Nyagudi v Kenya Power & Lighting Co Ltd (Civil Case 1 of 2023) [2025] KEHC 3298 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3298 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL CASE 1 OF 2023

DK KEMEI, J

MARCH 20, 2025

BETWEEN

HON KENNEDY ODHIAMBO NYAGUDI ..... PLAINTIFF

AND

KENYA POWER & LIGHTING CO LTD ..... DEFENDANT

RULING

1. The Defendant herein has filed a Notice of Preliminary Objection dated 18th February 2025, seeking the following reliefs:

    a. That at the time of filing this suit, this Honourable Court lacked jurisdiction to hear and determine this matter pursuant to the provisions of Section 61 (3) of the *Energy Act* of 2006.

    b. That notwithstanding the above, this Honourable court lacks jurisdiction to hear and determine this suit and should be struck out with costs as the same offends the provisions of Section 3, 10, 11 (e), (f), (i), (k), and (l); 23;24;36;40;42;159 (3);160 (3) and 224 (2) (e) of the *Energy Act*, 2019 together with Regulations 2,4,7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159(2) (c) and 169 (1) and (2) of *the Constitution* of Kenya, 2010 and Sections 9 (2) and (3) *Fair Administrative Action Act*, 2015.

2. The said Preliminary Objection was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.

3. Vide submission dated 26/2/2025, the Defendant submitted that the preliminary objection has been raised on good grounds. It was submitted that the same complies with the principles set out in the case

of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696 at Page 700 where the court held as follows:

> "…..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 is argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court…."
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> Further,a preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increases costs and, on occasion, confuse the issues, and this improper practice should stop."

4. The Defendant further submitted that the jurisdiction of this court has been prematurely invoked because the Plaintiff was under obligation to exhaust the alternative dispute resolution mechanisms prescribed under the *Energy Act* 2006 as repealed by the *Energy Act* 2019 and the Energy (Complaints and Dispute Resolution) Regulations, 2012. The Defendant contended that the Plaintiff should have filed his claim with the Energy Regulatory Commission which is tasked under Section 61 (3) of the *Energy Act* to hear and determine disputes relating to (a) any charges; or (b) the application of any deposit; or (c) any illegal or improper use of electrical energy; or (d) any illegal defects in any apparatus or protective devices; or (e) any unsuitable apparatus or protective devices. Further, Rule 4 of the Energy (Complaints and Disputes Resolution) Regulation 2012 lists the complaint and dispute to which the regulation applies and should be referred to the Energy Regulatory Commission. It was submitted that the *Energy Act* aforesaid make provisions for appeals from the decisions of the Energy Regulatory Commission as well as appeals thereon to the Energy Tribunal. It was therefore the view of the Defendant that the Plaintiff should have first exhausted these two avenues before coming to this court. The Defendant therefore is of the view that the Plaintiff should stick to the doctrine of exhaustion which imposes an obligation on parties to exhaust any alternative dispute resolution mechanism before approaching the courts which is in line with the provisions of Article 159 (2) (c) of *the Constitution*. It was finally submitted that the Plaintiffs' grievances against the Defendant relates to on alleged or illegal disconnection of power which falls within the ambit of the regulations under the *Energy Act* and therefore, by filing this suit in this court, the Plaintiff has sidestepped the regulatory framework.

5. The Defendant finally submitted that this court should find merit in the preliminary objection and proceed to dismiss the Plaintiff's suit with costs.

6. It was submitted for the Plaintiff that the preliminary objection is not founded in law and that the same is a tactic to delay the matter which has been in court for the last nine (9) years. It was submitted that the preliminary objection does not comply with the principles set out in the Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696 at Page 700 in that the court requires to investigate certain facts. It was also submitted that whereas the Energy Regulatory Commission has jurisdiction to hear and determine complaints on any charges or any alleged defects in any apparatus, the said commission did not oust the jurisdiction of the High Court to hear and determine the same matter since under Article 165 of *the Constitution*, the High Court has unlimited original jurisdiction in criminal and civil matters as well as jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. It was also submitted that the Defendant is acting in bad faith by filing the present

preliminary objection yet the matter was about to kick off for hearing. It was submitted that had the Defendant been serious, then it should have sought the matter early enough and refer it to the Energy Regulatory Commission before defending it in this suit. Again, the Plaintiff took issue with the conduct of the Defendant in participating in the matter all along which is clear proof that it has submitted itself to the jurisdiction of this court and hence this court should proceed to determine the case. It was submitted that it would be grossly unfair to allow the instant objection which has been brought late in the day as an attempt to derail the hearing and conclusion of the matter which has been pending since 2016. Finally, it was submitted that this court had issued orders for compliance by the Defendant in 2016 but which was not obeyed by the Defendant. The Defendant must now be bound by the maxim of equity – "he who comes to equity must come with clean hands." It is the view of the Plaintiff that the Defendant should not be allowed to frustrate the Plaintiff any further and that its preliminary objection should be dismissed with costs.

