



**Asitiba v Energy & Petroleum Regulatory Authority & 2 others (Petition E103 of 2023)  
[2025] KEHC 8541 (KLR) (Constitutional and Human Rights) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8541 (KLR)

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

**PETITION E103 OF 2023**

**LN MUGAMBI, J**

**JUNE 19, 2025**

**BETWEEN**

**EDWARD ASITIBA ..... PETITIONER**

**AND**

**ENERGY & PETROLEUM REGULATORY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**KENYA POWER & LIGHTING COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Petitioner in the Petition dated 29<sup>th</sup> March 2023, challenges the 1<sup>st</sup> Respondent's directive issued on 25<sup>th</sup> March 2023, introducing new electricity tariffs through the "Retail Electricity Tariff Review for the 2022/23-2025/26 fourth Tariff Control period (TCP)" effective from 1<sup>st</sup> April 2023. The Petitioner assails this directive on grounds that it is unconstitutional as violates Articles 10, 27, 42, 43, 46, 69 and 70 of *the Constitution*.
2. The Respondents filed Notices of Preliminary Objection to the Petition.

**The Preliminary Objections**

**1<sup>st</sup> Respondent's Case**

3. The 1<sup>st</sup> Respondent filed its Notice of Preliminary Objection on 4<sup>th</sup> May 2023 on the ground that:
  - i. This Court lacks the jurisdiction, as a Court of first instance, to hear and/or determine the issues raised in the Petition herein.



- ii. The instant Petition offends the provisions of Section 3, 10, 11(e) (f) (i) (k) and (l), 23, 24, 36, 40, 42, 160(3) and 224(2)(e) of the [Energy Act](#), 2019 together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations 2012 as read together with Article 159(2)(c) and 169(1)(d) and (2) of [the Constitution](#) and Sections 9(2) and (3) of the [Fair Administrative Action Act](#) 2015.
- iii. Considering the above, the Petitioners' suit offends the doctrine of exhaustion contrary to Article 159(2)(c) of [the Constitution](#).
- iv. The Petition in its entirety is therefore incompetent, an abuse of the court process and ought to be dismissed with costs to the 1<sup>st</sup> Respondent.

## 2<sup>nd</sup> Respondent's Case

- 4. The 2<sup>nd</sup> Respondent in its Notice of Preliminary Objection dated 18<sup>th</sup> April 2023 opposes the Petition on the premise that:
  - i. This Court lacks jurisdiction to hear and determine this dispute and Petition as against the 2<sup>nd</sup> Respondent and together with all consequential orders should be dismissed with costs as the same offends the provisions of Sections 3, 11(c), 24; 36(4); 40; 42; 80(7), 165 and 224(2)(e) of the [Energy Act](#), 2019 as read with Regulations 2, 4 and 21 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 and the Energy Tribunal Rules, 2008.
  - ii. This Court lacks jurisdiction to hear and determine this dispute and Petition as against the 2<sup>nd</sup> Respondent and together with all consequential orders should be dismissed with costs as the same offends the provisions of Article 159(2)(c) and 169(1)(d) and (2) of [the Constitution](#) as read with Sections 9(2) and (3) of the Fair Administration Act, 2015.
  - iii. This Court lacks original jurisdiction to hear this matter, and should be dismissed with costs, by dint of the appellate jurisdiction vested in this Court vide section 37(3) & (4); and 80(8) of the [Energy Act](#), 2019 and Regulations 21 of the Energy (Complaints and Disputes Resolution) Regulations, 2012.
  - iv. This Petition is prematurely before this Court pursuant to Section 36(4) of the [Energy Act](#), 2019 which provides that the Energy and Petroleum Tribunal shall have appellate jurisdiction over the decisions of the Authority (being the Energy and Petroleum Regulatory 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.
  - v. Further, Sections 85 and 117 (6) of the [Petroleum Act](#), 2019 expressly provide that matters such as the subject case should be referred to the Energy and Petroleum Tribunal.
  - vi. It is therefore in the interest of justice that the Petition be dismissed with costs.

