



**Times Touch Enterprises Limited v Rubis Energy Kenya PLC (Civil Suit E083 of 2023) [2024] KEHC 13956 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13956 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E083 OF 2023  
JK NG'ARNG'AR, J  
NOVEMBER 12, 2024**

**BETWEEN**

**TIMES TOUCH ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**RUBIS ENERGY KENYA PLC ..... DEFENDANT**

**RULING**

1. The Defendant filed a Notice of Intention to Raise a Preliminary Objection dated 19<sup>th</sup> January 2024 on grounds that the proceedings are offensive to the doctrine of exhaustion in so far as the matters raised are largely disputes within the meaning of Section 36 of the *Energy Act* (Act Number 1 of 2019) whose determination lies within the exclusive original jurisdiction of the Energy and Petroleum Tribunal under Section 36 of the *Energy Act*, and that the High Court lacks jurisdiction to hear the suit in the first instance.
2. The Preliminary Objection was canvassed by way of written submissions. The Defendants in their submissions dated 26<sup>th</sup> July 2024 stated that it is not in dispute the Plaintiff's alleged cause of action arises out of the Dealership License Agreement (DLA) entered into between the Plaintiff and the Defendant and the effect of its termination and/or determination by effluxion of time. The Defendant contends that the subject matter of the suit filed before this court falls within the exclusive original jurisdiction of the Energy and Petroleum Tribunal under Section 36 of the *Energy Act*. The Defendant argued that the provision of an alternative dispute resolution mechanism via the Energy and Petroleum Tribunal ought to be upheld as it ousts this court's jurisdiction at first instance as was held by the Court of Appeal in *Eliud Wafula Maelo v Ministry of Agriculture & 3 others* (2016) eKLR and *Eaton Towers Ltd v Ken Kasinga & 6 others* (2022) KECA 645 KLR. That the Plaintiff's suit therefore ought to be struck out with costs for having been filed in breach of the doctrine of exhaustion of alternative remedies.



3. The Plaintiff in their submissions dated 13<sup>th</sup> June 2024 cited Clause 22.1 of the Dealership License Agreement (DLA) which states: “This license shall be governed by and construed in accordance with the laws of Kenya and each of the parties irrevocably submits to the non-exclusive jurisdiction of the courts of Kenya.” The Plaintiff argued that the clause submits parties to the non-exclusive jurisdiction of the courts of Kenya. That the phrase suggests that the parties retain the right to approach the courts directly without being restricted to other dispute resolution forums like tribunals. That however, the use of non-exclusive does imply that other forms of jurisdiction (like arbitration or tribunal processes) could be permissible is ambiguous and not explicitly mandated in the agreement. That according to the contra proferentem rule, which is the principle used in the interpretation of contracts, states that where ambiguity or uncertainty in the terms of a contract drafted by one party is found, the interpretation is done against the drafter. The Plaintiff relied on *Mwangi Ngumo v Kenya Institute of Management* (2012) KLR and the *National Bank of Commerce Ltd v Nabro Ltd & another* (2008) 1 EA 432.
4. On whether the court has jurisdiction, the Plaintiff stated that Section 26 of the *Energy Act* 2019 establishes the Energy and Petroleum Tribunal conferring it with jurisdiction to adjudicate specific disputes relating to obligations under the *Energy Act* 2019 such as those arising from regulatory compliance or licensing issues in the energy and petroleum sector. That the issues at hand involve alleged breaches of a private commercial contract between the Plaintiff and the Defendant. That the dispute involves operational grievances and allegations of breach of agreed contractual terms such as termination without the requisite 30-day notice, failure to supply agreed quantities of fuel and LPG cylinders, and the unlawful takeover and disruption of the Plaintiff’s business operations. That Kenyan courts have traditionally exercised jurisdiction over contractual disputes, especially where jurisdiction is expressly conferred by the agreement between the parties. That Article 165 (3) of the the the the the the the *Constitution* vests the High Court with unlimited original jurisdiction in civil matters as was also held in *Okiya Omtata Okoiti & another v Attorney General & 2 others* (2015) eKLR.
5. On whether the Energy and Petroleum Tribunal has pecuniary jurisdiction, the Plaintiff submitted that in the Plaint, they are seeking exemplary damages for breach of contract, general damages amounting to Kshs 54,000,000, and interest and costs of the suit. That the Energy and Petroleum Tribunal has a significant role in resolving sector-specific disputes and the jurisdiction is conferred upon it by the *Energy Act*, 2019 which does not explicitly cover pecuniary jurisdiction limits. That this court is therefore the appropriate forum to adjudicate the matter.
6. I have considered the Defendant’s Notice of Preliminary Objection dated 19<sup>th</sup> January 2024 and submissions by the parties. The issue for determination is whether the proceedings herein are offensive to the doctrine of exhaustion as the dispute lies within the exclusive original jurisdiction of the Energy and Petroleum Tribunal.
7. What constitutes preliminary objection has been set out in *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 as follows: -