7. I have considered the preliminary objection together with the rival submissions. I find the only issue for determination is whether this court has the requisite jurisdiction to hear and determine this suit.

8. It is trite that a preliminary objection on grounds of jurisdiction can be raised at any stage of proceedings. Even though the Defendant has raised the said preliminary objection rather late in the day, it is still within its right to raise it for the court's consideration. As the same has been raised, this court must determine it first before embarking on further proceeding because whenever an issue of jurisdiction is raised by parties to a suit, the same must be dealt with by the court as a matter of priority. A preliminary objection has been described in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696 at Page 700 as follows:

9. "…..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 is argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court…."

> Further, a preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increases costs and, on occasion, confuse the issues, and this improper practice should stop."
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> From the foregoing, the preliminary objection entails three attributes inter alia; that it must have been pleaded and that it must arise by clear implication out of the pleadings; that if argued as a pure point of law, it may dispose of the suit; that it must be argued on the assumption that all the facts pleaded by the opposite party are correct and that it cannot be allowed if any fact has to be ascertained or if what is sought is the exercise of the court's discretion. In a nutshell, the preliminary objection must raise pure points of law in order to succeed. The thrust of the objection is that this court lacks jurisdiction to entertain the suit. In my view, this is a moot point of law warranting this court to determine it. Jurisdiction is a fundamental issue in any case. The late Justice Nyarangi observed in the case of Owners of Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Ltd [1989] eKLR that jurisdiction is everything and that the moment a court establishes that it has no jurisdiction to determine a matter before it, it must down its tools.

10. The Defendant has contended that this suit ought to have been filed or lodged before the Energy Regulation Commission (ERC) pursuant to the provisions of the *Energy Act* 2006 as amended in 2009 which brought about *Energy Act* 2019, and the Energy (Complaints and Dispute Resolution)

Regulations, 2012. Pursuant to Rule 4 of the said regulations, complaints and disputes that have been raised should be referred to the said Energy Regulation Commission. The same provides as follows:

a. Billing, damages, disconnection, health and safety, electrical installations, interruptions, license practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights of way in relating to the generation, transmission, distribution, supply and use of electrical energy.

b. Damages, adulteration under dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products; and

c. Any other activity and /or matter regulated under the Act.

Further, Section 107 of the *Energy Act* provided a two tier system regarding resolution of disputes in that the Act provided that complaints and disputes be first dealt with by the Energy Regulatory Commission and thereafter, appeals be made to the Energy Tribunal. From the foregoing, it would appear that the Plaintiff's claim ought to have been presented before the two forums for adjudication. In that regard, it would appear that the Plaintiff has prematurely moved this court. I am in agreement with the decision of Majanja J, held in the case of Kenya Power & Lighting Company Limited v. Samwel Mandere Ogeto [2018] KEHC 5779 (KLR) where he held as follows:

" 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 v. Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [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.

Similarly, Lady Justice Njoki Mwangi in the case of Royal Reserve Management Company Ltd Vs Kenya Power & Lighting Company Ltd [2017] eKLR, while dismissing an application relating to energy disputes for lack of jurisdiction, highlighted Section 61 (3) of the *Energy Act*, 2006, and the attendant regulations. She held that the Energy Regulatory Commission (now succeeded by the Energy and Petroleum Regulatory Authority, EPRA) had well-laid-out procedures in place for the hearing of cases such as the one before the court as follows: -

