49. Under sub - section (5) the Tribunal has powers to grant equitable reliefs mentioned therein. The Plaintiffs in its application seeks injunctive reliefs mentioned on the face of the Application. On the other hand, section 37 of the Act provides for the procedure for review and appeal of the decisions of the Tribunal, where it states that an appeal lies in the High Court. The section provides as follows:

> 37.
>
> (1) The Tribunal may, on its own motion or upon application by an aggrieved party, review its judgments and orders.

(2) Judgments and orders of the Tribunal shall be executed and enforced in the same manner as judgments and orders of a court of law.

(3) Any person aggrieved by a decision of the Tribunal may, within thirty days from the date of the decision or order, appeal to the High Court.

(4) The law applicable to applications for review to the High Court in civil matters shall, with the necessary modifications or other adjustments as the Chief Justice may direct, apply to applications for review from the Tribunal to the High Court.

50. The Learned Counsel submitted that on 26th September 2008, the then Chairman of the Energy Tribunal gazetted the Energy Tribunal Rules, 2008 (the Rules) under paragraph 12(4) of the *Energy Act*, 2006(repealed) as the Gazette Notice No.9163 vide Kenya Gazette Vol CX-No.78 dated 26th September, 2008. The Rules clearly sets out the procedures before the Energy and Petroleum Tribunal (formerly the Energy Tribunal). It is certain from the *Energy Act*, 2019 that a dispute resolution procedure has been established and therefore, the same must be followed. This proposition is supported by the findings of the court in the case of "Cyrus Komo Njoroge – Versus - Kiringa Nioroge Gachoka& 2 Others [2015] eKLR", where the court held that:

> " The principle that where *the Constitution* and or statute has provided a dispute resolution procedure, then that procedure must be strictly followed is well established." Court further held: "The Plaintiff must therefore exhaust the remedy stipulated by the *Land Registration Act*. The upshot of the foregoing is that the suit herein is dismissed."

51. The Learned Counsel submitted that going by the provisions of the provision of Section 36 of the *Energy Act*,2019 this Honourable Court has no jurisdiction to hear and determine the suit or even grant the reliefs sought by the plaintiff as against the defendant. The alternative judicial forum with jurisdiction is the Energy and Petroleum Tribunal.

52. On the issue of fair administration of justice, the Learned Counsel submitted that the issue of the jurisdiction of the courts has further been extensively addressed by the Fair Administration Act, 2015. The provision of Section 9(2) and (3) of the Fair Administration Act,2015 further illustrates the appropriate forum for resolution of disputes. The section states as follows:

> 9(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

53. The Learned Counsel submitted that it is the Plaintiffs' case and assertion is that the Defendant in exercising its powers and undertaking its duties provided for under the *Energy Act*, 2019, has purportedly disconnected her electricity supply. It is noteworthy that whereas the plaintiff's case is guised as a claim against the defendant, on keen perusal it is revealing that it is purely a complaint to be

pursued pursuant to the *Energy Act*, 2019. Section 9 of the Fair Administration Act, 2015 is couched in mandatory terms where the superior courts or subordinate courts are stripped off jurisdiction to hear matters where alternative dispute resolution mechanism have not been exhausted. In "Night Rose Cosmetics (1972) Ltd – Versus - Nairobi County Government & 2 Others [2018] eKLR" the Honourable Court in upholding a Preliminary Objection on this ground held:

> " I should emphasize that the use of the word shall in section 9 of the Act cited above is worth noting. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of what effect should be given to their directions. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory...
>
> The word 'shall' when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation."

