Kenya Electricity Transmission Company Limited v Matthew (Environment and Land Appeal E026 & E027 of 2024 (Consolidated)) [2025] KEELC 4878 (KLR) (26 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4878 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E026 & E027 OF 2024 (CONSOLIDATED)

OA ANGOTE, J

JUNE 26, 2025

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ... APPELLANT

AND

EARNEST KARAGANIA MATTHEW .... RESPONDENT

(Being an appeal from the Rulings of the Land Acquisition Tribunal delivered by Dr Nabil Orina, Chairperson at Nairobi on the 31st January, 2024 and 22nd February, 2024 in Land Acquisition Tribunal Case No E005 of 2023)

JUDGMENT

Background

1. Before this court for determination are two Appeals, by the Appellant, arising from the decisions rendered by the Land Acquisition Tribunal (hereinafter the Tribunal) on 31st January, 2024 and the 22nd February, 2024 respectively in Land Acquisition Tribunal case no E005 of 2023.

ELCLA Appeal No E027 of 2024

2. This Appeal arises from the Ruling of the Tribunal dated the 31st January 2024. The Ruling was pursuant to a Preliminary Objection filed by the Appellant herein, who was the Respondent at the Tribunal on the 4th January, 2024.

3. The Preliminary Objection challenged the Tribunal's jurisdiction to entertain the matter pursuant to Section 133C of the *Land Act*, 2012 and asserted that the claim contravened the provisions of Sections 3(1), (10), 11(e), (f), (i), (k) and (l), 23, 24, 36, 40, 42 and 244(2)(e) of the *Energy Act*, 2019 and Regulations 2, 4, 7 and 9 of the Energy (Complaints and Dispute Resolution) Regulations, 2012.

4. In response, the Respondent herein, who was the Claimant at the Tribunal, asserted that the Tribunal was well vested with jurisdiction to entertain the matter pursuant to the provisions of the *Land Act*, 2012.

5. Vide its determination on 31st January, 2024, the Tribunal found that it had the requisite jurisdiction to entertain the matter. Aggrieved by the foregoing, the Appellant filed a Memorandum of Appeal dated the 1st March, 2024, appealing against the entirety of the Ruling on the grounds that:

   i. The Tribunal erred in law in failing to consider that Section 11(e), (f), (i), (k) & (l) and 23 of the *Energy Act*, 2019 as read with Regulations 2, 4, 7 and 9 of the Energy(Complaints and Dispute Resolution) Regulations, 2012, specifically reserve the right to hear disputes in respect of matters falling under the *Energy Act* including the creation of wayleaves and easements, and all disputes involving energy sector entities which include the Appellant to the Energy and Petroleum Regulatory Authority(EPRA) in the first instance.

   ii. The Tribunal erred in law in finding Section 133C (6) of the *Land Act*, 2012, confers exclusive first instance jurisdiction on the Land Acquisition Tribunal in matters relating to the creation of wayleaves.

   iii. The Tribunal erred in law in failing to consider Section 3(1) of the *Energy Act* provides that in the event of conflict between the Act and any other Act, the *Energy Act* shall prevail on all matters regulated under the *Energy Act*.

   iv. The Tribunal erred in law in failing to follow the Court of Appeal's decision in Abidha Nicholus *vs Attorney General & Others, Civil Appeal No 21 of 2021*(Kisumu) on the forum for resolution of disputes under the *Energy Act* and involving energy sector entities which is binding on it and consequently disregarding the decision contrary to the doctrine of precedent based on the principles of stare decisis.

   v. The Tribunal misinterpreted the provisions of the *Land Act* and the *Energy Act* in making his ruling and as a result arrived at a totally erroneous decision.

6. The Appellant seeks:

   i. The Appeal herein be allowed.

   ii. The Ruling and consequential orders of the Land Acquisition Tribunal in Land Acquisition Case Number E005 of 2023 delivered on 31 January, 2024 be set aside.

   iii. This Honourable Court be pleased to find that the Appellant's Preliminary Objection dated the 04 January, 2024 is merited and consequently Land Acquisition Tribunal Case Number E005 of 2023 is struck out for lack of jurisdiction.

   iv. This Honourable Court be pleased to give any other orders that it may deem just and expedient in the circumstances.

   v. Costs of this Appeal and the Tribunal proceedings be awarded to the Appellant.

ELCLA Appeal E026 of 2024

7. This Appeal arises from the Ruling of the Tribunal dated the 22nd February, 2024. The Ruling was pursuant to a Motion filed by the Appellant, seeking a stay of the proceedings as per Section 6(1) of the *Arbitration Act*, 1995 on account of an arbitration clause in the Assignment of Easement agreement signed by the parties.

8. In response, the Respondent indicated that the agreement did not overturn the jurisdiction of the Tribunal to hear and determine the matter and the Motion was a disguised appeal against the rejection of the Preliminary Objection. Further, it was argued that it was tantamount to piecemeal litigation and an abuse of the process of the court.