## 3<sup>rd</sup> Respondent's Case

- 5. In reply, the 3<sup>rd</sup> Respondent's equally filed a Notice of Preliminary Objection dated 21<sup>st</sup> July 2023. However, the said Preliminary Objection could not be found in the Court file or Court Online Platform (CTS). The Court discovered its being details being referenced to in the 3<sup>rd</sup> Respondent's written submissions. Could the 3<sup>rd</sup> Respondent have drawn and not filed the Preliminary Objection? In view of the fact that I could not find this Preliminary Objection in the CTS or the physical Court file, I will not make any further reference to it.



## **Petitioner's Case**

6. The Petitioner in response to the preliminary objections filed his Replying Affidavits dated 26<sup>th</sup> July 2023 and 1<sup>st</sup> August 2023.
7. The Petitioner depones that the instant suit filed in public interest was brought under Rule 4, 10, 11(2), 13 and 20 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, thus competently before this Court.
8. He adds that Article 165(3) of *the Constitution* vests this Court with unlimited original jurisdiction in both criminal and civil matters and further questions in relation to whether the a fundamental right has been violated.
9. The Petitioner further asserts that the issues raised in the Petition can only be adjudicated upon by this Court. He points out that the Energy and Petroleum Tribunal is a quasi-judicial body which lacks jurisdiction to entertain a public interest matter such as this.
10. He as well avers that the increased electricity tariffs continue to violate consumer rights. On this basis, he contends that the Preliminary Objections have been filed in bad faith and are misconceived.

## **1<sup>st</sup> Respondent's Submissions**

11. The 1<sup>st</sup> Respondent through its Counsel, Igeria and Ngugi Advocates filed submissions dated 15<sup>th</sup> August 2023 in support of its Preliminary Objection. The issues were identified as: whether this Court has jurisdiction to hear and determine this Petition and whether the Petition offends the doctrine of exhaustion.
12. Answering in the affirmative in the first issue and relying in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, Counsel submitted that this Court does not have jurisdiction to entertain the matter as the dispute falls within the jurisdiction of the Energy and Petroleum Tribunal. Counsel stressed that Section 36(1) of the *Energy Act* grants the Tribunal original jurisdiction to determine matters relating to the energy and petroleum sector.
13. In this matter, Counsel asserted that the dispute revolves around the 1<sup>st</sup> Respondent's decision to adjust the electricity tariffs and tariff structures thus the Petitioner ought to have lodged his complaint with the Tribunal as provided in the Act however failed to do so.
14. Reliance was placed in Speaker of the National Assembly v James Njenga Karume [1992] KECA 42 (KLR) where it was held that:

“In our view, there is considerable merit in the submission 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 be strictly followed.”
15. Like dependence was placed in Mutanga Tea and Coffee Company Ltd v Shikara Ltd and Another [2015] eKLR and Geoffrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 Others (2015) eKLR.
16. Counsel further submitted that the Section 9(2) and (3) of the Fair Administration Act, provides that the Court should not review an administrative action or decision unless the mechanisms, including internal mechanisms for appeal or review and all remedies available under any written law are first exhausted. Counsel stressed that it was evident that the Petition offends the doctrine of exhaustion.



## 2<sup>nd</sup> Respondent's Submissions

17. The 2<sup>nd</sup> Respondent through its Counsel, Ochieng J. filed submissions dated 11<sup>th</sup> August 2023 and further supplementary submissions dated 25<sup>th</sup> July 2024. Counsel identified the issues as: whether the Court has jurisdiction to hear and determine this suit, whether the Petitioner has a recourse provided by statute and whether the Petition contravenes the doctrine of exhaustion.
18. On the first issue, Counsel submitted that this Court does not have jurisdiction to entertain this matter as the jurisdiction in the present matter is vested in the Energy & Petroleum Tribunal and so this suit is incompetent. Reliance was placed in *Jamal Salim v. Yusuf Abdulahi Abdi & Another* [2018] eKLR where it was held that:

“Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another v. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

