



REPUBLIC OF KENYA



KENYA LAW
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**Ichungwa v Kinuthia & another (Civil Appeal 371 of 2018)
[2025] KEHC 8034 (KLR) (Civ) (10 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 371 OF 2018

WM MUSYOKA, J

JUNE 10, 2025

BETWEEN

MARY MUMBI ICHUNGWA APPELLANT

AND

SERAH KINUTHIA 1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY LIMITED 2ND RESPONDENT

*(Appeal from ruling and orders of Hon. DN Musyoka, Senior Principal
Magistrate, SPM, in Kikuyu SPMCCC No. 367 of ____ 2009)*

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, at Kikuyu, against the respondents, seeking that a certain electricity supply account be transferred to the name of the 1st respondent, and that all the accrued electricity charges, on that account, be settled by the 1st respondent without any involvement of the appellant. The suit was consolidated with others, which had been initiated in Nairobi and Kikuyu, involving the same parties.
2. The respondents entered appearance and filed defence.
3. The matter was never heard on the main suit. Several interlocutory applications came up, were heard and disposed of. The matter was mentioned several times. The mentions at the tail-end are relevant to the determination of this appeal. On 6th March 2018, the matter was mentioned, to fix hearing dates, which did not happen, as it turned out that the matter was not ripe for hearing, for Order 11 of the Civil Procedure Rules had not been complied with. That prompted the court to fix the matter for a last mention to take a hearing date. The date given was 8th May 2018. On 8th May 2018, another mention date was given, for 22nd May 2018. On 22nd May 2018, none of the parties attended court, and it was



- directed that if no hearing date was fixed within the next 2 months, the suit would stand dismissed, with no orders as to costs. The matter was not allocated a date at that mention.
4. The parties moved to the court registry and fixed the matter for mention on 31st July 2018. At the mention, on 31st July 2018, the Advocate for the appellant appeared. He expressed difficulty with setting the matter down for hearing, on the basis that the Advocates for the other parties could not be traced. It was suggested that the Advocate wanted to serve the respondents in person and their Advocates through substituted service. The trial court was not impressed. It struck out the suit, on the basis that the matter was old, and the dispute was on electricity bills, and it should have been filed at the appropriate tribunal.
 5. The appellant was aggrieved, hence the instant appeal, initiated vide a memorandum of appeal, dated 8th August 2018. The grounds include the court acting whimsically in striking out the suit; the frustrations that came from the other parties; the issue of some tribunal having jurisdiction on the matter; not being granted audience; dismissing the suit on a date fixed for mention; being denied the constitutional right to be heard; and acting suo moto without the knowledge of the respondents.
 6. Directions were given, on 20th March 2025 and 2nd April 2025, for canvassing of the appeal by way of written submissions. Submissions have been filed by the appellant and the 2nd respondent.
 7. The appellant condenses her grounds into three. The first is that the trial court acted whimsically and did not allow her Advocate to address it, which denied her her constitutional right to be heard. The second is that the dispute was beyond an issue of mere billing, and the parties ought to have been given a chance to address the court before it was decided that the matter should have been filed at the tribunal at the first instance. It is also argued that the issue of jurisdiction had not been raised by the respondents. Finally, it is submitted that the suit was dismissed on a date fixed for mention, as opposed to on a hearing date, and *Cheserem vs. Miriga* [2023] KEHC 23821 (KLR) (J Njagi, J) is cited.
 8. The 2nd respondent addresses two issues: whether the trial court had power to dismiss the matter on its own motion, and whether there was jurisdiction in the first instance to entertain the matter. The two issues are argued in a manner that inter-connects them. The first is that jurisdiction is a fundamental issue, which the court can address suo moto. *Nasra Ibrahim Ibren vs. Independent Electoral and Boundaries Commission & others* [2018] KESC 75 (KLR)(Ojwang, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ) is cited. The second is that the *Energy Act*, 2006 (repealed by the *Energy Act*, 2019), conferred jurisdiction on the Energy and Petroleum Regulatory Authority, and the magistrates court had no jurisdiction.
 9. There is only one issue for determination, whether there was justification for dismissal of the suit.
 10. The suit was dismissed from two perspectives: for want of prosecution and want of jurisdiction. I will address the two in turn.
 11. Let me start with want of prosecution. The suit, struck out on 31st July 2018, had been consolidated with others. There were 3 suits. Two were filed at Kikuyu, and one in Nairobi. All three were filed in 2009. Between 2009, when they were all filed, and 2018, when the consolidated suit was struck out, no hearing was ever conducted on the main suit or suits, and the suit was, or suits were, never made ready for trial. The parties squandered a lot of time on interlocutory applications and mentions. It emerged, on 6th March 2018, that Order 11 of the Civil Procedure Rules had not been complied with. Order 11 is about pre-trial conferencing, as a precursor to, or to pave way for, the actual hearing. So, as at that date, the matter could not be fixed for hearing, as the case was not ready for hearing. At the ninth year of its life, the suit was not ripe for trial.



