



**Kenya Power & Lighting Company v Marwa (Environment and Land Appeal  
E002 of 2023) [2025] KEELC 3569 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3569 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E002 OF 2023  
FO NYAGAKA, J  
APRIL 23, 2025**

**BETWEEN**

**KENYA POWER & LIGHTING COMPANY ..... APPELLANT**

**AND**

**CHRISTINE WANKIO MARWA ..... RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate Hon. Dickson Onyango  
(CM) delivered on the 3rd April, 2022 in Migori CMC No. E012 of 2021)*

**JUDGMENT**

**Introduction**

1. This is an appeal arising from the ruling of Honourable Dickson Onyango Chief Magistrate, delivered on 13<sup>th</sup> April, 2022 in Migori CMC No. E012 of 2021.
2. The Appellant filed a Memorandum of Appeal dated 2<sup>nd</sup> October, 2023 appealing against the said ruling on the following grounds: -
  1. The Learned Magistrate erred in law and fact in finding that the Magistrate's Court had jurisdiction on disputes arising from the Energy Act contrary to the applicable laws and in particular Sections 25 and 36 of the Energy Act of 2019.
  2. That the Learned trial Magistrate failed to appreciate the doctrines of judicial abstention and exhaustion consequently reaching an erroneous decision.
  3. That the Learned trial Magistrate erred in law and fact by concluding that the defendant had trespassed on the plaintiffs land at an interlocutory stage.
  4. That the Learned trial Magistrate erred in law and fact in failing to take into consideration and appreciating the grounds of the preliminary objection dated 16<sup>th</sup> April 2021.



5. The Learned trial Magistrate failed to appreciate the supremacy of the Energy Act over all other legislation in relation to issues arising from the Energy Act 2019.
3. The Appellant seeks orders allowing the appeal and setting aside the trial magistrate's judgment dated 13<sup>th</sup> April, 2022. He also prays that the preliminary objection be upheld and the Respondent's case in the lower court be dismissed with costs.

### **Brief Facts**

4. The Respondent had filed a suit against the Appellant vide a plaint dated 10<sup>th</sup> March, 2021 alleging that the Appellant had trespassed onto the suit property and erected electric poles and cables. She sought for Kshs. 300,000/= compensation for the wayleaves and a declaration that the Appellant's actions were illegal.
5. The Appellant in response filed its statement of defence and preliminary objection on jurisdiction all dated 16<sup>th</sup> April, 2021.
6. The preliminary objection was heard on a priority basis where it was canvassed by way of written submissions. The trial magistrate in his ruling dated 13<sup>th</sup> April, 2022 dismissed the preliminary objection.
7. The Appellant being dissatisfied with the ruling filed the present appeal which was canvassed by way of written submissions.

### **Submissions**

8. Counsel for the Appellant filed his submissions dated 3<sup>rd</sup> November, 2023 where he identified two issues for determination. The first issue was whether the court erred in concluding the Appellant had trespassed on the Respondent's land at an interlocutory stage. While submitting in the affirmative, he relied on the case of Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA and argued that it was not in dispute that the issue was the alleged illegally erected power lines. He submits that the trial magistrate concluded that the Appellant had failed to abide by the provisions off Section 171 and 173 of the Energy Act ousting the Tribunal's jurisdiction. He further submits that the trial magistrate jumped the gun and erred in fact and law by making a determination on the substantive suit as opposed to dealing with the preliminary issue. It was counsel's submission that the trial magistrate made the said finding without having heard the suit in order to establish whether or not there was trespass. He submits that the trial magistrate's reliance on the case of Rachael Nelima Wanyonyi V Kenya Power Co. Ltd [2018] eKLR was misdirected since in the present matter the Appellant had filed its defence yet in the said case there was no defence and that the Energy Act of 2019 had not been enacted.
9. The second issue was whether the court erred in concluding that the dispute did not fall within the ambit of the Energy and Petroleum Tribunal. It was counsel's submission that the operations of the Appellant as a public body was regulated by the Energy Act with its regulations, Energy (Complaints and Disputes Resolution) Regulations 2012. He submits that the same dealt with complaints and disputes by persons regarding license, permit, contract, code, conduct and practice or operations of any party or matter regulated under the Act. He relied on Section 25 and 36 of the Energy Act which establishes the Energy and Petroleum tribunal and submits that the Respondent had not exhausted the said dispute resolution mechanism as provided under the Act. It was counsel's submission that Section 36 (1) and (3) made it mandatory for any dispute either on compliance or non-compliance with Sections 171-173 to be handled by the Tribunal. He submits that the trial magistrate erred when



he found that there was no evidence on record to demonstrate that either the Appellant or Respondent was a licensee under the *Energy Act*. He added that the P.O directed the court on the specific legal provisions that established the Appellant as an energy entity. He relied on the case in *Elijah Mutai & 10 Others V Kenya Power & Lighting Company Limited* [2020] eKLR and the Court of Appeal case in *Mutanga Tea & Company Ltd V Shikara Limited & Another* [2015] eKLR and submits that the tribunal was vested with the original jurisdiction in energy matters.

