



**THE REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC PETITION NO. 31 OF 2019**

JUSTIN KARIONJI NYAGA.....PETITIONER

- VERSUS -

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

ENERGY AND PETROLEUM REGULATORY AUTHORITY .....2ND RESPONDENT

KENYA POWER AND LIGHTING COMPANY.....3RD RESPONDENT

**RULING**

1. The petitioner, **Justin Karionji Nyaga**, brought this petition on 3/7/2019. He alleged that the 3rd respondent had trespassed on his land, Parcel Number **LR No 5982/2**, situated in Ngumba Estate, Nairobi, by erecting an electricity pole therein. The petitioner contended that he had presented the dispute to both the 2nd and 3rd respondents since the year 2015 but the two respondents had failed to mediate over the dispute “as envisaged in law” and were not willing to mediate in the dispute. It was the case of the petitioner that failure by the 3rd respondent to mediate in the dispute was a breach of its statutory duty. The petitioner did not specify the statute which had been breached by the 3rd respondent.

2. Consequently, the petitioner sought the following verbatim reliefs against the respondents:

- a. **Declaration that the refusal by the respondents to accord the petitioner a hearing by mediating over the dispute is unlawful, illegal and discriminating and breach of constitution and the Act;**
- b. **An order does issue directing the 1st respondent to direct the 2nd respondent to commence the mediation process forthwith upon the 3rd respondent involvement. In the alternative the 3rd respondent be directed to remove the electricity pole erected upon Plot Number LR Number 5982/2 – Ngumba Estate;**
- c. **There be a declaration that the fundamental freedoms of the petitioner in the Bill of Rights, Chapter 4, Articles 19, 27, 35, 39, 40, 42, 43, 47, 48, & 50 of the Constitution.**
- d. **Damages suffered by the petitioner be assessed and awarded to him since the 2nd and 3rd respondents have been making profit by unlawfully enjoying the erected electricity pole from 2015 to date.**
- e. **And such other orders that this honourable court shall deem just;**
- f. **Costs and interests.**

3. Upon being served with the petition, the 2nd respondent filed a notice of appointment of advocates together with a notice of preliminary objection dated 17/9/2019, urging the court to dismiss the petition herein on the following verbatim grounds:

- a. **That the petition offends the provisions of Section 6(L), 48 and 49 of the Energy Act, Cap 12 Laws of Kenya [sic];**
- b. **That the petition offends the provisions of Regulations 4, 7 and 8 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 (LN 42/2021);**
- c. **That the honourable court lacks substantive jurisdiction to entertain this petition, its jurisdiction having been prematurely**

invoked;

**d. That the petition dated 9th May 2019 constitutes an abuse of the honourable court's process warranting its immediate dismissal with costs to the 2nd respondent.**

4. The said preliminary objection is the subject of this ruling. The preliminary objection was canvassed through written submissions dated 17/5/2021, filed by the firm of *Murugu, Rigoro & Company Advocates*. Counsel for the objector submitted that the dispute in this petition was brought to the wrong forum. Counsel argued that **Sections 25, 36 and 37** of the **Energy Act** established the Energy and Petroleum Tribunal and vested in it the jurisdiction to adjudicate and determine disputes such as the one in this petition. Counsel contended that this court's jurisdiction in the present dispute may only be invoked at the appellate stage and only after the Tribunal has rendered a determination. Citing various decisions of superior courts, counsel urged the court to uphold the objection and dismiss the petition.

5. The petitioner and the 1st respondent did not file submissions on the preliminary objection. The 3rd respondent did not file a response but supported the preliminary objection at the plenary hearing in virtual court.

6. I have considered the gist of the preliminary objection together with the objector's submissions thereon. I have also considered the relevant constitutional and statutory frameworks together with the prevailing jurisprudence on the key question falling for determination in the preliminary objection. The single question falling for determination in the preliminary objection is whether the petition herein offends the doctrine of exhaustion of remedies.

7. The tenor and import of the doctrine of exhaustion of remedies is that, where a dispute resolution mechanism has been established by a statute outside the mainstream courts, that mechanism should be exhausted before the jurisdiction of the mainstream courts is invoked. Put differently, where there exists a legitimate statutory primary dispute resolution mechanism, such as a tribunal, the mainstream courts should be the fora of last resort and not the first port of call.

8. The Supreme Court of Kenya underscored the significance of the doctrine of exhaustion of remedies in Kenya's civil legal system in the case of **Benard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR** in the following words:

**“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”**

9. On its part, the Court of Appeal in **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** emphasized that where there is a clear procedure prescribed by the Constitution or by a statute for the redress of a particular grievance, that procedure should be strictly followed and exhausted before invoking the jurisdiction of the court.

10. The dispute in this petition was triggered by an electricity pole which the 3rd respondent mounted on the petitioner's land. The petitioner terms the act of mounting the electricity pole on his land as trespass. He contends that he invited the 2nd and 3rd respondents to “mediate” over the dispute but they failed to do so. Consequently, he brought the present petition on 3/7/2019.

11. Prior to the initiation of this petition, Parliament had enacted the **Energy Act, No 1 of 2019 [the Act]**. The said Act received presidential assent on 12/3/2019 and came into force on 28/3/2019. It is therefore clear that as at the time of bringing this petition, the Act was in force.

12. **Section 25** of the Act establishes the Energy and Petroleum Tribunal. **Section 36** of the Act sets out the following jurisdiction of the Tribunal:

**“36. (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. There is no contestation about the fact that the 3rd respondent was a licensee within the meaning of **Section 2** of the Act. It therefore follows that the dispute resolution forum established by the Act for the resolution of the present dispute, as at the time of initiating the petition herein, was the **Energy and Petroleum Tribunal** established under Section 25 of the Act. The petitioner, for unexplained reasons, did not utilize that primary dispute resolution mechanism. No explanation has been tendered to justify the petitioner's failure to exhaust the dispute resolution mechanism provided under the Act.

14. In the circumstances, the court finds that the petition herein offends the doctrine of exhaustion of remedies. The net result is that the petition herein stands to be struck out. The petitioner will have the right to seek redress in the Tribunal, as prescribed under the Act, subject to the relevant law on limitation.

15. I will not make any award relating to costs of this petition because the respondents did not place before court any evidential material such as legal notices relating to the exact date when the Tribunal established under Section 25 of the Act was operationalized. In the circumstances, parties will bear their respective costs.

16. In the end, the 2nd respondent's preliminary objection dated 29/6/2020 is upheld to the extent that the petition herein is struck out on the ground that the petitioner has not exhausted the primary dispute resolution mechanism established under the Energy Act, No. 1 of 2019. There will be no order as to costs of the petition.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF OCTOBER 2021**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Onyango for the Petitioner

Mr Odhiambo for the 2nd Respondent

Mr Maina for the 3rd Respondent

Court Assistant: Lucy Muthoni

**NOTE:**

The preliminary objection was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court

Station. This is why I have delivered the Ruling virtually at Thika.

**B M EBOSO**

**JUDGE**