



**Kanyara v Kenya Power and Lighting Company (Civil Appeal  
115 of 2021) [2023] KEHC 685 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 115 OF 2021  
RN NYAKUNDI, J  
FEBRUARY 10, 2023**

**BETWEEN**

**SAMUEL NDURA KANYARA ..... APPELLANT**

**AND**

**KENYA POWER AND LIGHTING COMPANY ..... RESPONDENT**

*(Being an appeal from the ruling of Honourable R. Odenyo (SPM)  
delivered on 16th September, 2021 in Eldoret CMCC No. 850 of 2019)*

**JUDGMENT**

1. By a plaint dated October 2, 2019, the appellant sued the respondent seeking damages resulting from loss of rental income of five houses situated on parcel of land known as Block 16/538 Kamukunji. The appellant maintains that the said loss is a result of the respondent's actions as the said houses are vacate due to power shortages.
2. In response to the appellant's claims, the respondent filed a notice of preliminary objection dated October 29, 2019, in which the respondent deposed that in view of section 36 of the [Energy Act, 2019](#) as read together with the [Energy \(Complaints & Dispute Resolution\) Regulations, 2012](#) the trial court lacked the requisite jurisdiction to hear and determine the appellant's case in the first instance.
3. The trial court having been presented with a notice of preliminary objection at that juncture delivered it ruling dated September 16, 2021, in which the learned trial magistrate observed that he lacked jurisdiction as the suit herein should have in the first instant be filed in the tribunal.
4. Aggrieved by the said decision the appellant filed the memorandum of appeal dated September 22, 2021 in which he raised (8) grounds which can be summed up as follows; that the learned trial magistrate erred in law and fact in finding that the court lacked jurisdiction to hear and determine the appellants case.



5. The appellant filed submissions dated March 11, 2022 in which he urged the court to award him Kshs 14,400,000/= as damages arising from the respondents actions.
6. The respondent on the other hand did not file any submissions

### Determination

7. This being the first appellate court, its duty is to re-evaluate the evidence and all the material availed before the trial court so that I may come up with its own conclusions while bearing in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. In the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, the Court of Appeal stated;

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

8. I have considered this appeal and submissions relied on. I have also perused the trial court's record and considered the impugned ruling and find that the only issue for determination is whether appellant's suit is debarred by the exhaustion doctrine.

9. From onset I must point out that an objection to the court's jurisdiction may be raised as a preliminary objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from the *Constitution* or statute. If a court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. See the case of *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Limited* [1989] KLR 1:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. The appellant herein has faulted the trial magistrate for finding that he lacked the requisite jurisdiction to hear and determine his suit and thus, downing its tools.

11. The dispute between the parties from the pleadings which are summarized above concerns the disconnection of power supply to the appellant's business premises. The respondent maintains that such matters are governed by the *Energy Act* which was enacted to regulate the production, supply and use of electricity among other purposes. The Act establishes an Energy and Petroleum Regulatory Authority ("the authority") and an Energy and Petroleum Tribunal ("the tribunal") under sections 9 and 25 respectively to perform various functions under the Act.

12. Section 36 of the *Energy Act*, provides for the said tribunal's jurisdiction as follows:

"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."
13. Courts have consistently held that an aggrieved party must first exhaust all dispute resolution mechanisms provided under the law before proceeding to court. In *Speaker of the National Assembly v James Njenga Karume* [1992] Civil Application No Nai 92 of 1992 (Nai 40/92 UR) eKLR the Court of Appeal held;
- "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."
14. The Court of Appeal has also variously cautioned courts against expanding its jurisdiction to hear and determine matters over which it otherwise lacks jurisdiction. Litigants are also warned against drafting their pleadings with the intent to bypass dispute resolution mechanisms provided under the Statute.
15. Makhandia JA in *Kibos Distillers Limited & 4 others v Benson Ambuti Adege & 3 others* Civil Appeal No 153 of 2019 [2020] eKLR also held;
- "To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta that in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated 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."
16. From the above analysis it plainly evident that the appellant's first pot of call should have been the Energy Tribunal and not the trial court. The appellant cannot be heard to fault the trial court for downing it tools when it is evident that in the first instance the court lacked jurisdiction. It is worth



noting that procedures are put in place so as to be followed. Where there are alternative forms of avenues to ventilate issues, then parties are under obligation to resolve their disputes in those particular forums in the first instance. Where aggrieved by the decisions therein then parties are at liberty to prefer an appeal to the High Court if need be.

17. In the case of *Re E* (1984)1WLR 156: A court in exercising jurisdiction must never lose sight of a fundamental feature of the jurisdiction conferred by the Constitution of the statute. It will therefore be the duty of the court to look beyond the submissions of the parties and endeavour to do what is right and necessary in the interest of justice.
18. In the end it is my finding that the appeal herein lacks merit and is hereby dismissed.
19. Each party shall bear its own costs.

**DATED AND DELIVERED AT ELDORET THIS 10<sup>TH</sup> DAY OF FEBRUARY , 2023.**

Judgement delivered in the absence of the parties

.....

**R. NYAKUNDI**

**JUDGE**

**Coram: Hon. Justice R. Nyakundi**

**Mr.Kaigango Advocate for the Respondent**

**Samuel Ndura Kanyara & Co. Advocate**