9. Vide its determination on the 22nd February, 2024, the Tribunal found that in filing the Preliminary Objection, the Appellant had taken a procedural step removing it from the ambit of Section 6(1) of the *Arbitration Act*. Further, that the Motion was not filed timeously as anticipated by Section 6(1) of the *Arbitration Act*.

10. Aggrieved by the foregoing, the Appellant vide the Memorandum of Appeal dated the 1st March, 2024 seeks the setting aside of the Tribunal's findings and orders on the following grounds:

    i. The Tribunal erred in law in failing to uphold the arbitration agreement between the parties contained in clause 11 of the Grant of Easement dated(sic)registered on 09 December, 2021.

    ii. The Tribunal erred in law in failing to uphold the arbitration agreement contained in clause 11 of the Grant of Easement registered on 09 December, 2021 after finding the arbitration agreement was both valid and binding on the Appellant and the Respondent.

    iii. The Tribunal erred in law and in fact in failing to consider the Appellant's application dated 08 February, 2024 was filed timeously in accordance with Section 6(1) of the *Arbitration Act*, 1995.

    iv. The Tribunal erred in law in finding that the filing of a Preliminary Objection dated the 04 January, 2024 by the Appellant challenging its jurisdiction amounted to a procedural step taken after entering appearance, in the context of Section 6(1) of the *Arbitration Act*, 1995.

    v. The Tribunal erred in law in finding that the application dated 08 February, 2024 had been filed after significant delay in the context of Section 6(1) of the *Arbitration Act*, 1995.

    vi. The Tribunal erred in law by acting without jurisdiction when it dismissed the application dated 08 February, 2024 outside the 60-day timeline provided in Section 133C (3) of the *Land Act*, 2012 for the Tribunal to resolve complaints. The Tribunal acknowledged in its ruling this timeline had lapsed and consequently, the Tribunal lacked jurisdiction to take any further steps without extending the timeline as required by Section 133C (4) of the *Land Act*, 2012.

    vii. The Tribunal relied on wrong principles of law in making his Ruling.

11. The Appellant therefore seeks that:

    a. The Appeal herein be allowed.

    b. The Ruling and consequential orders of the Land Acquisition Tribunal in Land Acquisition Tribunal Case No E005 of 2023 delivered on 22 February, 2024 be set aside.

    c. The Honourable Court be pleased to order a stay of proceedings in Land Acquisition Tribunal Case Number E005 of 2023 and reference of the dispute to arbitration.

    d. The Honourable Court be pleased to give any other orders it may deem just and expedient in the circumstances.

    e. Costs of this Appeal and the tribunal proceedings be awarded to the Appellant.

Submissions

12. The Appellant filed submissions in support of the two Appeals on the 11th April, 2025. Counsel submitted that the Appellant is an energy sector entity responsible for inter-alia planning, construction and management of the Kenyan national electricity transmission grid and that vide a Grant of Easement registered on the 9th December, 2021, the Respondent granted it an easement in respect of Nanyuki/Marura Block/5647(Nturukuma) for putting up power transmission lines.

13. It was submitted that under the law, easements and wayleaves may be created either pursuant to Part VII of the *Energy Act*, or pursuant to Part X of the *Land Act*, and that in the circumstances of the case, the easement was one anticipated by the *Energy Act*.

14. Consequently, it was submitted, and as guided by Section 3 (1) of the *Energy Act*, as well as the Energy (Complaints and Dispute Resolution) Regulations, 2012, the matter ought to have been determined by the Energy Petroleum Regulatory Authority in the first instance.

15. Counsel submitted that the *Energy Act* came into force on the 28th March 2019, whereas the *Land Act* came into force on the 2nd May, 2012 and as such there is a legislative presumption that Parliament was aware of the provisions of the earlier *Land Act* on creation of easements and wayleaves when it made separate provisions governing these matters under the *Energy Act*. Reliance was placed on the provisions of Martin Wanderi & 19 Others vs Engineers Registration Board of Kenya & 5 others [2014] KEHC 1519 (KLR) and Speaker of National Assembly vs James Njenga Karue[1992]eKLR.

16. According to Counsel, this court has on numerous occasions held that the complaints and dispute resolution procedures prescribed under the Energy (Complaints and Dispute Resolution) Regulations, provide a sufficient and comprehensive framework for resolving disputes on wayleave and easement compensation under the *Energy Act*. Reliance was placed on the cases of Gathumbi vs Kenya Power & Lighting Co Ltd [2024] KEELC 13603 (KLR), Wachu & another vs Kenya Electricity Transmission Company Limited [2023] KEELC 18348 (KLR), Sombo & 2 others v Ketraco & 3 Others [2023] KEELC 21061 (KLR), Nicholus vs Attorney General & 7 Others; National Environment Complaints Committee as well as George Arego Arego v KETRACO (Dispute No. EPRA/ECP/CP/4/581/2024).