10. Counsel relied on Article 159 (2) (c) and 169 (1) (d) of *the constitution* and Section 2 and 9 of the Fair Administration Act. It was his argument that there were mandatory terms that the high court or subordinate courts had been stripped off jurisdiction to hear matters where alternative dispute mechanisms had not been exhausted. He relied on the case of *Night Rose Cosmetics (1972) Ltd V Nairobi County Government & 2 Others* [2018] eKLR and *Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 Others* [2015] eKLR. He submits that the Energy & Petroleum Tribunal comprised of experts in matters energy. It was his submission that in the case of *Kisumu ELC Petition No. 7 of 2020 Abidha Nicholas V KPLC & Others*, both the ELC court as well as the Court of Appeal found that the Energy and Petroleum Tribunal had the original jurisdiction in dealing with issues that emanated from the *Energy Act*.
11. Counsel for the Respondent on the other hand filed his submissions dated 11<sup>th</sup> January, 2024 where he submitted on two issues. The first issue was that the appeal was incompetent and ought to be dismissed or struck out immediately. He submits that the Appellant had not sought leave to appeal out of time from the trial magistrate's court that made the ruling dated 13<sup>th</sup> April, 2022 as provided for under Section 75(2) of the *Civil Procedure Act*. He also relied on the case in *Kisumu CA No. 96 of 2016 Rayleigh W Wanyama V Lorna Mukwana Wanyama & 3 Others* and submits that failure to obtain leave before lodging the appeal was fatal and incurable.
12. The second issue was whether the trial court erred in law and in fact in finding that it had jurisdiction to hear the matter thus dismissing the Appellant's preliminary objection. It was counsel's submission that the preliminary objection did not fall within the parameters of a preliminary objection as highlighted in the case of *Mukisa Biscuit Manufacturing Ltd v West End Distributors (1969) EA*. He submits that the objection was based on Section 3(1) of the *Energy Act* which he argues that the same did not oust the lower court's jurisdiction to hear and determine the case before it. He submits that if a dispute of interpretation were to arise, it could not be disposed by way of a preliminary objection since evidence had to be taken first. It was his submission that as established under Section 36 of the *Energy Act*, 2019, the tribunal only had jurisdiction when the Appellant was a licensee of the Respondent which was not the case in the present suit. He further submits that were there was no existence of a licensor-licensee relationship, the tribunal had no jurisdiction. He relied on the case of *Ayadem Company Ltd V Kenya Power Co. Ltd (2017) eKLR*. He submits that the ratio-decidenti in the High court decisions were that as long as the Appellant was not a licensee of the Respondent where it allegedly erected the power lines, then it was an ordinary trespasser under the ordinary jurisdiction of the court. It was his submission that it did not oppose the tribunal's jurisdiction in so far as dispute resolution within the concerned ambit but that the Respondent and Appellant were not in a licensor-licensee relationship. He went on to submit that the doctrine of exhaustion was not applicable in the instant case since there was no licensee-licensor relationship between the Appellant and Respondent.

### **Analysis And Determination**

13. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:
  1. Whether the appeal is merited.



2. Who should bear the cost of the appeal.
14. Being a first appeal, the court relies on a number of principles as set out in *Selle and another V Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”
15. To begin with Section 79G of the *Civil Procedure Act* provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
16. It is not in dispute that the Appellant made an application before the present court where he sought leave to file the appeal out of time. It is also not in dispute that leave was granted on 16<sup>th</sup> October, 2023. It is this court’s view that the argument by the Respondent that the Appellant ought to have sought leave to file the appeal before the trial court is rather misplaced since it was an appeal from a subordinate court to the high court which procedurally did not require leave from the lower court.
17. In the case of *Nicholus V Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* [2023] KESC 113 (KLR) the court held as follows:

“In addressing the conundrum placed before us, we must remind ourselves that, what is in dispute before this Court is the applicability of these provisions to the appellant’s claim and not the true meaning of the provisions of either EMCA or the *Energy Act*. This is because the provisions of EMCA or the *Energy Act* do not expressly oust the jurisdiction of the ELC in respect of the procedure for the determination of disputes that involve the management of the environment or issues of petroleum and energy. In the ordinary course of events, the ELC still has original jurisdiction over the matters that are handled by NEMA, unless such jurisdiction is specifically and expressly ousted in a constitutionally compliant manner. The same holds true for proceedings under the *Energy Act*.”
18. In the said case, the Supreme Court identified one of the Appellant’s complaint to be that KPLC trespassed on his property, dug holes, and erected electricity poles thereon without notice to him or his authority to do so. That, in substance, is the case currently before this court. The Supreme Court then proceeded to hold that:

“Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court



for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.”

19. I have keenly perused the court records and it is a fact that there was no agreement between the Appellant and Respondent for the erection of electricity poles on the suit land. In addition, the claim by the Respondent is clearly that of trespass as alleged under paragraph 4 of her Pleint.
20. This court being guided by the above authority, I find that the trial court was right in its finding that indeed there was no licensor-licensee relationship between the parties as provided for under the [Energy Act](#), 2019. It is noteworthy that the learned trial magistrate did not determine the matter substantively but only gave a scenario if the court would find that there was trespass by the Appellant as stated in the pleadings in line with the provisions of the [Energy Act](#).
21. In the end this Court finds that the appeal lacks merit. It is hereby dismissed with costs to the Respondent.
22. It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 23<sup>RD</sup> DAY OF APRIL 2025**

**HON. DR. IUR NYAGAKA**

**JUDGE**