12. The court fixed the matter, on 6th March 2018, for mention, on 8th May 2018, and fired a warning shot to the appellant, that that was the last mention that the trial court was going to entertain, and the appellant needed to get her house in order. It signalled that drastic action was on the offing, should the appellant fail to ready the matter for trial. More time was given on 8th May 2018, when a further mention was given for 22nd May 2018. Come 22nd May 2018, none of the parties attended court. The court was still flexible and magnanimous. It did not fix another mention date, but directed that, if no hearing date would have been fixed in two months' time, the matter would stand dismissed. The parties went to the registry and fixed the matter for 31st July 2018, for mention. That was when the matter was struck out. No hearing date had been fixed, contrary to the order of 22nd May 2018, and the court was not persuaded by the excuses advanced by the Advocate for the appellant. There was an inordinate delay, of nine years, between when the suit was filed and when it was struck out.
13. The appellant has argued that the striking out happened on a date when the matter was up for mention. That is true. I am alive to the point stated in *Cheserem vs. Miriga* [2023] KEHC 23821 (KLR) (J Njagi, J), regarding that position. However, that is not a hard and fast rule. Each case should be evaluated based on his own circumstances. For nine years, the appellant was unable to fix the matter for hearing, and there was no telling when she was going to make it happen. Secondly, the court had given the parties two months, on 22nd May 2018, to fix the matter for hearing, otherwise the matter stood dismissed after expiry of the said two months. The two months expired on 22nd July 2018. So, by 31st July 2018, the suit stood dismissed effective from 22nd July 2018, and the order of 31st July 2018 merely formalized that, for there had been no compliance.
14. There were arguments about being condemned unheard, being denied audience, and the constitutional right to fair hearing being denied. The striking out happened on 31st July 2018. The record, for that date, indicates that Mr. Njuguna, for the appellant, addressed the court before the striking out order was made. Surely, it cannot be that he was denied audience and was condemned unheard. This is what is recorded as his address to the court, on 31st July 2018:

“We have difficulties setting down this case for hearing. We keep inviting counsels to come and fix the matter for hearing. Kihiu is not being found. Nyoike does not have a functional office. We have written asking the court to give us a hearing date since we cannot find the counsels for the defendants. We wanted to serve the defendants in person and their advocates by registered post”.
15. The argument, by Mr. Njuguna, that he was having difficulty getting the Advocates for the respondents, to fix the matter for hearing, is not borne out by the record. The said Advocates had been attending court in the course of 2018, so were their clerical assistants attending the court registry. The record reflects that, on 6th February 2018, Mr. Njuguna attended court, with Mrs. Waitthaka for the 1st respondent. On 6th March 2018, Mrs. Kinyanjui held brief for Mr. Njuguna, while Mr. Nyoike was present for the 1st respondent. On 8th May 2018, Esther for Mr. Kiarie for the appellant and Mr. Nyoike for the respondent were in court. I am not persuaded that the said Advocates were unavailable, as argued by Mr. Njuguna.
16. On the violation, or non-compliance or non-observance, of Article 50 of *the Constitution*, with respect to fair hearing, the matter was filed in 2009 and came up multiple times between then and 31st July 2018. There were a record 41 court appearances. Numerous interlocutory applications were filed, heard and ruled upon within that period. It cannot be then that the appellant was not given an opportunity to be heard. She was heard on her various applications. She was entertained on the multiple times the matter came up for mention. She had an opportunity to make her case ready for