17. Counsel contended that as expressed by the Court of Appeal in Technoservice Limited vs Nokia Corporation and Anor[2024] KECA 1429 (KLR), and Burn Manufactering USA LLC vs Sage South Africa (PTY) Limited [2020] KEHC 10416 (KLR) where parties have contractually agreed on a specific dispute resolution forum, that agreement is binding and must be upheld. In this case, it was urged, the Grant of Easement agreement provided under Clause 11 that disputes were to be resolved through arbitration.

18. It was averred that contrary to the Tribunal's finding and as stated by the Court of Appeal in Eunice Soko Mlagui vs Suresh Parmar & 4 Others [2017] eKLR, the step referenced in Section 6(1) of the *Arbitration Act*, is the filing of a Defence. A Preliminary Objection, it was asserted, does not constitute a procedural step as anticipated herein and that a Preliminary Objection as explained in Mukisa Biscuit Manufactering Co Ltd vs Westend Distributors Limited (1969)E.A 696 is a pure point of law that can preliminarily dispose of a suit and cannot be equated to a Defence.

19. On timelines, it was submitted that the Motion for referral to arbitration was filed within 8 days of the Tribunal assuming jurisdiction and as such was timeous. As regards costs, it was urged that as stated by the Supreme Court in Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others[2014]Eklr, the same is at the discretion of the court guided by the general principle that costs follow the event.

20. The Respondent filed two sets of submissions in respect of the Appeals both dated the 2nd May, 2025. Counsel submitted that jurisdiction is donated either by *the Constitution*, an Act of parliament, or through statute.

21. In the circumstances, it was stated, Section 133C (6) of the *Land Act*, as read with Section 175 of the *Energy Act*, granted the Land Acquisition Tribunal the jurisdiction to determine the matter being a dispute with respect to wayleaves compensation and the same was bound to be followed. Reliance in this regard was placed on the case of National Assembly vs Karume (1992) eKLR.

22. It was submitted that the Energy Tribunal is a regulatory body, while the Land Acquisition Tribunal is an adjudicatory body and the subsidiary legislation cited by the Appellant cannot oust the express provisions of Section 133 C (6) of the *Land Act* which is an Act of Parliament. Further, it was urged, the cases cited by the Appellant are inapplicable in the circumstances.

23. Ultimately, it was urged, the Tribunal was correct in finding that it has jurisdiction to entertain the matter. Reliance in this regard was placed on the case of Malindi ELC Civil Appeal No E039 of 2021 -Catherine Muthoni Gatere & Anor vs Kenya Electricity Transmission Co Ltd.

24. As regards the question of whether the Tribunal erred in declining to refer the matter to arbitration, Counsel submitted that Section 6(1) of the *Arbitration Act*, 1995 is clear that a party is obligated to file the application seeking reference not later than the time a party enters appearance and that in filing the Preliminary Objection, the Applicant took a procedural step. Reliance in this regard was placed on the case of Mt Kenya University vs Step Up Holdings (k) Limited, [2013] eKLR.

25. Further, it was submitted, the Tribunal properly exercised its discretion and that it has not been established that the said discretion was improperly exercised either on account of the fact that the Tribunal misdirected itself in law, misapprehended facts, considered that which it should not have or made a wrong decision.

Analysis and Determination

26. The appellate jurisdiction of this court over the present Appeal is anchored in Article 162(2)(b) of *the Constitution* as read together with Section 13(4) of the *Environment and Land Court Act*, 2011 as well as Section 133D of the *Land Act*.

27. This being a first appeal, the court is required to re-evaluate the evidence tendered and make its own findings and conclusions. The court is not bound by the findings of fact and law made by the lower court or Tribunal as in this instance and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated in the case of Selle & Another vs Associated Motor Boat Co. Ltd & others (1968) EA 123 where the Court of Appeal held:

> “ This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect.”

28. This position was re-affirmed by the Court of Appeal in the case of Peter M. Kariuki vs Attorney General [2014]eKLR where it was held that:

> “ We have also, as we are duty bound to do as a first appellate Court, reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions

and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence."

29. As to the circumstances within which this court can interfere with the decision of a subordinate court, including a Tribunal, the Court of Appeal in Khalid Salim Abdulsheikh vs Swaleh Omar Said [2019] eKLR expressed thus:

> "We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings."

30. Having considered the Memorandum of Appeals and the submissions filed by the parties, the issues that arise for determination are

    i. Whether the Tribunal erred in finding that it had jurisdiction to entertain the matter?

    ii. Whether the Tribunal erred in finding that the Appellant was barred from seeking a stay of proceedings under Section 6(1) of the *Arbitration Act*, 1995 on grounds that it had taken steps in the proceedings?

    iii. Whether the Tribunal's actions in dismissing the Appellants' Application after the 60-day limit prescribed under Section 133C (3) of the *Land Act*, 2012, without first extending the period constitutes a nullity?