“The jurisdiction either exists or does not ab initio ...jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction and Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”
19. Similar reliance was placed inter alia in *Kakuta Maimai Hamisi v. Peris Pesi Tobiko & 2 Others* [2013] eKLR and *Joseph Njuguna Mwaura & 2 Others v. Republic* [2013] eKLR.
20. Counsel submitted that this argument is anchored in Sections 24, 36(4), 37(3) and (4), 40, 42 and 80(8), (9) and (10) of the *Energy Act, 2019* and Regulations 21 of the Energy (Complaints and Disputes Resolution) Regulations, 2012, which clearly demonstrates that this Court is not granted appellate jurisdiction from the decisions of the 1<sup>st</sup> Respondent, but the Energy and Petroleum Tribunal is.
21. Reliance was placed in *Cyrus Komo Njoroge v. Kiringa Njoroge Gachoka & 2 Others* [2015] eKLR where it was 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.”
22. Counsel pointed out that this argument is further supported by the provisions of Section 9(2) and (3) of the *Fair Administrative Action Act*. Reliance was placed in *Abidha Nicholus v. Attorney General & 7 others; National Environmental Complaints Committee (NECC) & 5 others (Interested Parties)* [2021] eKLR where it was held that:

“This court further finds that Section 9(2) and 3 of the Fair Administrative Actions Act, 2015 removes this kinds of disputes from this court and places jurisdiction to the Energy Authority.”
23. Like dependence was placed in *Republic v. Energy Regulatory Commission & 2 Others* [2018] eKLR, *Night Rose Cosmetics (1972) Ltd v. Nairobi County Government & 2 Others* [2018] eKLR, *Mutanga Tea & Company Ltd (supra)* and *Republic v. Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited* [2018] eKLR among others.



24. Counsel was certain therefore that the Petitioner had contravened the doctrine of exhaustion. Reliance was placed in *Martin Kabubii Mwangi v. County Government of Laikipia* [2019]eKLR where it was held that:

“The exhaustion principle enunciated in precedents such as the case of *Secretary, County Public Service & Another v. Hulbhai Gedi Abdille* (supra) does not permit an election as to the parts of a statute that one should rely on. Put another way, it removes discretion on the part of a litigant from choosing whether to follow the provision or not. In this case the suit was filed before the exhaustion of the remedy under the law, namely the provisions of Section 77 of the *County Governments Act*, The Claimant ought to have appealed against his removal to the Public Service Commission before moving the court. The suit did not fall in the category of suits that can be entertained by the court. As he did not appeal as provided for in law, the suit is a non-starter and is accordingly struck out with no order as to costs.”

25. Equal dependence was placed in *Godfrey Paul Okutoyi* (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) v *Habil Olaka – Executive Director (Secretary) of the Kenya Bankers Association Being sued on behalf of Kenya Bankers Association) & another* [2018] eKLR and *Secretary, County Public Service Board & another v. Hulbhai Gedi Abdille* [2017] eKLR.

26. It was further submitted that the Petitioner’s argument that public interest ousts jurisdiction by virtue of Article 165 of *the Constitution*, is misconceived. Counsel urged that *the Constitution* should be read as a whole, meaning that whereas *the Constitution* gives the High Court unlimited and original jurisdiction over criminal and civil matter, the High Court should still refrain from hearing and determining matters where another judicial body has prior jurisdiction that precedes the High Court. This principle is guided by Article 159 (2) (c), 169 (1) (d) and (2) as read together with Section 9(2) and (3) of the Fair Administration Act.

27. Reliance was placed in *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR where it was held that:

“But what is meant by a holistic interpretation of *the Constitution*” It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

28. Comparable reliance was placed in *Kenya Anti-Corruption Commission vs. Deepak Chamanlal Kamni and 4 others*, [2014] eKLR and *Patel v Lagat* (Civil Application E046 of 2021) [2022] KECA 509 (KLR).

### 3<sup>rd</sup> Respondent’s Submissions

29. State Counsel, Christopher Marwa filed submissions dated 4<sup>th</sup> September 2023, where the single issue for determination was identified as whether the Petitioner has exhausted the internal dispute resolution mechanisms as prescribed under the *Energy Act* 2019.

