



**Matu v Rubi Energy Limited (Commercial Case E407 of 2023)
[2024] KEHC 15235 (KLR) (Commercial and Tax) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15235 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E407 OF 2023
NW SIFUNA, J
NOVEMBER 21, 2024**

BETWEEN

SIMON GITHUA MATU PLAINTIFF

AND

RUBI ENERGY LIMITED DEFENDANT

RULING

1. The Defendant contests this court's jurisdiction to hear and determine the instant suit on the grounds that it lacks jurisdiction. The Defendant's notice of Preliminary Objection dated 16th November 2023 is that the jurisdiction of this court to adjudicate on this matter has been wrongly invoked for reasons that:
 - a. The plaint has been instituted in total disregard of the provisions of Section 117(5) of the *Petroleum Act* No. 2 of 2019 as read with Sections 36 (1) and (3) of the *Energy Act* No. 1 of 2019.
 - b. The suit as presented offends the doctrine of exhaustion of remedies as the prescribed forum for consideration of the grievance set out in the plaint is the Energy and Petroleum Tribunal and
 - c. The Plaint is an abuse of the court process and is therefore bad in law in so far as it relates to the Defendant
2. The parties disposed of the Preliminary objection by way of written submissions. The Defendant's counsel submitted that the dispute before this court emanates from a breach of a dealership agreement by the Plaintiff, the dispute which ought to be adjudicated before the Energy and Petroleum Tribunal.
3. To emphasise the need to exhaust the available mechanisms in adjudicating the dispute before invoking the jurisdiction of this court the Defendant cited the following authorities: Geoffrey Muthinja &



- Another v. Samuel Muguna Henry & 1756 Others [2015] eKLR, Willian Odhiambo Ramogi & 3 others v. Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties) [2020] eKLR.
4. The Defendant submits that Section 117(5) of the [Petroleum Act](#) No.2 of 2019 read with Section 36(1) and (3) of the [Energy Act](#) No. 1 of 2019 vest the tribunal with jurisdiction to handle the dispute arising in the instant case. Counsel submitted that Section 36 (3) of the [Energy Act](#) confers the tribunal with original civil jurisdiction on any dispute between a license and a third party or between licensees and has the power to grant equitable reliefs.
 5. The Defendant submitted the alternative remedy of lodging a dispute at the Energy and Petroleum tribunal is unavailable. The existence of a competent dispute resolution mechanism to determine the dispute at hand ousters this court's jurisdiction to hear the dispute filed by the Plaintiff.
 6. In rebuttal, the Plaintiff's counsel submits the Preliminary objection lacks merit as the determination as to whether the dispute herein falls under the jurisdiction of the Energy Petroleum Tribunal calls for evaluation of documentary evidence to wit the Petroleum dealership agreement dated 14th August 2023.
 7. Counsel argues the implication of dismissing the suit means the Plaintiff cannot file any suit before a judicial body with the current dispute which amounts to taking the Plaintiff from the sit of justice without a remedy.
 8. Counsel urged the court that in instances ot finds it lacks jurisdiction to exercise the jurisprudential practice and transfer the suit to the tribunal with jurisdiction to handle the dispute.
 9. I have considered the opposing positions presented by the parties. The only issue for determination is whether this suit offends the doctrine of exhaustion of remedies.
 10. The Preliminary objection raises the issue of jurisdiction. The law emphasises that jurisdiction is a fundamental issue that should be raised at the earliest. It is a long-established principle that jurisdiction is everything and without jurisdiction, the court has no power to make any other step, and it ought to down its tools in respect of the matter before it. See the Court of Appeal's decision in Owners of the Motor Vessel "Lilian s" vs Caltex Oil (Kenya) Ltd 1989.
 11. Section 36 of the [Energy Act](#) no. 1 of 2019 establishes the jurisdiction of the tribunal
 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.



12. On the other hand, Section 117 (5) of the [Petroleum Act](#) No. 2 of 2019 vests the Tribunal with original civil jurisdiction, the section provides as follows:

“Section 117 (5) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees in midstream and downstream petroleum operations.”