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

> " Article 159 of *the Constitution* which provides for principles governing courts and tribunals "...imposes on the Judiciary the obligation to promote alternative dispute resolution hence the utilization of Tribunals such as the Energy Tribunal falls within this objective."
>
> The court further held: "It has been held that where a statute provides for a mode"

55. The Learned Counsel submitted that it is settled that matters energy, there are alternative forums where such disputes are to be handled. There are plausible reasons as to why the Authority or the Tribunal are vested with jurisdiction in energy matters and the above captioned powers and the sameshould be strictly adhered to. In the case of "Mutanga Tea & Company Ltd – Versus - Shikara Limited & Another [2015] eKLR", the Court of Appeal in addressing the importance of adhering to alterative dispute resolution mechanism noted:

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

56. In the recent case of "Republic – Versus - Public Procurement Administrative Review Board & Energy Sectors Contractors Association, Zoec – Zhepedc - Nginu Ex parte Kenya Power & Lighting Company Limited [2020] eKLR" the court also noted that:

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

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

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

58. In "Josiah Tatiya Kipelian – Versus - Dr. David ole Nkadienye&2 Others [2014] eKLR", Justice Mabeya had occasion to pronounce himself thus:

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

59. The Learned counsel submitted that the question that the Honourable court should ask is if the Plaintiffs have exhausted the mechanism under the *Energy Act*, 2019 dealing with the dispute. The answer is in the negative, the Plaintiff has elected to ignore the mechanism laid down for resolution of the instant dispute and now invites the court to invoke craft and innovation and assume jurisdiction which it does not have. On account of the foregoing, it is beyond doubt that the Plaintiffs' action of filing this suit before this Honourable Court as against the defendant amounts to an abuse of the court process.

60. The Learned counsel submitted that having established that there exist competent alternative dispute resolution mechanisms available to the Plaintiff and the same are bestowed with the requisite capacity to grant the orders sought, the Honourable Court should find that it lacks jurisdiction to entertain this matter at first instance. From the reading of the aforementioned sections of the *Energy Act*, 2019, it is evident that the Energy and Petroleum Regulatory Authority is bestowed with jurisdiction to handle the complaint as against the defendants. On the other hand, the Energy and Petroleum Tribunal is clothed with jurisdiction to grant equitable reliefs, including injunctions, penalties, damages and orders of specific performance as sought by the Plaintiffs. In view of the foregoing, the orders that the Plaintiffs seeks against the Defendant can be issued by the Tribunal by dint of the provision of Section 36 (5) of the *Energy Act*, 2019. The section states as follows:

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

61. The Learned Counsel submitted that by doing so, the plaintiff will not be prejudiced, as her rights will be protected by either the Authority or the Tribunal, as the case may be. They relied on the case of "Thomas Schering – Versus - Nereah Michael Said & Others [2019] eKLR" whereby in upholding a preliminary objection of the same nature, the court held that:

> " From the provisions of the *Energy Act*, it is apparent that Parliament in its wisdom wanted such disputes to be taken away from the mainstream courts to be handled by a specialized body known as the Energy Regulatory Commission."

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

> " ...disputes of this nature are the preserve of the Energy Regulatory Commission and appeal therefrom lie with the Energy Tribunal as established under section 108 of the *Energy Act*."
>
> "It is clear from the above that the Plaintiff's first port of call should be the Energy Regulatory Commission and not this Court. Where the law has granted jurisdiction to other organs of Government to handle specific grievances, the courts must respect and uphold the law."
>
> "In our understanding, court have no jurisdiction in matters over which other arms of Government have been vested with jurisdiction to act."
>
> "The Plaintiff has not approached as a first point of cal. it would be an un-warranted intrusion into the Jurisdiction of another organ if this Court were to purport to handle this dispute. It is in the interest of the proper, orderly and efficient administration of justice that proper procedures provided for in the hierarchy of dispute resolution be followed and that the organs mandated to arbitrate over such disputes be respected and allowed to perform their Statutory responsibilities. That is why those procedures were formulated and such organs established."