30. To commence with, Counsel stated that the 1<sup>st</sup> Respondent under Section 11(c) of the *Energy Act* is granted power to set, review, and adjust electric power tariffs and tariff structures. A party grieved



by the 1<sup>st</sup> Respondent's decision is required under Section 24(1) of the [Energy Act](#) to appeal to the Tribunal established under Section 36, within 30 days of receipt of the decision.

31. Dependence was placed in *Robert Khamal Situma and 8 Others v Acting Clerk of the Nairobi City County Assembly 2022 eKLR* where it was held that:

“exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine's purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.”

32. Comparable dependence was placed in *Speaker of the National Assembly(supra), Geoffrey Muthiga Kabiru (supra) and William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR*.

33. In counsel's view, the instant Petition offends the doctrine of exhaustion as the provisions of the [Energy Act](#) were not exhausted before this Petition was filed. Counsel as such urged the Court to dismiss the Petition. Reliance was placed in *Mutanga Tea & Coffee Company Ltd (supra)* where it was held that:

“We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very *raison d'être* of the mechanisms provided under the two Acts.”

### **Petitioner's Submissions**

34. Opposing the Respondents' case, the Petitioner through his own firm filed submissions dated 30<sup>th</sup> August 2023 where he identified the key issue as whether this Court has jurisdiction to determine this matter on account of the doctrine of exhaustion.

35. Counsel submitted that the jurisdiction of this Court stems from Article 165(3) and (6) of [the Constitution](#). Counsel pointed out that this Court has unlimited original jurisdiction in both civil and criminal matters including determination of a question of enforcement of the Bill of Rights.

36. In this matter, Counsel submitted that the Petition had been brought under public interest as the 1<sup>st</sup> Respondent's actions had violated the citizens fundamental rights and continue to do so. Consequently, Counsel urged the Court to consider that this matter is an exception to the doctrine of exhaustion.

37. Reliance was placed in *Mustafa Tobiko Ole Tampul v Hassan Ole Naado & 17 others [2021] KEHC 3954 (KLR)* where it was held that:

“21. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows:

59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)*



(supra), after exhaustively reviewing Kenya’s decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.*)

60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

38. Furthermore, Counsel submitted that the Petition raises constitutional issues in relation to Articles 10, 27, 42, 43, 46, 69 and 70 of *the Constitution*, which can only be adjudicated by this Court. To buttress this point reliance was placed in *Wahome v Attorney General & 2 others (Petition E277 of 2020)* [2021] KEHC 73 (KLR) where it was held that:

“Taking cue from the foregoing, and broadly speaking, a constitutional issue is, therefore, one which confronts the various protections laid out in a Constitution. Such protections may be in respect to the Bill of Rights or *the Constitution* itself. In any case, the issue must demonstrate the link between the aggrieved party, the provisions of *the Constitution*



alleged to have been contravened or threatened and the, manifestation of contravention or infringement.”

### **Analysis and Determination**

39. Only one issue arises for determination in the instant matter;

### **Whether the Respondents’ Preliminary Objections are merited.**

40. The threshold of a Preliminary Objection was summarized in *Parbat Siyani Construction Limited v Kenyatta International Convention Centre* [2023] KEHC 1603 (KLR) where the Court citing the classic authorities stated as follows:

“54. This Court would wish to remind the parties that it is dealing with a preliminary objection. The validity of any preliminary objection is gauged against the requirement that it must raise pure points of law capable of disposing the dispute at once. It is, therefore, mandatory for a Court to ascertain that a preliminary objection is not caught up within the realm of factual issues that would necessitate the calling of evidence.

55. The foregoing nature of preliminary objections was discussed in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd*, (1969) EA 696 page 700 when the Court observed 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 if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.’

41. Likewise, the Court in *Dismas Wambola v Cabinet Secretary, Treasury & 5 others* [2017] KEHC 8777 (KLR) observed as follows:

“...a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law. Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts.”

42. The issue that the instant preliminary objections raise is jurisdictional in nature as it founded on doctrine of exhaustion that bars the Court from taking cognizance of the matter before other available statutory remedies that are provided for resolution of the dispute have been exhausted. The Supreme



Court in *Waity vs Independent Electoral & Boundaries Commission And Three Others* [2019] KESC 54 (KLR) explained the principle as follows:

“(63) Where *the Constitution* or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 Others*; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

43. Equally, the Supreme Court in *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] KESC 83 (KLR) stated as follows:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

(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.