13. The above provisions provide that any dispute in the energy sector between licensees or between licensees and a third party falls within the original jurisdiction of the Energy and Petroleum Tribunal. In the instant case, the dispute relates to the breach of a dealership agreement between the Plaintiff and the Respondent which in my view falls within the purview of a license and a third party which is subject to the energy and Petroleum Tribunal.

14. The Defendant’s position is that the Plaintiff has failed to exhaust the available remedies before approaching this court. The Doctrine of Exhaustion is defined in Black’s Law Dictionary 10th Edition as follows:

“exhaustion of remedies. The doctrine is 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.”

15. It has been said that where there exist other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute. This position was stated in the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where the Court of Appeal held as follows:

“... 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. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

16. The above position was reiterated in William Odhiambo Ramogi & 3 others v. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR the Court held as follows;

“The question of exhaustion 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 within the mechanisms in place for resolution outside the Courts.”

17. In Geoffrey Muthinja & Another v. Samuel Muguna Henry & 1756 Others [2015] eKLR the Court of Appeal provided the constitutional rationale and basis for the doctrine of exhaustion as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is 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 the resolution of outside the courts...This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

18. Also, the Supreme Court of Kenya explained the importance of the doctrine of exhaustion of remedies in *Benard Murage v. Fine Serve Africa Limited & 3 others* [2015] eKLR and observed as follows:

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

19. The position of the above-cited authorities is that where there exists an alternative remedy for resolving a dispute created by the statute the alternative remedy ought to be pursued first. The provisions of Article 159(2) of *the Constitution* of Kenya 2010 provide that in exercising Judicial Authority, the courts and Tribunals shall be guided by the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation and arbitration. It is thus the court's finding that the provisions of the *Energy Act* and the *Petroleum Act* are applicable to the instant case and the Plaintiff ought to exhaust the available mechanism before invoking the jurisdiction of this court.

20. *The Constitution* also vests upon the courts, tribunal or any independent body the power to decide cases impartially. Article 50(1) of *the constitution* provides as follows:

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

21. The court may in exceptional circumstances find the exhaustion requirement would not be in the interest of justice and permit a party to proceed before it. See *Fleur Investments Limited v. Commissioner of Domestic Taxes & another* [2018] eKLR where the Court of Appeal while determining whether a litigant can be exempt from the doctrine of exhaustion held as follows:

"Whereas courts of law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

22. In the instant case, I find the Plaintiff has not established any special circumstances that would warrant this court to invoke its discretion and allow the Plaintiff to proceed before it. The upshot is that this court is an appellate court on matters involving energy and thus lacks the jurisdiction to determine the issues raised by the Plaintiff in the instant suit.

23. The Plaintiff urged the court to transfer the suit to a court of competent jurisdiction if it finds it lacks jurisdiction as the dismissal of a suit is a draconian measure that will drive the Plaintiff from the sit of justice. It is my considered view, that a transfer of the suit to the tribunal is untenable as the suit was



filed in a court which lacks jurisdiction. In *Boniface Waweru Mbiyu vs. Mary Njeri & Another* [2005] eKLR the court held as follows:

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.

24. Also in *Abraham Mwangi Wamigwi v. Simon Mbiriri Wanjiku & Another* [2012] eKLR, the Court held as follows:

“The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In *Kagenyi v. Musiramo* (supra), Sir Udo Udoma, CJ made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In *Ali Abdi Sheikh v. Edward Nderitu Wainaina & Others* (supra), Koome, J (as she then was) found that since the Plaintiff had filed a suit in respect of a claim to land whose value exceeded Ksh 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the *Civil Procedure Act* cannot be exercised in a matter where the suit was filed in a court without jurisdiction.”

25. I therefore find that this Preliminary Objection has merit uphold it accordingly. With the consequence that this suit is hereby struck out for reason that this court lacks jurisdiction to determine this dispute, as the same ought to have been lodged at the Energy and Petroleum Tribunal. The Defendant shall have the costs of this Preliminary Objection, as well as those of the suit itself.

DATED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2024.

PROF (DR) NIXON SIFUNA

JUDGE