- trial, so that the court could hear her on her complaint. Nothing hindered her. Least of all, the court did not place any impediments on her way. Instead, it waited patiently, for the appellant to do all that was required to get the hearing going, so that it could hear her, but no avail.
17. The appellant had nine years to get her case moving. For nine years she did not get the case ready for trial. She had a right to be heard. The court was alive to that and indulged her repeatedly. It gave her nine years to be heard. She never got ready for it. She was never ready for hearing within that nine-year period. She had the opportunity to be heard. She squandered it. The trial court cannot, surely, be the one to blame for her predicament. She has no one else to blame for her problems, except herself. Surely, the opportunity to be heard cannot be available forever, time without end. At some point, the system must give in. There is a long queue of cases for hearing, those dead unmoving cases, like the instant one, that create a logjam, must be discarded, to give way for the hearing of those filed after them, whose movers are eager and ready to be heard.
 18. Regarding want of prosecution, I believe I have said enough, to demonstrate that the appellant never had appetite to prosecute her case, and the trial court was justified to bring the circus, that had become of the process, to an end.
 19. It was because of want of jurisdiction, that the suit was struck out, rather than dismissed. The basis for this was the *Energy Act*. The 2006 Act, at section 108, established the Energy Tribunal. Its jurisdiction was provided for in Clause 10 of Schedule 3 to the 2006 Act. It had jurisdiction to hear and determine all matters referred to it, relating to the energy sector, arising under that Act. The instant dispute arose during the existence of the Energy Tribunal, and the matter ought to have been filed there in the first instance. The scheme, under the *Energy Act*, 2006, created an environment, then, which is still in place, where the magistrate's court has no jurisdiction over disputes relating to the energy sector, for the Act has established dedicated entities for handling such disputes. See *James Mwaura Ndung'u vs. Kenya Power and Lighting Co. Ltd* [2016] eKLR [2016] KEHC 5893 (KLR) (Sergon, J) and *Kenya Power & Lighting Co. Limited vs. Samuel Mandere Ogeto* [2018] eKLR [2018] KEHC 6067 (KLR) (Majanja, J).
 20. The law on exhaustion of alternative dispute resolution mechanisms is clear enough, as set out in *Speaker of the National Assembly vs. Njenga Karume* [1992] eKLR [1992] KECA 42 (KLR) (Kwach, Cockar & Muli, JJA) and *Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 others* [2015] eKLR [2015] KECA 304 (KLR) (Waki, Nambuye & Kiage, JJA). See also *Albert Chaurembo Mumbo & 7 others vs. Maurice Munyao & 148 others* [2019] eKLR [2019] KESC 83 (KLR) (Mwilu, DCJ&VP, Ojwang, Wanjala, Ndungu & Lenaola, SCJJ) and *United Millers Ltd vs. Kenya Bureau of Standards, Directorate of Criminal Investigations & 5 others* [2021] eKLR [2021] KESC 72 (KLR) (Mwilu, DCJ&VP, Ibrahim, Wanjala, Ndungu & Lenaola, SCJJ). The appellant should have exhausted the mechanisms provided for under the *Energy Act*, 2006, before moving to court. See *Kenya Power and Lighting Co. Ltd vs. Geoffrey Orina Oganga* [2020] eKLR [2020] KEHC 4672 (KLR) (Musyoka, J) and *Njoroge vs. Kenya Power & Lighting Company* [2023] KEHC 1924 (KLR) (Mrima, J).
 21. Jurisdiction is at the core of whatever the court does. It is what gives a court the authority to act. A court without jurisdiction cannot move. See *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited* [1989] KLR 1653 [1989] eKLR (Nyarangi, Masime & Kwach, JJA), *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA).
 22. The issue of jurisdiction can be raised at any stage of the proceedings. The court need not be moved by the parties, it can address the issue suo moto, on its own motion. See *Kenya Ports Authority vs. Modern*



Holdings (EA) Limited [2017] eKLR [2017] KECA 293 (KLR) (Makhandia, Ouko & M’Inoti, JJA). The first thing that the court should worry about, once a file or a matter is placed before it, is whether there is jurisdiction to deal with it. It is not an issue that the court should wait for the parties to raise. The court should only act, on a matter before it, where there is jurisdiction, and it should address its mind to jurisdiction before it entertains the matter. The trial court was not on the wrong footing, in addressing the jurisdiction issue suo moto. It is a good policy to hear parties on whether a court has jurisdiction, but it is not mandatory. The court can still down its tools, once it establishes it has no jurisdiction, without having to wait to hear the parties on the matter.

23. Overall, I find no merit in the appeal herein. It is for dismissal, and I hereby dismiss the same. The 2nd respondent shall have the costs. It is so ordered.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 10TH DAY OF JUNE 2025.

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Caroline Oyusu, Court Assistant, Milimani, Nairobi.

Ms. Azenga Alenga, Legal Researcher.

Advocates

Mr. Njuguna, instructed by Kiarie Njuguna & Company, Advocates for the appellant.

Ms. N. Kihara, Advocate for the 2nd respondent.