(119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be



expressed in the formula that judicial intervention is premature in the absence of administrative action.”

44. There are instances where exceptions may be justified as was observed by the Court in William Odhiambo Ramogi (*supra*) where the Court stated:

“60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

45. The Respondents contend that the dispute herein should have in the first instance been lodged at the Energy and Petroleum Tribunal pursuant to the provisions of the *Energy Act*.

46. Section 24 of the Act provides as follows:

Appeal against a decision of the Authority

1. A person aggrieved by a decision of the Authority may appeal to the Tribunal within thirty days of receipt of the decision.
2. Notwithstanding subsection (1), the Tribunal may entertain an appeal after the expiry of the thirty-day period if it is satisfied that there was sufficient cause for not filing it within that period.

47. The Energy and Petroleum Tribunal is established under Section 25 of the Act. The Tribunal’s jurisdiction is provided for under Section 36 of the Act and states thus:

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.
48. Section 37 stipulates the power of review and appeals from Tribunal as follows:
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.
49. A perusal of the Petition and its Supporting affidavit reveals that the Petitioners aggrieved by the 1<sup>st</sup> Respondent's decision, instituted this Petition claiming the violation of constitutional rights as specified in the Petition.
50. Evidently, even though the Petition claims violation of constitutional rights, the substratum of this dispute is the application of the *Energy Act* by the 1<sup>st</sup> Respondent under the authority granted to by Section 11 of the Act which provides as follows:

The Authority shall have all powers necessary for the performance of its functions under this Act and in particular, the Authority shall have the power to—

- a. issue, renew, modify, suspend or revoke licences and permits for all undertakings and activities in the energy sector;
- b. set, review and approve contracts, tariffs and charges for common user petroleum logistics facilities and petroleum products;
- c. set, review and adjust electric power tariffs and tariff structures and investigate tariff charges, whether or not a specific application has been made for a tariff adjustment;
- d. prescribe the form and manner in which any application for any authority, licence, consent or approval under this Act shall be made and the fees payable in respect of such application;
- e. make and enforce directions to ensure compliance with this Act and with the conditions of licenses issued under this Act;
- f. issue orders in writing requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe



periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled;

- g. formulate, set, enforce and review environmental, health, safety and quality standards for the energy sector in coordination with other statutory authorities;
- h. approve electric power purchase and network service contracts for all persons engaging in electric power undertakings;
- i. investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;
- j. enter, inspect and search any premises where an offence is being committed or is suspected to have been committed;
- k. issue orders or directions to ensure compliance with this Act;
- l. impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;
- m. enter, inspect and search any premises at which any undertaking relating to petroleum operations is carried out or an offence is being committed or is suspected to have been committed;
- n. issue orders either requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled in furtherance of its powers under the law relating to petroleum;
- o. impose such sanctions and civil fines not exceeding five hundred thousand shillings per violation per day to secure compliance with orders issued under the law relating to petroleum;
- p. take or remove, for analysis, testing or for use in evidence in connection with the commission of an offence under the law relating to petroleum, samples of petroleum or other substances from any area where any upstream petroleum operations are being carried on; and
- q. inspect, take extracts from, or make copies of any document relating to any upstream petroleum operations.

51. This Petition thus revolves around the execution of the 1<sup>st</sup> Respondent's mandate under the [Energy Act](#) particular, i.e. reviewing the impugned tariffs.
52. Consequently, the Petitioner was required to exhaust the statutory process set out under Section 36(4) of the [Energy Act](#) before instituting any Court proceedings. The Petitioner in filing this Petition against the 1<sup>st</sup> Respondent bypassed the Tribunal's jurisdiction into which he should have appealed before coming to this Court.
53. The Petitioner has also not demonstrated that the Petition falls within the exceptions of the exhaustion Rule.



54. The Petitioner invoked this Court’s jurisdiction prematurely. It is my finding that the Petition offends the doctrine of exhaustion of remedies. I hereby strike out the same with no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