Whether the Tribunal erred in finding that it had jurisdiction to entertain the matter?

31. It is trite that jurisdiction is everything. This was expressed in the locus classicus case of Owners of Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Limited [1989] IKLR, where the court held:

> "Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction…where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given."

32. It is equally trite that jurisdiction flows solely from *the Constitution* or an Act of Parliament, and cannot be assumed or implied. Speaking to this, the Apex Court in the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank Ltd & 2 Others (2012) eKLR noted:

> "A court's jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings."

33. It is also a well-established principle that where the law prescribes a clear procedure for the resolution of a dispute, that procedure must be strictly followed. This position was affirmed by the Court of Appeal in Speaker of the National Assembly vs James Njenga Karume [1992] eKLR, thus:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed……"This observation alluded to the application of the exhaustion principle where there exists other dispute resolution mechanisms prescribed by *the Constitution* or an Act of Parliament."

34. The court is so guided.

35. By way of a brief background, vide a claim dated the 8th December, 2023, the Respondent herein sought as against the Appellant an order compelling it to compensate him for the structures erected on L.R No Nanyuki/Kimaru/Block 8/5467 Nturukuma.

36. It was the Respondent's case that in July, 2021, the Appellant expressly indicated that it would be constructing a 96km, 132v transmission line and the wayleave for the same would be 30metres wide passing through his property. The Respondent contended that while he was compensated for the wayleave and loss of land, he was not compensated for the buildings thereon as anticipated by the law.

37. In response, the Appellant filed a Preliminary Objection challenging the jurisdiction of the Tribunal contending that the claim was in contravention of provisions of the *Energy Act*, 2019 and the Energy (Complaints and Dispute Resolution) Regulations, 2012. This objection was dismissed by the Tribunal prompting the present appeal.

38. According to the Appellant, the Tribunal's decision in this regard was erroneous and the dispute, being for additional compensation for a right of easement created in favour of the Appellant under the *Energy Act*, the Energy and Petroleum Regulatory Authority (EPRA) had original jurisdiction to determine the same.

39. On its part, the Respondent maintains that the Tribunal was correct in assuming jurisdiction which has been granted to it pursuant to the provisions of the *Land Act*.

40. It is indeed undisputed that the crux of the dispute involves wayleaves compensation. A wayleave is a legal right granted by a landowner to a third party typically a utility company or public body to access, use, or pass through private land for the purpose of installing, operating, and maintaining infrastructure such as electricity transmission lines, poles, cables, and other related facilities.

41. In Kenya, the legal framework governing wayleaves is primarily addressed under two statutes: the *Energy Act*, 2019 and the *Land Act*, 2012. The *Energy Act* regulates the licensing, development, and operation of energy services, including the authority of licensees to access land for the construction, operation, and maintenance of energy infrastructure.

42. The *Land Act*, on the other hand, establishes the overarching legal and procedural framework governing land tenure and use in Kenya. It deals with proprietary interests in land, including easements and servitudes such as wayleaves, and also provides statutory safeguards for the protection of private land rights.

43. Specifically, Sections 143, 144, and 148 of the *Land Act* governs the legal regime relating to wayleaves. Section 143 empowers the National Land Commission (NLC) to create public rights of way, including wayleaves, for the benefit of the national or county government, a public authority, or a corporate

entity, where such access is necessary for the discharge of public functions while Section 148 provides for compensation in respect to public rights of way.

45. Of particular relevance to this Appeal is Section 133C of the *Land Act*, which establishes the Land Acquisition Tribunal and sets out its jurisdiction. Subsection (6) is categorical that:

> "Despite the provisions of sections 127, 128 and 148(5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal."

46. On the other hand, the *Energy Act*, 2019, under Part VII, titled "Rights of Way, Wayleaves and Use of Land for Energy Resources and Infrastructure" provides the regulatory framework under which licensed energy undertakers may gain access to land for purposes of energy development. This includes detailed procedures for engagement with landowners and affected parties.

47. The Appellant has submitted that the Energy and Petroleum Regulatory Authority (EPRA) has first-instance jurisdiction over the present dispute. It relies on Sections 11 sub sections (e), (f), (i), (k) and (l), and 23 of the *Energy Act*. With regards to Section 11, the cited subsections outline the powers and functions of EPRA, as including the issuance of directions to ensure compliance with license conditions, issuance of orders requiring performance of acts or prohibiting acts and timelines thereto, investigation and resolution of licensing disputes, and imposition of penalties.

48. On the other hand, Section 23 of the *Energy Act* provides for procedural timelines and decision-making frameworks within which EPRA operates. Crucially, none of these provisions directly reference dispute resolution on matters of wayleave compensation.