63. The Learned Counsel also place reliance on the case of "James Kibugi Githinji – Versus - Kenya Power & Lighting Company Limited [2016] eKLR" wherein in determining that the court did not have jurisdiction, the judge held that:

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

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

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

65. The Learned Counsel also submitted that in the recent decision in "Kenya Power and Lighting Co. Ltd – Versus - Geofrey Orina Oganga [2020] eKLR" the Judge held that:-

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

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

> "Flowing from the provisions I have cited, I hold that any disconnection whether illegal or otherwise falls within the scope of disputes to be referred to the ERC. The Act and Regulations point to the fact that there is statutory scheme for resolving disputes between the appellant and its customers and the respondent was obliged to follow the procedure established. In Peter Muturi Njuguna – Versus - Kenya Wildlife Service NKU CA Civil Appeal No. 260 of2013 [2017] eKLR, the Court of Appeal reiterated this principle that, "It is abundantly clear to us that where there is a specific procedure as to redress of grievances, the same ought to be strictly followed. I find that the learned magistrate erred in dismissing the preliminary objection. The subordinate court had no jurisdiction to hear the matter. I allow the appeal and uphold the preliminary objection. Consequently, the suit is struck out."

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

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

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

> "7. The tenor and import of the doctrine of exhaustion of remedies is that, where a dispute resolution mechanism has been established by a statute outside the mainstream courts, that mechanism should be exhausted before the jurisdiction of the mainstream courts is invoked. Put differently, where there exists a legitimate statutory primary dispute resolution mechanism, such

as a tribunal, the mainstream courts should be the fora of last resort and not the first port of call.

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

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

16. In the end, the 2nd respondent's preliminary objection dated 29/6/2020 is upheld to the extent that the petition herein is struck out on the ground that the petitioner has not exhausted the primary dispute resolution mechanism established under the *Energy Act*, No. 1 of2019."

69. Whereas the High Court in Kisumu made the same holding in the case of "Vitalis Ouma Osano – Versus - Kenya Power and Lighting Company PLC [2021] eKLR" and held that:

> "I do find that this dispute revolves on development of Energy infrastructure namely Electricity Supply lines on the alleged Plaintiff's land which is private land. The Plaintiff's aggrieved with the act of the defendant.
>
> Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector arising under the Act to the Tribunal. The plaintiff has no option but to refer the dispute to the Tribunal has the Jurisdiction to grant the orders being sought by the plaintiff.
>
> Indeed Article 159 (2) c of *the Constitution* of Kenya 2010 provides that in exercising Judicial Authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration....
>
> In view of the above, this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act. The Preliminary Objection is upheld and the suit is struck out. Costs to the defendant."

70. The Learned Counsel submitted that this sound jurisprudence in your consideration and determination of this present matter. On account of the above, it is imperative that this Honourable Court affords opportunity to the statutory bodies mentioned, to exercise their jurisdiction with respect to the matter. Article 159 of *the Constitution* is instructive that in exercising judicial authority the court shall inter alia be guided by the principle of promoting alternative forms of dispute resolution. This Honourable Court must also take judicial notice of the huge backlog of cases before the courts and therefore take cognizance of the fact that encouraging and promoting these statutory bodies would in essence substantially reduce the number of cases filed before this court and enhance principle of expeditious disposition of cases.

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

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

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

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

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

74. The Learned Counsel submitted that the Plaintiffs being fully aware of the mechanisms put in place for parties to pursue reprieve in instances such as these and to ventilate the issues raised in the plaint elected to prematurely drag the defendant to court. The defendant has expended considerable resources in this matter and thus ought to be awarded costs as reprieve. In the case of "Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & Another [2016] eKLR" while quoting with approval the case of "Republic – Versus - Rosemary Wairimu Munene ex-parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Ltd" stated as follows:

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

75. In the case of "Party of Independent Candidate of Kenya – Versus - Mutula Kilonzo & 2 others", while citing the case of "Nedbank Swaziland Ltd v. Sandile Dlamini No.(144/2010)-2012 SZHC 30 (2013)" where it was stated that the underlying principle in awarding costs are that the award of costs is a matter of discretion of the Judge to be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at and that the general rule is that costs are awarded to the successful party, unless there good ground for not doing so. The Learned Counsel asked the Court to be guided by these authorities.