> " it is clear from the foregoing provisions that the *Energy Act* contains elaborate provisions on the matter that the ERC can hear and determine. The said Commission also has powers to appoint Directors, Officers or other staff for the proper discharge of the functions of the Commission under the *Energy Act*. it therefore follows that the ERC is well equipped with the necessary expertise to resolve the dispute at hand. Contrary to the argument by counsel for the Respondent, the provisions of Section 61 (4) of the *Energy Act* do not mean that a matter that has been filed in court cannot be referred to the ERC.
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> A narrow interpretation of the provisions of Article 165 (2) (a) of *the Constitution* would mean that each and every dispute that is civil or criminal in nature would be heard in the High Court. Article 169 (1) (d) of *the Constitution* makes provision for the establishment of any other court or local tribunal by an Act of Parliament through the powers conferred by Article 169 (1) (d) of *the Constitution* of Kenya. The suit before me is not seeking orders for this court to exercise its supervisory jurisdiction under the provisions of Article 165 (6)

of *the Constitution*. The Respondent is seeking the hearing and determination of the suit that was filed on 7th February 2017.

In the case of Speaker of the National Assembly vs. Njenga Karume [2008] 1 KLR 425, the Court of Appeal held that;

"in our view there is considerable merit..... that where there is clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, the procedure should be strictly followed."

11. The Plaintiff has contended that the Defendant has already submitted to the jurisdiction of this court by filing its defence and that the preliminary objection is meant to be a throwback in these proceedings. The Plaintiff maintains that this court has jurisdiction and that it is his view that the forums provided by the *Energy Act* are not in a position to handle all the many complaints raised by consumers. Reliance was placed in the case of Eldoret White Castle Motel Limited v Kenya Power and Lighting Company Ltd [2010] eKLR, (cited Umoja Rubber Products Limited v *Kenya Power & Lighting Company Limited (Civil Appeal 175 of 2019*) [2023] where the Court of Appeal was of the view that matters outside the metering are outside the merit of the tribunal. The Court of Appeal stated as follows:

> "the only issue before us is one of jurisdiction. Gacheche J. appears, in our view, to have come to the conclusion that all disputes between the Respondent as supplier of electricity to various consumers, have first to be handled by the Board. Whether or not Parliament by enacting Section 87, above intended to deny the High Court the original jurisdiction to deal with even minor complaints on electricity bills by domestic consumers, is to our minds, doubtful. This country has both large and small consumers of electricity scattered all over the country. The Board was based in Nairobi and had only 7 members. It is doubtful if the Board, as constituted would have the capacity to handle al disputes arising from the supply of electricity by the Respondent. Besides, a careful reading of Section 121 which sets out the functions of the Electricity Regulatory Board, does suggest that Section 87 has not been read along with it in order to make out whether the disputes referred to under Section 87, above include even those arising from complaints by small domestic consumers. Moreover, the wording of Section 87, does suggest that it is only concerned with the accuracy or otherwise of metres for ascertaining the amount of electricity consumed by a given customer. The Section as material, reads thus "87 (1) if any dispute arises as to whether any meter ... is or as to whether that value has been correctly registered in any case by any meter...."

The doctrine of exhaustion was comprehensively dealt with by a 5-Judge Bench in Mombasa High Court Constitutional Petition No. 201 of 2019 William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Huma Rights & 2 others (Interested Parties) (2020) eKLR wherein at paragraph 52, the Court stated as follows: -

52. The question of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest without the mechanisms in place for resolution outside the courts. This encourages alternative dispute resolution mechanism in line with Article 159 of *the Constitution* and was aptly elucidated by the High Court in R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex parte National Super Alliance (NASA) Kenya and 6 others [2017].

The Court of Appeal Kisumu in the judgment delivered by a three judge bench in the case of Nicholas v. Attorney General & 14 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties) [2023] KECA 34 (KLR) put to rest the question of jurisdiction in terms of doctrine of exhaustion in matters related to energy as against the Appellant in an appeal which rose from the case of Abidha Nicholas vs. Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others. In this case, the Court of Appeal outlined and clarified the following three tire mechanisms for handling disputes as against the Appellant on matters related to billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections. Quality of service, quality of supply, tariffs, wayleave, easements or rights of way in relation to the generation, transmission, distribution, supply and use of electrical energy as enshrined under the *Energy Act* 2019.

i. The first tier is to raise a complaint with the Energy and Petroleum Regulatory Authority (EPRA) which succeeded the Energy Regulatory Commission (ERC).

ii. The second tier is the Energy and Petroleum Tribunal (EPT) which succeeded the Energy Tribunal.

iii. The third is the High Court (only upon exhaustion of the appellate process before the Energy and Petroleum Tribunal).