49. Importantly, Section 175 of the *Energy Act* falling under Part VII aforesaid dealing with inter-alia wayleaves addresses the question of compensation and expressly provides as follows:

> "If any difficulty or question arises as to the amount, entitlement to compensation or person entitled to compensation payable under this Act, the determination shall be made in accordance with the provisions of the relevant written law."

50. The critical issue, therefore, is what constitutes the "relevant written law" for purposes of determining disputes related to wayleave compensation, as contemplated under Section 175 of the *Energy Act*.

51. A contextual and purposive reading of this provision reveals that the *Energy Act* defers such matters to a different legal regime rather than retaining it. This legislative intent is reinforced by the phrase "in accordance with the provisions of the relevant written law." In this regard, the *Land Act* emerges as the applicable and "relevant written law." Section 133C (6) of the *Land Act* is unequivocal in mandating that all disputes relating to among others creation of wayleaves must in the first instance be referred to the Land Acquisition Tribunal.

52. It is noted that the Appellant also invokes Section 3(1) of the *Energy Act* and asserts that it provides that in the event of a conflict between the *Energy Act* and any other law, the *Energy Act* shall prevail. This section is very clear that the *Energy Act* shall prevail in matters touching on:

> "a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy;(b) the exploration, production, transportation, distribution, and supply of any other form of energy; and(c)all works and apparatus for any or all of these purposes."

53. These are technical and operational aspects of energy development and supply. This section does not oust the application of other laws particularly in relation to the adjudication of compensation disputes over wayleaves. Therefore, the Appellant's reliance on Section 3(1) aforesaid as a basis for excluding other legal frameworks or fora from addressing such disputes is misplaced.

54. In any event, there is no conflict between the *Land Act* and the *Energy Act* on matters of dispute resolution as regards wayleave compensation.

55. The Appellant further relies on the Energy (Complaints and Dispute Resolution) Regulations, 2012, specifically Regulations 2, 4, 7, and 9. Regulation 2 provides that the regulations apply to any complaint or dispute relating to a license, permit, contract, code of conduct, practice, or operation of any party or any matter governed by the *Energy Act*.

56. Regulation 4 goes on to set out the nature of disputes to which the Regulations apply and these include disputes concerning wayleaves, easements, or rights of way in connection with the generation, transmission, distribution, supply, and use of electrical energy. Regulations 7 and 9 set out the procedure for referring such disputes to the Energy and Petroleum Regulatory Authority (EPRA), formerly the Energy Regulatory Commission.

57. The Appellant is, un disputably, an entity engaged in energy-related activities and is duly regulated under the *Energy Act*. A plain reading of Regulations 2 and 4 of the Energy (Complaints and Dispute Resolution) Regulations, 2012 suggests that EPRA has a role in resolving wayleave disputes where an energy regulated entity is concerned.

58. It is however a well-settled principle of law that subsidiary legislation cannot create rights or confer powers that are inconsistent with, or extend beyond, the scope of the parent statute. Consequently, to the extent that the said Regulations may be construed as vesting jurisdiction to EPRA to determine disputes relating to compensation for wayleaves, such an interpretation would be inconsistent with the provisions of the *Energy Act*. It is, therefore, legally untenable.

59. In this regard, Section 31(b) of the *Interpretation and General Provisions Act*, Cap. 2, is instructive:

> " No subsidiary legislation shall be inconsistent with the provisions of an Act."

60. Section 29 of the same Act provides that expressions used in subsidiary legislation shall bear the same meaning as in the enabling statute, unless a contrary intention is clearly expressed. No such contrary intention is found in either the *Energy Act* or the *Land Act*.

61. Consequently, to the extent that any provision in the 2012 regulations purports to confer on EPRA jurisdiction over wayleave compensation disputes, it would be inconsistent with the express provisions of both the *Energy Act* and the *Land Act*, and is therefore without legal effect.

62. The Appellant also contends that the Tribunal breached the doctrine of stare decisis by failing to follow the rationale in the Abidha Nicholus v. Attorney General & 7 Others; National Environmental Complaints Committee (NECC), NEMA, Siaya County, KPLC & Others [2023] eKLR, since overturned by Supreme Court in Abidha Nicholus v Attorney General & 7 Others [2024] KESC 17 (KLR).

63. Having considered the case, the court agrees with the Tribunal that the same was clearly distinguishable from the dispute before it. In the Abidha Case(supra), the Court of Appeal addressed whether the Environment and Land Court had jurisdiction to entertain a constitutional Petition concerning energy

infrastructure and environmental impacts without first resorting to the dispute resolution mechanisms under the *Energy Act* and EMCA.

64. The central issue was the application of the doctrine of exhaustion in the face of multi-faceted claims. Crucially, the court did not address, nor was it invited to determine the jurisdiction of the Land Acquisition Tribunal under the *Land Act* vis the *Energy Act*. The case, therefore, does not assist in resolving the present question.