76. The Learned Counsel conclude by stating that the suit herein as against the defendant is one that exclusively falls under the jurisdiction of the Energy & Petroleum Regulatory Authority or in the

alternative the Energy & Petroleum Tribunal as such the plaintiff must pursue its claims there. The defendant prays that the suit herein be hereby dismissed with costs.

B. The Written Submissions by the Plaintiffs

77. On 30th November, 2022, the Learned Counsel for the Plaintiffs the Law firm of Messrs. Birir & Company Advocates filed their written submissions dated 23rd November, 2022. Mr. Birir Advocate submitted that the Defendant's Notice of Preliminary Objection is misconceived, incompetent, misplaced and is an abuse of the process of this Honourable Court and that the same ought to be dismissed with costs.

78. The Learned Counsel argued that the Sections relied upon by the Defendant did not apply to the issues raised in the suit. He sated that the *Energy Act*, 2019 as enacted and as per the preamble was to:-

    i. Provide National and County Government functions in relation to energy;

    ii. Provide for establishment, power and functions of energy sector entities;

    iii. Promotion of renewable energy; exploration, recovery and commercial utilization of the geothermal energy;

    iv. Regulation of midstream and downstream petroleum and coal activities;

    v. Regulation, production, supply and use of electricity and other energy forms;

    vi. For connected purposes.

79. The Learned Counsel submitted that a lock at the preamble was evident that the same had nothing to do with the 3rd Parties but it had everything to do with regulating those in the energy sector, in the circumstances. Therefore, without belabouring the point, the Learned Counsel submitted that the Preliminary Objection was misplaced, misguided, misapplied and should be dismissed with costs

VI. Issues for Determination

80. I have considered the gist of the preliminary objection dated 29th September, 2022 as well as the submissions thereon. I have also considered the relevant constitutional and statutory frameworks together with the prevailing jurisprudence on the key question falling for determination in the preliminary objection.

81. In order to arrive at an informed, reasonable, just and equitable decision, the Honourable Court has condensed the Subject matter to the following three (3) issues for its determination. These are:

    a. Whether the Preliminary Objection dated 29th September, 2022 by the Defendant met the thresholds of an objection as stipulated under the law and precedents.

    b. Whether this Honourable Court is clothed with the Jurisdiction to entertains this suit filed by the Plaintiffs herein taking into the account the doctrine of exhaustion of remedies.

    c. Who will bear the Costs of this Preliminary objection.

VII. Analysis and Determination

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

82. According to the Black Law's dictionary, a preliminary objection is defined as being:

> " In case before the tribunal, an objection that if upheld, would render further proceedings before the tribunal impossible or unnecessary..."

83. An objection to the court's jurisdiction may be raised as a preliminary objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from *the Constitution* or Statute. If a court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. This position was stated by the Supreme Court in the case of "Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank Limited & 2 Others (2012) eKLR".

84. The purpose of a preliminary objection was broadly discussed in "Charles Onchari Ogoti – Versus - Safaricom Ltd & anor [2020] eKLR" as follows:

> "
>
> " (9) This court is aware of the leading decision on Preliminary Objections where he Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:
>
> Law, JA.:
>
> "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 point may dispose of the suit. Examples are an objection on 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."
>
> Newbold, P.:
>
> "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 points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."
>
> [10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed, and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of *the Constitution* of Kenya 2010.

(11) In case cited by the 1st Respondent, David Nyekorach Matsanga & Another – Versus - Philip Waki & 3 Others [2017] eKLR, the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) after considering various holdings of the Supreme Court of Kenya on question of Preliminary Objection held as follows:

"We quickly turn to the question whether we have before us a Preliminary Objection proper. Traditionally, the case of Mukisa Biscuit Manufacturing Co Ltd – Versus - West End Distributors Ltd [1969] EA 696has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in Nitin Properties Ltd – Versus - Singh Kalsi & another [1995]eKLR also captured the legal principle when it stated as follows:

"A Preliminary Objection 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."