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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 a contract giving rise to the suit to refer the dispute to arbitration.”

In the same case Sir Charles Newbold, P. stated:

“... 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 issue, and this improper practice should stop.”

8. The Defendant has raised the issue of jurisdiction in the Preliminary Objection which according to the Supreme Court in *Mary Wambui Munene v Peter Gichuki Kingara and Six others* (2014) eKLR held that jurisdiction is a pure point of law and should be resolved on a priority basis.
9. The Defendant argued that the subject matter of the suit filed before this court falls within the exclusive original jurisdiction of the Energy and Petroleum Tribunal under Section 36 of the *Energy Act*, that the provision of an alternative dispute resolution mechanism via the Energy and Petroleum Tribunal ought to be upheld as it ousts the jurisdiction of this court, and that the proceedings are offensive to the doctrine of exhaustion.
10. The doctrine of exhaustion is provided for under Article 159(2)(c) of the the the the the the the the the *Constitution* which recognizes the use of alternative mechanisms of dispute resolution in the following terms: -

In exercising judicial authority, the Courts and tribunals shall be guided by the following principles: -

- (c) alternative forms of dispute resolution including resolution, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted
- ...

11. The doctrine of exhaustion was comprehensively dealt with in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* (2020) eKLR 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.

12. The Plaintiff on the other hand argued that the Energy and Petroleum Tribunal has been conferred with jurisdiction to adjudicate specific disputes relating to obligations under the *Energy Act* 2019 such as those arising from regulatory compliance or licensing issues in the energy and petroleum sector. That the issues at hand involve alleged breaches of a private commercial contract between the Plaintiff and the Defendant and Kenyan courts have traditionally exercised jurisdiction over contractual disputes, especially where jurisdiction is expressly conferred by the agreement between the parties. Additionally, that in the Complaint, they are seeking exemplary damages for breach of contract, general damages amounting to Kshs 54,000,000, and interest and costs of the suit but *Energy Act*, 2019 which does not explicitly cover pecuniary jurisdiction limits.



13. Courts have dealt with exceptions to the doctrine of exhaustion as in *R v Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* (2017) eKLR the court held: -

“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.”

14. Section 36 (3) of the *Energy Act* provides that: -

The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees.

15. The *Energy (Complaints and Dispute Resolution) Regulations, 2012* under Regulation 2 provides the framework for settlement of complaints or a dispute regarding licences, permits, contracts, code, conduct, practice or operation of any party or any matter. Regulation 3 (1) defines a complaint to include dissatisfaction with the services rendered by, or a practise of, any person carrying out any undertaking pursuant to a license, permit or registration issued or granted by the Commission (the Authority). It also defines a dispute as any disagreement that exists between parties acting in good faith who have failed to reach an amicable resolution of a complaint after all due efforts have been made to resolve it.
16. The issues highlighted by the Plaintiff fall within the jurisdiction of the Tribunal which has original civil jurisdiction and also has powers to grant equitable reliefs including but not limited to injunctions, penalties, damages, and specific performance.
17. In consideration of the above, I uphold the Preliminary Objection dated 19<sup>th</sup> January 2024 and refer the matter to the Energy and Petroleum Tribunal for hearing and determination. The Plaintiff to bear costs.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**J.K. NG'ARNG'AR, HSC**

**JUDGE**

In the presence of: -

No appearance Advocate for the Plaintiff

Mwangi Advocate for the Defendant

Court Assistant – Mr. Samuel Shitemi

**J.K. NG'ARNG'AR, J.**