65. Similarly, the other authorities cited by the Appellant relate primarily to the interface between EPRA's jurisdiction and that of the Environment and Land Court, and not, as in the present case, the jurisdiction of the Land Acquisition Tribunal vis EPRA and/or the Energy Petroleum Tribunal in compensation matters arising from wayleave creation.

66. Accordingly, the court is satisfied that the Tribunal acted within its statutory mandate. The dispute before it concerned compensation for the creation of a wayleave, a matter falling squarely within the jurisdiction of the Land Acquisition Tribunal under Section 133 C (6) of the *Land Act*.

Whether the Tribunal erred in finding that the Appellant was barred from seeking a stay of proceedings under Section 6(1) of the *Arbitration Act*, 1995 on grounds that it had taken steps in the proceedings?

67. Vide its Motion of 8th February, 2024, the Appellant sought a stay of the proceedings before the Tribunal pursuant to Section 6(1) of the *Arbitration Act* citing an arbitration clause in the Assignment of Easement agreement signed by the parties.

68. In response, the Respondent, while conceding to the arbitration clause, maintained that the agreement did not overturn the jurisdiction of the Tribunal to hear and determine the matter and that the Motion was a disguised appeal against the rejection of the Preliminary Objection. Further, it was argued that the Motion was tantamount to piecemeal litigation and an abuse of the process of the court.

69. Vide its determination on the 22nd February, 2024, the Tribunal found that in filing the Preliminary Objection, the Appellant had taken a procedural step removing it from the ambit of Section 6(1) of the *Arbitration Act*. Further, that the Motion was not filed timeously as anticipated by Section 6(1) of the *Arbitration Act*. This, the Appellant asserts, was erroneous.

70. Section 6 of the *Arbitration Act* provides that:

> " (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—(a)that the arbitration agreement is null and void, inoperative or incapable of being performed;
>
> Or (b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.
>
> (2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.
>
> (3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing

of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

71. Speaking to this provision, the Court of Appeal in Mt. Kenya University vs Step Up Holding (K) Ltd [2018] eKLR held as follows:

> " The obligation of the court upon being moved in terms of the above provision has been crystalized by case law. We find it prudent to highlight a few as follows. In the case of Niazsons(K) Ltd v China Road & Bridge (supra) the court held inter alia that: "All that an applicant for a stay of proceedings under section 6 (1) of the *Arbitration Act* of 1995 is obliged to do is to bring his application promptly. The court will then be obligated to consider the threshold being:(a)Whether the applicant has taken any step in the proceedings other than the steps allowed by the section;(b)Whether there are any legal impediments on the validity, operation or performance of the arbitration agreement; and(c)Whether the suit intended concerned a matter agreed to be referred to arbitration" In Corporate Insurance Company v Wachira (supra) the court held inter alia that existence of an arbitration clause is a defence to a claim filed against a party, save that a party seeking to rely on the existence of such an arbitration clause as a defence cannot be allowed to use it to circumvent a statutory requirement with regard to the mode of applying for a stay of proceedings. In UAP Provincial Insurance Company Ltd v Michael John Beckett (supra), the court added that the current legal position with regard to applications for stay of proceedings pending arbitration was introduced by the 2009 amendment to section 6 of the *Arbitration Act*. In the said case, the court had this to say: "In our view, the issue with which Mutungi, J was concerned when dealing with the application under section 6 of the *Arbitration Act* was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. Section 6 of the Arbitration provides an enforcement mechanism to a party who wishes to compel an initiator of legal proceedings with respect to a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. Section 6 of the *Arbitration Act* under which UAP's application for stay of proceedings was presented provides in the relevant part:..It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1) (b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry, the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, and then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court. The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6 (1) (b), to the question whether there is in fact, a dispute. In our view, it is within the province of the court, when dealing with an application for stay of proceedings under section 6 of the *Arbitration Act*, to make an evaluation of the merits or demerits of the dispute. In dealing with the application for stay of proceedings, and question whether there was a dispute for reference to arbitration, Mutungi J, was therefore within the ambit of section 6 (1) (b) to express himself on the merit or demerit of the dispute. Indeed, in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute. The provisions in section 6 (1) (b) of the *Arbitration*

Act are similar to the provisions of section 1(1) of the *Arbitration Act*, 1975 of England before its amendment by the *Arbitration Act*, 1996."

72. It is apparent from the foregoing that where parties to a contract consensually agree on arbitration as their dispute resolution forum of choice, the courts are obliged to give effect to that agreement.

73. Secondly, where a party elects to come to court and the other party to the arbitration agreement seeks to invoke the arbitration agreement, the party seeking to invoke the agreement is obligated to do so not later than the time of entering appearance or otherwise acknowledging the claim against which the stay of proceedings is sought.

74. The question before this court is whether the filing of a Preliminary Objection against the jurisdiction of the Tribunal was a procedural step anticipated by Section 6(1) of the *Arbitration Act*, 1995.