In Hassan Ali Joho & another -Versus - Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

"a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit"

85. From the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court's discretion.

86. In the case of "Artar Singh Bhamra & Anor – Versus - Oriental Commercial Bank – Civil Suit No. 53 of 2004 – High Court Kisumu" the court held:

" A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."

87. A perusal of the amended Plaint and annexures including the Notice of Motion application dated 28th June, 2022 by the Plaintiffs against the Defendant claiming that they are residents of Miritini area within the County of Mombasa and dwellers of Jomvu Brightstar area, Jomvu Sub-county and owned houses there. Their case is that the Defendant herein sent its workers and/or agents to put 'X' marks on all houses at Jomvu Brighstar area, Jomvu alleging that the same were in the wayleave area. The Plaintiffs have sought injunctive prayers. The Plaintiffs contend that the Defendant is not mandated to put 'X' on their houses and that it is only Kenya Electricity Transmission Company Limited (KETRACO) Limited and that the *Energy Act* does not apply to this suit.

88. The Defendant's contention is that the matter before this court falls within the jurisdiction of both the Energy and Petroleum Tribunal and the Energy and Petroleum Regulatory Authority. Being that the Plaintiffs have sued the Defendant, the issue being raised in the preliminary objection is whether this Court has the requisite jurisdiction to entertain this instant suit and if the Plaintiffs have exhausted other avenues of recourse available to them. This to me is a noble legal question which goes to the root of the matter herein. It is a point of law which could dispose of the case depending on how it goes. I therefore find the issue raised satisfy the principle in the "Mukisa Biscuit Manufacturing Co. (Supra)". Therefore, I shall proceed to consider them and determine them accordingly.

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

89. Under the issue, the Defendant has pleaded that the Court does not have jurisdiction to hear and determine the suit that the same falls within the jurisdiction of both the Energy and Petroleum Tribunal and the Energy and Petroleum Regulatory Authority, in the case of "United Millers Limited – Versus - Kenya Bureau of Standards & 5 others [2021] eKLR" the Court of Appeal held; -

> " In Council – Versus - Trans Mara County Council & Another [2000] eKLR and in the case of Godffrey Muthinja Kabiru, (Supra) this Court stated thus:
>
> We may further add that in the case of Albert Chaurembo Mumba &7 others – Versus - Maurice Munyao & 148 others (2019) eKLR the Court in addressing similar circumstances was emphatic that:
>
> 'In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute'."

90. I have considered the Preliminary Objection and do find that the interpretation section of the *Energy Act* Cap 314 Laws of Kenya describes a person as any public or Local authority, company, person or body of persons and therefore the defendant is one of the persons described by the section. Section 46 of the *Energy Act* states: -

> 46.
>
> (1) 'No person shall enter upon any land, other than his own-
>
> (a) To lay or connect an electric supply line; or
>
> (b) To carry out a survey of the land for the purposes of paragraph (a) except with the prior permission of the owner of such land.
>
> (2) The permission sought in sub-section (1) shall be done by way of notice which shall be accompanied by a statement of particulars of entry'.

91. The provision of Section 170 of the *Energy Act* 2019 provides:

> " 170. A person may develop energy infrastructure, including but not limited to electric supply lines, petroleum or gas pipelines, geothermal or coal infrastructure, on, through, over or under any public, community or private land subject to the provisions of this Act and relevant written law."

92. In the case of "Alice Mweru Ngai – Versus - Kenya Power & Lighting Co Ltd [2015] eKLR" the court struck out a similar case for lack of jurisdiction and for having failed to approach the relevant forum for dispute resolution set out by an Act of Parliament.