12. Being guided by the foregoing authorities, it is my considered view that it is proper to uphold the principles articulated in Article 159 (2) (c) and 169 (1) (d) and (2) of *the Constitution* of Kenya, 2010, alongside the provisions of Sections 3,10, 11 (e), (f), (i), (k) and (l); 23; 24;25;36;40;42;167; and 224 (2) (e) of the *Energy Act*, 2019 which repealed Section 61(3) of the Energies Act, 2006, as well as Regulations 2,4,7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012, the Energy Tribunal Rules, 2008, and Section 9(2) and (3) of the Fair Administrative Action Dispute Resolution Framework for matters within the energy sector, including the remedies available to the Plaintiff. Further, Article 159 (2) (c) of *the Constitution* expressly recognizes alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism. Further, under Article 169 (1) (d) of *the Constitution*, the same provides 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) which recognizes the role of Parliament to create Tribunals to hear and determine certain disputes, such as Energy and Petroleum Tribunal through the statutes created by Parliament such as the *Energy Act*, 2019 and the powers donated by Article 169 (1) (d) of *the constitution*.

13. It is noted from the claims raised in the Plaint that the same seem to tally with what is provided for in section 9 of the Act which establishes the Energy & Petroleum Regulatory Authority with powers as set out under Section 11 of the Act which includes inter alia; sets out the powers of the Authority.

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

(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 act or things form 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 on direction 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;

As there is a clear dispute resolution procedure provided by the *Energy Act* 2006 as repealed in 2009, the same ought to have been followed by the Plaintiff herein. The availability of the said forum for dispute resolution must be exhausted by the Plaintiff before moving to this court for redress. In the case of Speaker of National Assembly Vs Njenga Karume [1992] 1KLR 425 it was held that where there is 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. The thrust of the Plaintiff's claim comprise of alleged disconnection of power at his premises and hence the same ought to have been first placed before the doorstep of the Energy and Petroleum Regulatory Authority, the precursor of the Energy Regulatory Commission. It was thus incumbent upon the Plaintiff to exhaust the remedy stipulated by the *Energy Act* which provides for the three tier frontiers namely; dispute being placed before the Energy and Petroleum Regulatory Authority; Appeals therefrom being made to the Energy and Petroleum Tribunal and finally appeals being made to the High Court.

14. It is apparent therefore that the Plaintiff seems to have jumped the gun by bypassing the initial two forums before moving to this court. The plaintiff was under obligation to start presenting his dispute before the other two forums. I find that the doctrine of exhaustion was applicable in the circumstances and that the Plaintiff was bound by the same.

15. The Plaintiff has taken issue with the Defendant's conduct in proceeding to file a statement of defence and engaging the Plaintiff up to this stage and then turning around and raising the present objection. Indeed, the parties had been engaging each other all along and that it was expected that they would proceed to conclude the matter. However, any party is at liberty to raise such an objection at any stage of the proceedings however late in the day. Indeed, the move by the Defendant is rather late but then this court cannot fault it for raising the objection. It is expected that the Plaintiff had been aware of the availability of the Energy and Petroleum Regulatory Authority and the Energy and Petroleum Tribunal but opted not to present his claim to them. I find the said forums were not provided to do nothing. They were meant to handle disputes from an array of persons who have issues relating to the *Energy Act*. The Plaintiff should have presented his claim to those forums instead of rushing to the High Court which ought to be the last port of call after exhausting the other forums.

16. Having found that this court lacks the requisite jurisdiction, the next issue for determination is whether it should dismiss the suit or refer it to the Energy and Petroleum Regulatory Authority for determination. This court has fount hat a suit d that it lacks jurisdiction and thus it must down its tools at this stage. It is trite law that a suit filed in a court without jurisdiction is a nullity in law. That being the position, this court is unable to transfer the suit elsewhere as it must down its tools.

17. In view of the foregoing observations, it is my finding that the Preliminary objection dated 18/2/2025 has merit. The same is hereby upheld and that the Plaintiff's suit is hereby dismissed. Each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 20TH DAY MARCH, 2025.

D.KEMEI

JUDGE

In the presence of :

Naibei for Swaya.....for Plaintiff

Mbogo.....for Defendant

Mboya.....Court Assistant