75. The Court of Appeal in the case of Yooshin Engineering Corporation vs AIA Architects Ltd [2020] eKLR had the opportunity to consider this question. In the circumstances therein, the Appellant had after entering appearance filed a Preliminary Objection objecting to the court's jurisdiction on the basis that the matter ought to have been referred to arbitration in accordance with the contract entered between the parties and contending that the suit was otherwise premature, bad in law, frivolous, vexatious and an abuse of the court process. The court noted:

> " 27. In the appeal before us, the appellant filed a Notice of Preliminary Objection on grounds as earlier stated. The appellant went beyond the scope of existence of an arbitration agreement as the basis for urging the court to find and hold that it had no jurisdiction to hear and determine the matter. The appellant also urged the trial court to find that the suit was bad in law, frivolous, vexatious and an abuse of the court process which are not jurisdictional issues.
>
> 28. For the trial court to determine all the issues raised in the preliminary objection, it had to consider the substance and propriety of the suit. By so claiming, the appellant had submitted itself to the jurisdiction of the court and was estopped from challenging the same, having tasked the court with the responsibility of looking into the substance and merit of the claim to determine whether it was "bad in law, frivolous, vexatious and an abuse of the court process," which are not jurisdictional issues."
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> 29. But that is not all. Apart from filing an inappropriate Notice of Preliminary Objection instead of a notice of motion, the appellant's attempt to challenge the trial court's jurisdiction was not made within the prescribed time under section 6(1) of the Act. An application for stay of legal proceedings under that rule should be made "not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought." (Our own emphasis)
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> 30. The preliminary objection was raised four days after entry of appearance. This Court has severally held that the provisions of sections 6(1) of the Act must be construed strictly. In Mount Kenya University v Step up Holding (K) Ltd (supra), this Court held: -
>
> > "We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no

> further procedural steps in the matter. The appellant herein entered appearance, and then responded to the respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically, the appellant's response to the respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed."

31. Similarly, in Charles Njogu Lofty v Bedovin Enterprises Ltd [2005] eKLR, this Court affirmed the position taken by the trial court (Githinji, J.) (as he then was) who held that: -

> "In my view, section 6(1) of the *Arbitration Act*, 1995, which (this) court is construing means that any application for stay of proceedings cannot be made after the applicant has entered appearance or after the applicant has filed pleadings or after the applicant has taken any other step in the proceedings, so the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance."

76. It is clear from the foregoing that the Court of Appeal has consistently taken a strict and purposive interpretation of Section 6(1) of the *Arbitration Act*, 1995. That provision requires that an application for referral to arbitration must be filed concurrently with the entering of appearance or before taking any further step in the proceedings.

77. The rationale behind this requirement is grounded in the principle that the court or Tribunal should refrain from engaging with the merits or substance of the dispute before determining whether the matter is arbitrable.

78. It is indeed conceded that a Preliminary Objection is, by its nature, dispositive and capable of being raised at any stage of the proceedings. Courts have long recognized their utility in disposing of matters on pure points of law without delving into the facts.

79. However, in the specific context of Section 6(1) of the *Arbitration Act*, the statutory language is categorical that any party wishing to invoke an arbitration clause must apply for a stay of proceedings before engaging the forum in any other way.

80. The failure to do so whether by filing a statement of defence, a response, or indeed a Preliminary Objection that calls for a ruling on the Tribunal's jurisdiction, other than an objection in reference to arbitrability of the matter, amounts to a waiver of the right to arbitration and the Tribunal cannot be faulted in so finding.

81. As regards timelines, the Tribunal was correct in finding that the Appellant's Motion for stay and referral to arbitration was not filed timeously within the meaning of Section 6(1) of the *Arbitration Act*. As aforesaid, the statutory requirement is not only that such an application be made before any other step in the proceedings, but also that it be made promptly, simultaneously with or immediately upon entering appearance.

Whether the Tribunal's actions in dismissing the Appellants' Application after the 60-day limit prescribed under Section 133C (3) of the *Land Act*, 2012, without first extending the period constitutes a nullity?

82. The Appellant, through its Memorandum of Appeal, contends that the Tribunal lacked jurisdiction to determine the Motion dated 8th February 2024, having rendered its decision beyond the statutory 60-day period prescribed under Section 133C (3) of the *Land Act*.

83. It is further submitted that without first extending the time in accordance with Section 133C(4), the Tribunal was functus officio and incapable of taking any further steps in the matter. This contention though raised, was not addressed by the Appellant in its submissions. The court will nonetheless determine the same.

84. As aforesaid, the statutory framework governing proceedings before the Tribunal are found in Section 133C of the *Land Act*. Subsection (3) provides thus:

> " Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application."

85. However, Section 133C (4) provides a crucial qualification noting:

> " The Tribunal "may, for sufficient cause, extend the time prescribed for doing any act or taking any proceedings under this Act."