93. Section 25 of the *Energy Act* 2019 provides:

> " 25. There is established the Energy and Petroleum Tribunal, hereinafter referred to as the Tribunal for the purpose of hearing and determining disputes and appeals in accordance with this Act or any other written law."

94. Sections 36 of the Act provides:

> " 36.
>
> (1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act. (2) 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."

95. I do find that this dispute resolves on development of Energy infrastructure namely Electricity Supply line on the alleged Plaintiffs' property which is private land. The Plaintiffs are aggrieved with the act of the Defendant.

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

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

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

98. The Court of Appeal in the case of "Geoffrey Muthinja & Another – Versus Samuel Muguna Henry & 1756 others (2015) eKLR" was also elaborate that;

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

99. See also the case of "Speaker of the National Assembly – Versus - James Njenga Karume (1992) eKLR" where the Court of Appeal emphasized that where there is a clear procedure prescribed by *the Constitution* or by a statute for the redress of a particular grievance, that procedure should be strictly followed and exhausted before invoking the jurisdiction of the court.

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

101. The Plaintiffs contend that the Defendant do not have the jurisdiction to mark their houses and only KETRACO Limited who are mandated to mark buildings for demolition. I have had the pleasure to peruse the documents and annexures attached by the Plaintiffs and the pictures clearly indicate that the same was marked 'X' by KPLC which is the Defendant in this suit. I am concerned with the Plaintiffs averment being that the Defendant they have bought the action against is one already provided for under the *Energy Act*. It is not KETRACO Limited that they have laid their claims on but Kenya Power and Lighting Company which they have expressly made the suit against.

102. This Honourable Court is guided by a similar case of "Vitalis Ouma Osano – Versus - Kenya Power and Lighting Company PLC [2021] eKLR" the court held that: -

> "I do find that this disputes revolves on development of Energy infrastructure namely Electricity Supply lines on the alleged Plaintiff's land which is private land. The Plaintiff is aggrieved with the act of the defendant.
>
> Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector arising under the Act to the Tribunal. The plaintiff has no option but to refer the dispute to the Tribunal. The Tribunal has the Jurisdiction to grant the orders being sought by the plaintiff.
>
> Indeed Article 159 (2) c of *the Constitution* of Kenya 2010 provides that in exercising Judicial Authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration.
>
> In view of the above, this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act. The Preliminary Objection is upheld and the suit is struck out. Costs to the defendant."

103. The provision of Section 36 of the Act bestows the jurisdiction to hear and determine all the matters referred to it, relating to the Energy and Petroleum Sector arising under the Act to the Tribunal. The plaintiff has no option but to refer the dispute to the Tribunal. The Tribunal has the Jurisdiction to grant the orders being sought by the plaintiff.

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

105. Section 9 of the fair Administration Act provides:

> " 9.
>
> (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
>
> (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
>
> (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
>
> (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
>
> (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal."

106. I do fully agree with the Learned Counsel for the Defendant that the Defendant act of wanting to constructing the way leaves in the Plaintiffs' land and the 'X' marks made by the Defendant's workers and/or agents is a decision that affects the rights of the plaintiff and therefore is an administrative action.

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

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

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

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

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

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

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

VIII. Conclusion and Disposition

111. Consequently, having conducted such an elaborate and indepth analysis of the framed issues surrounding the objection raised by the Defendant herein, the Honourable Court finds on preponderance of probability that the objection has merit. Therefore, the Court finds as follows:-

a. That the Preliminary Objection dated 29th September, 2022 be and is hereby found to have merit and is upheld and the suit is struck out. The matter stands closed.

b. That this dispute ought to have been referred to the Energy and Petroleum Tribunal in accordance with the Act.

c. That the costs of the preliminary objection and the suit are awarded to the Defendant.

It Is So Ordered Acordingly.

FINAL RULING DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

.....

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

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:

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

b. No appearance for the Plaintiffs

c. No appearance for the Defendant