86. In the circumstances, it is not disputed that as at the time the Tribunal was rendering its determination on the Appellant's Motion of 8th February, 2024 on 22nd February, 2024, this timeline had since passed. This was conceded by the Tribunal which noted that the Motion for stay had been filed 3 days to the expiry of the 60-day timeline for resolution of the claim.

87. The courts have had the opportunity to discuss the legal effect of decisions made outside stipulated statutory timelines in adjudicative processes. In doing so, they have consistently emphasized the need to interpret such timelines in light of the overarching objectives of justice, fairness, and access to judicial remedies.

88. For instance, in Crown Beverages Limited v MFI Document Solutions Limited (Civil Appeal E833 of 2021) [2023] KEHC 58 (KLR) (Civ) (17 January 2023) (Judgment), the court, dealing with a similar provision in the Smalls Claims Court Act stated as follows:

> " Although section 34(2) of the SCCA is couched in mandatory terms, the court must look at the context of the provision in light of the guiding principles which include, inter alia, the timely disposal of all proceedings before the court using the least expensive method. The provision as to delivery of judgment is meant to be directory and not mandatory as it is not the intention of the SCCA to invalidate any proceedings that violate the statutory timelines. To adopt such a position would undermine the statutory objects and cause injustice to the parties as the case would have to be reheard.10.The issue of breach of timelines for delivery of judgment is not a novel issue and has been dealt with by our courts in reference to order 21 rule 1 of the Civil Procedure Rules which provides that judgments must be delivered within 60 days upon conclusion of the hearing. In Nyagwoka Ogora alias *Kennedy Kemoni Bwogora v Francis Osoro Maiko Civil Appeal No 271 of 2000* (UR) the Court of Appeal observed as follows: The real question is what is the consequence of non-compliance therewith? no doubt that rule is an important one in the expeditious dispensation of justice.

And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void ipso facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.11. There may be instances where the delay is inordinate and such delay prejudicial to the parties. In such cases, the court may set aside the judgment as was held by the Court of Appeal in Manchester Outfitters Services Limited and Another v Standard Chartered Financial Services Limited and Another [2002] eKLR. The appellant does not contend that the failure to deliver the judgment within the stipulated timelines was prejudicial or that the delay was inordinate. I therefore reject the appellant's contention that the judgment is null and void."

89. Similarly, the court in Biosystems Consultants vs Nyali Links Arcade (Civil Appeal E185 of 2023) [2023] KEHC 21068 (KLR) (31 July 2023) (Ruling) noted:

"I don't think the legislative intent of section 34 of the Small Claims Act is to impose unnecessary bottlenecks. Even tax statutes have timelines for paying or declaring taxes. It is never that non-payment makes those taxes void. There should be consequences. In the *Income Tax Act*, the non-compliance with deadlines does not vitiate the taxes. It attracts known penalties. What are the consequences under section 34 of the Small Claims Court?

55. A court is not entitled to impose a penalty that was not hitherto anticipated. The parties must know, a priori, the consequences of their actions. Any act, especially one promoting certain aspects of *the constitution* cannot be read mechanically. The Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No 26 of 2014 [2014] eKLR, opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows: "In Pepper v Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the court is not to be held captive to such phraseology. Where the court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself: "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at

much extraneous material that bears upon the background against which the legislation was enacted."

56. The purpose of the *Small Claims Court Act* is to facilitate expeditious disposal of the disputes while at the same time respecting the right to be heard. The net result is that balancing the two may result at times to overshooting the 60 days. The 60 days do not have penal consequences for good reason. They are aspirational. This is part of having access to justice over amounts that need not be in the normal system. Allowing the application will open floodgates that will eventually defeat the purpose of the Act."

90. Guided by the foregoing jurisprudence and the purposive interpretative approach adopted in analogous contexts, it becomes evident that statutory timelines such as those under Section 133C(3) of the *Land Act*, must be understood within the broader framework of promoting access to justice, procedural fairness, and finality in adjudication.

91. While the Appellant is correct in observing that the Tribunal did not formally extend time as anticipated under Section 133C(4), the Tribunal's jurisdiction was not thereby extinguished.

92. The provision expressly empowers the Tribunal to extend time "for sufficient cause," and no provision of the Act renders the failure to do so as fatal to its jurisdiction. The overarching consideration is whether there has been prejudice occasioned by the delay.

93. In the present matter, the Appellant has not demonstrated any prejudice suffered as a result of the Tribunal rendering its decision beyond the 60 days, nor has it alleged that the delay was inordinate, malicious, or in bad faith.

94. Accordingly, this court rejects the contention that the Tribunal's failure to make a determination within 60 days renders the decision and proceedings a nullity.

95. In the end, the court finds the two Appeals to be unmerited and the same are hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mwaka for Appellants

No appearance for Respondent

Court Assistant: Tracy